

**THE MAINSTREAMING
OF
SAME SEX
RELATIONSHIPS –
BECOMING PARENTS**

By

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Introduction

In recent years, through a combination of media exposure and lobbying for law reform by the gay and lesbian community, the concept of gay and lesbian couples having children and starting their own families has received greater public attention.

There is no definition of *family* in the *Family Law Act*. A conservative view may consider a family as consisting of a mother, a father and children. The reality within society, and it is submitted recognised by our Family Law Jurisdictions, is that the *family* comes in many different forms. For instance, a number of years ago the Family Court of Australia has recognised a form of traditional adoption within Torres Strait Islander communities whereby a newly born child of a couple will be taken into the care of an aunt or uncle who would raise the child.

Within the gay and lesbian community same sex couples starting their own families is nothing new. The options available to gay and lesbian couples wishing to start a family are influenced by obvious biological factors. In general, the options that are available, or may become available, are as follows:

1. For lesbian couples, undergoing an artificial conception procedure such as donor insemination or invitro-fertilisation. This can be done either at an IVF clinic with a known or anonymous sperm donor, or by way of a home insemination procedure.
2. A co-parenting arrangement. This may involve either a single male or a lesbian couple, or single woman and a gay male couple, or two same sex couples all undertaking a parenting role. Conception of the child is usually by way of an artificial conception procedure.
3. Surrogacy.
4. Adoption.

It should be noted that conception via conventional means, sexual intercourse, is not being listed as an option for obvious reasons.

A number of legal issues arise from same sex couples having children. There is nothing illegal about same sex couples having children, despite the views of some conservative people. The legal issues that do arise concern who as a parent, and who can exercise parental responsibility. The child support issue also arises.

The balance of this paper will examine the issues surrounding the formation of families, rather than the core business of family lawyers dealing with post separation issues.

Parental Responsibility

Part VII of the *Family Law Act* deals with children's issues. Section 61B of the Family Law Act provides a definition of *Parental Responsibility* as follows:

Meaning of parental responsibility

*In this Part, **parental responsibility**, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.*

Section 61C of the Family Law Act deals with who has parental responsibility. This section provides as follows:

Each parent has parental responsibility (subject to court orders)

(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.

(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

Essentially each of the parents of a child has parental responsibility. Significantly for same sex couples Section 61C(3) provides that each of the parents will have parental responsibility subject to any Court Order.

Section 61D is also significant to same sex couples. The Section provides as follows:

Parenting orders and parental responsibility

(1) A parenting order confers parental responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child.

(2) A parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent (if any):

(a) expressly provided for in the order; or

(b) necessary to give effect to the order.

A Parenting Order can allocate parental responsibility for a child on a person. Section 61D does not limit the persons to whom a Parenting Order can apply when conferring parental responsibility, and it is not limited to two persons.

The issue for same sex couples having children in whatever arrangement and by whatever means, is who is a parent, and who has parental responsibility. This is a significant issue because in circumstances where a person who for all intents and purposes is functioning in the role of a parent of a child, if that person does not have parental responsibility then he/she does not have the authority at law to make decisions concerning long term arrangements for the child, such as enrolling the child in a school or giving consent for major medical procedures.

Who is a Parent?

There is no definition of the word *parent* in the *Family Law Act*. This was probably by design giving the emergence of IVF technology in the 1970's and the emergence of different family forms. What the *Family Law Act* does give us, and equivalent State and Territory based legislation, is presumptions of parentage.

During the early 1980's a standing committee of the Attorney Generals of the States and Territories and the Commonwealth looked at implementing uniform state based legislation dealing with presumptions of parentage, including arising out of artificial conception procedures. In NSW we have the *Status of Children Act*. With respect to children conceived by way of artificial conception procedures, Section 14 of the *Status of Children Act* provides as follows:

Presumptions of parentage arising out of use of fertilisation procedures

(1) *When a married woman has undergone a fertilisation procedure as a result of which she becomes pregnant:*

- (a) her husband is presumed to be the father of any child born as a result of the pregnancy even if he did not provide any or all of the sperm used in the procedure, but only if he consented to the procedure, and
 - (b) the woman is presumed to be the mother of any child born as a result of the pregnancy even if she did not provide the ovum used in the procedure.
- (1A) When a woman who is in a *de facto* relationship with another woman has undergone a fertilisation procedure as a result of which she becomes pregnant:
- (a) the other woman is presumed to be a parent of any child born as a result of the pregnancy, but only if the other woman consented to the procedure, and
 - (b) the woman who has become pregnant is presumed to be the mother of any child born as a result of the pregnancy even if she did not provide the ovum used in the procedure.
- (2) If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed not to be the father of any child born as a result of the pregnancy.
- (3) If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using an ovum obtained from another woman, that other woman is presumed not to be the mother of any child born as a result of the pregnancy. This subsection does not affect the presumption arising under subsection (1A) (a).
- (4) Any presumption arising under subsections (1)–(3) is irrebuttable.
- (5) In any proceedings in which the operation of subsection (1) is relevant, a husband’s consent to the carrying out of the fertilisation procedure is presumed.
- (5A) In any proceedings in which the operation of subsection (1A) is relevant, the consent of a woman to the carrying out of a fertilisation procedure that results in the pregnancy of her *de facto* partner is presumed.
- (6) In this section:
- (a) a reference to a married woman includes a reference to a woman who is in a *de facto* relationship with a man, and
 - (b) a reference (however expressed) to the husband or wife of a person:
 - (i) is, in a case where the person is in a *de facto* relationship with a person of the opposite sex, a reference to that other person, and
 - (ii) does not, in that case, include a reference to the spouse (if any) to whom the person is actually married.
- (7) In this section:

de facto partner, in relation to a person, means the other party to a *de facto* relationship with the person.

de facto relationship has the same meaning as in the Property (Relationships) Act 1984.

Section 14(1A) of the *Status of Children Act* was inserted and commenced in September 2008. This presumption of parentage provides that where a woman has a child conceived by way of artificial conception procedure and she is in a *de-facto* relationship with another woman at the time of conception, then her partner (“the co-mother”) is presumed a parent of the child. Previous to the enactment of this sub-section, the co-mother was in a legal vacuum and had no presumption of parentage applying to her.

Otherwise of significance to gay and lesbian parents is Section 11 of the *Status of Children Act* providing a presumption of parentage arising from birth registration. The Section provides as follows:

Presumptions of parentage arising from registration of birth

- (1) A person is presumed to be a child’s parent if the person’s name is entered as the child’s parent in the Births, Deaths and Marriages Register or a register of births or parentage information kept under a law of the Commonwealth, another State or a Territory or a prescribed overseas jurisdiction.
- (2) Nothing in this section affects the operation of Chapter 5 (Recognition of adoptions) of the Adoption Act 2000.

The presumption of parentage under Section 14 of the *Status of Children Act* is irrebuttable, whereas the presumption of parentage under Section 11 is rebuttable. Relevantly, Section 17 of the *Status of Children Act* provides as follows: -

17 Conflicts involving irrebuttable parentage presumptions

(1) *If two or more irrebuttable presumptions arising under this Division conflict with each other, the presumption that appears to the court to be more or most likely to be correct prevails.*

(2) *If an irrebuttable presumption arising under this Division conflicts with a rebuttable presumption arising under this Division that is not rebutted in any proceedings, the irrebuttable presumption prevails over the rebuttable presumption.*

As the *Family Law Act* prescribes who has parental responsibility, its presumptions of parentage are applicable when determining who is a parent.

Presumptions of parenting arising out of birth registration details is provided for in Section 69R of the *Family Law Act* as follows:

Presumption of parentage arising from registration of birth

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, Territory or prescribed overseas jurisdiction, the person is presumed to be a parent of the child.

Therefore a person named on a birth certificate under a law of the Commonwealth, State or Territory or Prescribed Overseas Jurisdiction will be presumed a parent of the child.

Presumptions of parenting arising out of artificial conception procedures is dealt with by Section 60H of the *Family Law Act* which provides as follows:

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;

(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

(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 of this Act.

(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.

(5) 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.

(6) In this section:

"**this Act**" includes:

(a) the standard Rules of Court; and

(b) the related Federal Magistrates Rules.

S.60H(1) of the *Family Law Act* is relevant to lesbian couples. It makes reference to *de facto partner*. The definition of *de facto partner* is contained in S.60EA of the *Family Law Act*: -

Definition of de facto partner

For the purposes of this Subdivision, a person is the **de facto partner** of another person if:

(a) a relationship between the person and the other person (whether of the same sex or a different sex) is registered under a law of a State or Territory prescribed for the purposes of section 22B of the Acts Interpretation Act 1901 as a kind of relationship prescribed for the purposes of that section; or

(b) the person is in a *de facto* relationship with the other person.

Subparagraph (b) makes reference a *de facto partner* as being in a *de facto relationship* with the other person. Therefore, regard must be given to the definition of *de facto relationship* contained in S.4AA of the Family Law Act, and in particular subsection (5), which provides:

(5) For the purposes of this Act:

(a) a *de facto relationship* can exist between 2 persons of different sexes and between 2 persons of the same sex; and

(b) a *de facto relationship* can exist even if one of the persons is legally married to someone else or in another *de facto relationship*.

Therefore, the presumption of parentage set out in S.60H(1) to the *de facto partner* of a woman who has a child conceived by an artificial conception procedure will apply to a lesbian partner of the birth mother.

The recent decision of Justice Watts of the Family Court of Australia in *Re Michael: Surrogacy Arrangements*¹ provided that the second limb of Section 60H(1)(b) *Family Law Act* incorporates the presumptions of parentage under the *Status of Children Act (NSW)*, since the *Status of Children Act (NSW)* is a prescribed law for the purposes of Section 60H *Family Law Act*. Therefore, if a presumption of parentage arising out of an artificial conception procedure applies under Section 14 of the *Status of Children Act (NSW)*, and therefore under Section 60H *Family Law Act*, then by virtue of the provisions of Section 17 *Status of Children Act (NSW)* it will prevail over any presumption of parentage which may apply out of birth registration under Section 11 *Status of Children Act (NSW)* or Section 69R *Family Law Act*.

Although *Re Michael: Surrogacy Arrangements* involved an opposite sex couple who entered into a surrogacy arrangement with the mother of the intended mother, and an Application to the Family Court for leave to adopt under Section 60G of the *Family Law Act*, the reasoning in this decision has application in cases involving gay or lesbian parents where the sperm donor is named on a birth certificate as a father. The sperm donor's presumption of parentage by being named on a birth certificate will be displaced by the presumption of parentage that applies to parties of a lesbian couple by virtue of the presumption of parentage that applies to them under Section 60H(1) of the *Family Law Act*.

¹ [2009] FamCA 691

Lesbian Couples Having Children by Way of Artificial Conception Procedures

Prior to recent law reform of Section 60H(1) of the *Family Law Act*, which came into effect on 21 November 2008, the co-mother of a lesbian couple having a child by way of an artificial conception procedure was left in a legal vacuum. In order for her to acquire parental responsibility, the common mechanism utilised by a number of lawyers was to obtain parenting orders by consent conferring parental responsibility upon the co-mother. The problem with this procedure was that there was no consistency between the various Jurisdictions dealing with Family Law, let alone as between various Registry's of the Family Court.

Once upon a time obtaining Consent Orders for lesbian couples conferring parental responsibility upon the co-mother was a simple matter of filing a Form 11 Application with the Orders and having it dealt with by a Deputy Registrar in Chambers. A number of years ago a committee was established within the Melbourne Registry of the Family Court to look at implementing a uniform procedure for Parenting Orders by consent involving same sex couples. It seems that this issue was put on hold as other issues were given higher priority within the Family Court. Then some case law threw the procedure for consent orders for same sex parents into confusion.

Then in 2003 Justice Brown of the Family Court at Melbourne delivered a decision in the case of *Re: Mark: an application relating to parental responsibilities*². This was a case involving a gay male couple who entered into a commercial surrogacy arrangement with a woman from California. Commercial surrogacy is legal in some places in the United States, including in California. In this surrogacy arrangement, an egg donation was provided by an anonymous female third person, and a sperm donation was provided by one of the gay male couple who are from Melbourne. The embryo was implanted in the surrogate mother, who happened to be married. Upon the birth of the child, he was surrendered to the care of the gay male couple, the parties entered into a legal mechanism via the Californian Courts to confer parental responsibility upon the gay male couple, and a birth certificate issued naming the parents as the sperm donor and the surrogate mother.

²[2003] FamCA 822

The gay male couple filed an Application for Consent Orders in the Family Court at Melbourne. They were named as the Applicants, and the Respondents were the surrogate mother and her husband. Eventually Justice Brown made the Consent Orders, but by way of obiter she considered the issue of who is a parent in this situation. She reviewed previous case authorities including *B&J*³ and *Re: Patrick*⁴.

Justice Brown concluded that by applying presumptions of parentage applicable in Australia, the surrogate mother and her husband would be presumed the parents of the child. However, the sperm donor was noted on the birth certificate as the father of the child. Justice Brown then examined whether he would be presumed a parent for the purposes of Section 69R of the *Family Law Act*. Section 69R can deem a person a parent if they are named as a parent on a birth certificate issued from a Prescribed Overseas Jurisdiction. At the time, there were no Prescribed Overseas Jurisdictions in the *Family Law Regulations* for the purpose of recognising birth certificates from overseas. Accordingly, she found that the sperm donor was not a parent for the purposes of Section 69R.

When examining other case authority Justice Brown found that in the absence of a definition of the word *parent* or any deeming provision as to the status of the sperm donor, she could apply the common law definition of parent, which is to be found in the Oxford dictionary. She found that a parent is a person who has begotten or born a child.

Turning to the facts of the case in *Re: Mark*, Justice Brown found that the sperm donor provided a sperm donation expressly for the purpose of conceiving a child which he would parent. She fell short of making any finding that the sperm donor in this case was a parent for a number of reasons. This included the fact that there was no party opposing the Application and there may very well be alternative views as to whether the sperm donor could be deemed a parent. But significantly she was mindful of the impact of finding a sperm donor to be a parent. All of a sudden men who had donated sperm to the IVF industry may find that they are deemed parents and therefore have parental responsibility and potential child maintenance liabilities.

In an unreported decision of Justice Le Poer Trench in *Bernasconi & Toma* the issue of the status of the sperm donor again arose. This case involved a lesbian couple who had 2

³ [1996] FamCA 124

⁴[2002] FamCA 193

children by way of a donor insemination procedure performed at home. The sperm donor was known to them. They filed an Application for Consent Orders in the Sydney Family Court. The birth mother was named as the Applicant, and the co-mother was named as the Respondent. The sperm donor was neither a party to the Application nor the Consent Orders. The Application for Consent Orders received a requisition from a Registrar of the Court requiring the parties to join the sperm donor as a party to the Application and the Orders. The reasoning was that given Justice Brown's decision in *Re:Mark*, the sperm donor could be considered a parent.

It was submitted in response to the Registrar's requisition that under the *Family Law Rules*⁵ upon an Application for Parenting Orders the parties required to be joined include the parents of the child, and the parties to any previous Orders. It was submitted the sperm donor in this case is clearly not a parent under Section 14 of the *Status of Children Act NSW*, and his status under Section 60H of the *Family Law Act* is silent, and otherwise there is no authority to establish the sperm donor as a parent when he is not in a marriage or de facto relationship with the birth mother. Therefore there was no necessity to join the sperm donor as a party to the matter. The Applicants then refused to comply with the requisition, and a request was made of the Registrar to make a determination upon the Application.

The Registrar dismissed the Application for Consent Orders. Subsequently an Application for Review was filed. Eventually the Application for Review came before Justice Le Poer Trench. Upon a mention of the matter he was informed of the Registrar's decision upon the requisition of the Application for Consent Orders, and the issue for determination was whether the sperm donor needed to be joined as a party. In determining that issue, his Honour was informed that he had to determine whether the sperm donor is a parent for the purposes of the *Family Law Act*.

The Consent Orders were made and a decision was handed down. The issue of whether the sperm donor was a parent for the purpose of the *Family Law Act* was avoided. His Honour found that he had the power under Rule 1.12 of the *Family Law Rules* to dispense with any requirement under the Rules. Whilst not specifically saying that there was any requirement that the sperm donor be joined as a party to the matter, he dispensed with that requirement if such a requirement in fact existed. He otherwise found it appropriate to make the Orders.

⁵ Rule 6.02

After the decision in the matter of *Bernasconi & Toma*, submissions were made via the Inner City Legal Centre to the Principal Registrar of the Family Court recommending that a standard practice and procedure be implemented with respect to obtaining consent parenting Orders in same sex parenting cases. Shortly thereafter Principal Registrar revoked the delegation to Deputy Registrars to deal with same sex parenting orders. Then, in the Sydney Registry at least, all same sex parenting Consent Orders were to go before a Judicial Registrar upon the filing of an Initiating Application with Affidavit material in support. The consent parenting Order process then all of a sudden became more labour intensive, intrusive and expensive. In the Sydney Registry the Judicial Registrars required evidence of both mothers as to their respective parenting roles. There also appears to have been (in the author's submission erroneously) a requirement to join the sperm donor where he is known to the parties.

The decision of Justice Watts in *Re Michael: Surrogacy Arrangements*, and amendments to Section 60H(1)(d) *Family Law Act*, have now resolved the position of the status of the sperm donor where he is not in a marriage or de facto relationship with the birth mother of a child conceived by way of an artificial conception procedure. It is clear the sperm donor in that position is not a parent of the child.

The Consent Orders procedure where a lesbian couple have a child by way of an artificial conception procedure has now become redundant with the amendment to Section 60H(1) of the *Family Law Act*. Essentially Section 60H(1) of the *Family Law Act* creates a presumption of parentage on the part of a co-mother of a lesbian couple who has a child by way of an artificial conception procedure. The proviso is that the parties were in a de-facto relationship at the time of conception of the child, and that the procedure was with the consent of both parties.

The presumption of parentage contained in Section 60H(1) by itself is all very well. However, there is an issue of evidence of this presumption. Fortunately in late 2008 the *Registration of Births Deaths and Marriages Act and Regulations (NSW)* were amended in NSW so that birth certificates in NSW can now record as parents both parties of a lesbian couple who have had a child by way of an artificial conception procedure. The Registry of Births Deaths and Marriages has devised and implemented an application whereby birth registration details can be retrospectively changed to record both women as parents in such cases. Therefore upon the co-mother of a lesbian couple having a child by way of an

artificial conception procedure being named on the birth certificate as a parent, she will have a presumption of parentage under both Section 60H(1) and Section 69R of the *Family Law Act*.

In those cases where lesbian parents have not availed themselves of the birth registration process to have the co-mother recorded as a parent, issues can arise if there is a breakdown of the relationship. An example arose in a recently reported decision of *Keaton and Aldridge [2009] FMCA fam 92*. This was a decision of Chief Federal Magistrate Pasco in a case involving a lesbian couple who had a child conceived by way of an IVF procedure. The parties separated some eight months after the birth of the child, and before changes to Section 60H of the *Family Law Act* and the *Registration of Births Deaths and Marriages Act and Regulations* amendments. In this case the co-mother was not named on the birth certificate as a parent of the child. The child was conceived with a sperm donation from an anonymous donor. After separation occurred the co-mother's time with the child was gradually reduced to the point where she was not spending any time with the child at all. The co-mother commenced proceedings in the Federal Magistrate Court seeking Orders to spend time with the child.

At the final hearing of the matter when determining whether to follow the legislative pathway as prescribed in *Goode and Goode*⁶, the Chief Federal Magistrate had to look at the operation of the presumption of parentage in Section 60H(1) of the *Family Law Act*. On the part of the birth mother, it was argued that the presumption of parentage in Section 60H(1) did not apply to the Applicant co-mother in this case, as it was asserted that the parties were not in a de-facto relationship at the time of conception. The Applicant co-mother sought equal shared parental responsibility, and substantial and significant time with the child, on the basis she was a parent for the purposes of S.60H(1), as she was in a de facto relationship with the birth mother at the time of conception. In his Judgment, Chief Federal Magistrate Pascoe closely examined the evidence concerning the nature of the relationship between the parties before making a finding of whether there was a de facto relationship, and then whether to follow the legislative pathway prescribed in *Goode & Goode*.

Section 4AA of the *Family Law Act* now provides a definition of de-facto relationship as follows:-

⁶ [2006] FamCA 1346

De facto relationships

Meaning of de facto relationship

(1) A person is in a ***de facto relationship*** with another person if:

(a) the persons are not legally married to each other; and

(b) the persons are not related by family (see subsection (6)); and

(c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

Paragraph (c) has effect subject to subsection (5).

Working out if persons have a relationship as a couple

(2) Those circumstances may include any or all of the following:

(a) the duration of the relationship;

(b) the nature and extent of their common residence;

(c) whether a sexual relationship exists;

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;

(e) the ownership, use and acquisition of their property;

(f) the degree of mutual commitment to a shared life;

(g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;

(h) the care and support of children;

(i) the reputation and public aspects of the relationship.

(3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a *de facto* relationship.

(4) A court determining whether a *de facto* relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(5) For the purposes of this Act:

(a) a *de facto* relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and

(b) a *de facto* relationship can exist even if one of the persons is legally married to someone else or in another *de facto* relationship.

When 2 persons are related by family

(6) For the purposes of subsection (1), 2 persons are ***related by family*** if:

(a) one is the child (including an adopted child) of the other; or

(b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or

(c) they have a parent in common (who may be an adoptive parent of either or both of them).

For this purpose, disregard whether an adoption is declared void or has ceased to have effect.

The definition of de-facto relationship under the *Family Law Act* is in similar terms to the definition under the *Property Relationships Act*. In *Keaton & Aldridge*, evidence relating to all of the factors in the definition of *de facto relationship* was examined.

In order to avoid any subsequent issues upon a breakdown of any lesbian relationship with children as to whether the co-mother is a parent or not, and to avoid the type of scrutiny that occurred in *Keaton & Aldridge*, it is recommended that the parties immediately register both women as parents on the birth certificate. Alternatively, for those lesbian couples who have children it is recommended they make contact with the Registry of Births Deaths and Marriages and enquire about amending the birth registration details to have the co-mother recorded as a parent of the child.

Upon both women of a lesbian couple being named as parents on a birth certificate, this will give both the presumption of parentage and confer parental responsibility on them. There will then be no need to apply for parenting Orders by consent.

Co-Parenting Arrangements – Options for Male Couples

Within the gay and lesbian community it is not uncommon to hear of co-parenting arrangements whereby more than two adults undertake a parenting role. Conception of the child is most usually by way of an artificial conception procedure. The parenting configurations may include a lesbian couple whereby one of the women is the birth mother, and a single male who provides the sperm donation. An alternative may be a gay male couple whereby one of the couple provides the sperm donation, and a single woman who is the birth mother. Another alternative may be a gay male couple and a lesbian couple all co-parenting in a four way arrangement, whereby one of the lesbian couple is the birth mother, and one of the male couple provides the sperm donation.

Often within whatever co-parenting arrangement, the sperm donor agrees to being named on the birth certificate as the father of the child. Although this may be in breach of regulations concerning birth registration details, if in fact the donor is not in a marriage or de-facto relationship with the birth mother, it usually does not result in a prosecution of the sperm donor. However, it will give rise to a rebuttable presumption of parentage on the part of the sperm donor, pursuant to Section 69R of the *Family Law Act*. If the co-parenting arrangement involves a lesbian couple and a single male as sperm donor (or a gay male couple where one has donated sperm), and the sperm donor has been named as a parent on the birth certificate, then the presumption of parentage applying to birth mother and her de facto partner under Section 60H *Family Law Act* will prevail over the presumption of parentage applying to the sperm donor under Section 69R *Family Law Act* applying the reasoning in the decision of *Re Michael: Surrogacy Arrangements*. This leaves the sperm donor without a presumption of parentage applying to him, and no parental responsibility.

The solution in co-parenting cases to allocate parental responsibility where it is intended that more than two parties have a parenting role is to obtain parenting orders by consent allocating parental responsibility upon all parties.

The author of this paper has had personal experience advising a gay male couple and a single woman who have entered into a co-parenting arrangement. One of the male couple provided the sperm donation, and the woman was the birth mother. The sperm donor was named as the father on the birth certificate. The intention between all three parties was that they would all co-parent and all have parental responsibility in relation to the child. The solution was to apply for parenting Orders by consent conferring parental responsibility upon all parties. This was done in the Sydney Family Court by way of a Form 11 Application for Consent Orders, with a brief Affidavit from each of the parties. The Orders were made in chambers before a Deputy Registrar.

It should be noted that this procedure occurred prior to the Principal Registrar revoking the delegation to Deputy Registrars dealing with same sex parenting Orders by consent. Nowadays to achieve the same parenting Orders by consent one of the parties would need to file an Initiating Application, presumably the birth mother, with each of the male parties named as a Respondent. In such circumstances it is recommended that each party file an Affidavit in support addressing what the care arrangements are for the child, and what arrangements are contemplated. It should also address what parenting role is contemplated

for each party. In the Sydney Registry the matter would be transferred to a Judicial Registrar. The same Application could be filed in the Federal Magistrates Court.

It is recommended that where such an arrangement is contemplated and the parties wish to enter into consent parenting orders allocating parental responsibility upon all parties, and they seek access to a family law jurisdiction outside of Sydney, then some forum shopping should be undertaken taking into account which jurisdictions are available locally and whether a friendly service likely to be received.

The co-parenting arrangement involving a lesbian couple and a sperm donor, or alternatively a gay male couple and a lesbian couple, raises some other interesting issues. In either scenario, whether a three way or four way parenting arrangement, if it is contemplated that all parties exercise parental responsibility then the solution would again be parenting Orders by consent allocating parental responsibility to each party. Procedurally the same process would apply with an Initiating Application in either the Family Court or Federal Magistrates Court with an Affidavit in support by each party addressing the care arrangements for the child, proposed arrangements, and the contemplated parenting role of each party.

When advising parties about the co-parenting arrangements that they contemplate if conception has not yet occurred, it is always a good idea to refer the parties to counselling so that they all have a clear understanding of their roles and how they will make the co-parenting arrangements work.

The co-parenting arrangements are a more common option for gay male couples wishing to have children and a parenting role. If it is contemplated that the sperm donor is going to be named on the birth certificate, then he ought to be advised of his potential child support liability. Although the parties may agree between themselves that the birth mother may not seek child support from the donor, if she is in receipt of Centrelink benefits she may not have any choice in the matter. This then may give rise to the type of fact situation in the case of B & J⁷. In that case, a 1996 decision of Justice Fogarty of the Family Court at Melbourne, a lesbian couple approached a male friend to provide a sperm donation for an artificial conception procedure. The male friend provided the sperm donation, conception occurred and later one of the lesbian couple gave birth to a child. As she was in receipt of Centrelink benefits, she was required to seek child support from the sperm donor. The sperm donor

⁷ [1996] FamCA 124

sought an application for a declaration under the *Child Support (Assessment) Act* that the birth mother was not entitled to a child support assessment.

Although the sperm donor was named on the birth certificate as the father of the child, and a Section 69R presumption of parentage applied, it was rebuttable. Justice Forgarty found that the sperm donor was not in a marriage or de-facto relationship with the birth mother, and therefore the presumption of parentage under Section 60H did not apply. As the definition of parent under Section 5 of the *Child Support (Assessment) Act* includes a person who is deemed a parent for the purposes of Section 60H of the *Family Law Act*, he found that the donor in this case did not come within the definition of parent for the purposes of the *Child Support (Assessment) Act*. Accordingly he granted the child support declaration that was sought.

When advising sperm donors who contemplate being named on the birth certificate, they ought to be mindful of the potential child support liability, and if they are not prepared to accept that liability of what action they make take to deal with that situation.

Surrogacy

Surrogacy is an alternative option for gay male couples wishing to start a family where they do not wish to enter into a co-parenting arrangement with a single woman or a lesbian couple. It is a less common arrangement for various reasons which will emerge later in this paper.

Surrogacy is an arrangement where a couple (“the intending parents”) approach a woman to conceive a child on their behalf, and then later surrender the child to their care after birth.

Currently a standing committee of the Attorney General’s of the States and Territories and the Commonwealth is conducting an inquiry into the implementation of uniform laws across Australia to deal with surrogacy. Currently there are inconsistent laws at a State and Territory level dealing with surrogacy arrangements. Up until relatively recently, NSW had no laws dealing with surrogacy at all. In most other States or Territories around Australia, the laws dealing with surrogacy were somewhat limited and merely provided that commercial is illegal, and altruistic surrogacy is not illegal, although not enforceable.

Commercial surrogacy is an arrangement where the intending parents enter into a commercial agreement with a surrogate mother to provide her consideration for her services. Such

arrangements are not only prohibited, but parties entering into them can be prosecuted. However, it is not illegal for parties to enter into altruistic surrogacy arrangements which is essentially the same thing except that no money exchanges hands between the parties.

Within the IVF industry, some IVF clinics provide treatment in surrogacy arrangements, whether it involves same sex or opposite sex couples. However, the provision of treatment is not regulated by any legislative instruments anywhere in Australia. In that regard the IVF industry seems to be self regulated.

From the authors own experience of clients undergoing surrogacy arrangements within Australia, the common arrangement is one of the intending parents provides the sperm donation, and an egg is harvested from a woman other than the surrogate mother. The subsequent embryo is then implanted into the surrogate mother.

In a surrogacy arrangement that occurs within Australia, who is the parent? Given the operation of Section 60H of the *Family Law Act*, the surrogate mother and her married or de-facto partner (whether same sex or opposite sex) would be presumed the parents of the child, even though the child does not have any of their DNA. The intending parents do not have a presumption of parentage applying to them, even if the sperm donor is named on the birth certificate, as was the case in *Re Michael: Surrogacy Arrangements*. This has created an issue for intending parents with respect to the exercise of parental responsibility, and being legally recognised as the parents of the child. The exception to this involves States or Territories which have prescribed laws dealing with surrogacy. In that regard, S.60HA of the *Family Law Act* provides: -

Children born under surrogacy arrangements

(1) If a court has made an order under a prescribed law of a State or Territory to the effect that:

(a) a child is the child of one or more persons; or

(b) each of one or more persons is a parent of a child;

then, for the purposes of this Act, the child is the child of each of those persons.

(2) In this section:

"this Act" includes:

(a) the standard Rules of Court; and

(b) the related Federal Magistrates Rules

The prescribed laws of a State or Territory referred to in S.60HA(1) is dealt with in Regulation 12CAA of the *Family Law Regulations*, which provides as follows: -

Children born under surrogacy arrangements -- prescribed law

For subsection 60HB (1) of the Act, the following laws are prescribed:

- (a) *section 21 of the Surrogacy Act 2008 (WA);*
- (b) *section 26 of the Parentage Act 2004 (ACT).*

At present in NSW, and in every other State and Territory around Australia with the exception of the ACT and Western Australia, the solution lies in applying to the Family Court for parenting orders conferring parental responsibility upon the intending parents. This does not go as far as making them legal parents in a way that adoption would for instance. It would otherwise leave the surrogate mother and her partner exposed to potential child support liability whereupon the intending parents could ground an application as carers of the child under Section 25A of the *Child Support (Assessment) Act*.

The *Parentage Act 2004 (ACT)*, in Division 2.5 of that Act, makes provision for *Parentage Orders*. The relevant sections, Sections 23-26, provide as follows:-

Parentage orders

23 Definitions for div 2.5

In this division:

birth parent, of a child, means—

- (a) *the woman who gave birth to the child; or*
- (b) *the other person (if any) presumed under division 2.2 to be a parent of the child.*

birth sibling, of a child, means a brother or sister of the child who is born as a result of the same pregnancy as the child.

commercial substitute parent agreement—see section 40.

parentage order means an order under section 26.

procedure means the procedure of transferring into the uterus of a woman an embryo derived from an ovum fertilised outside her body.

substitute parent, of a child—see section 24 (1) (c).

substitute parent agreement means a contract, agreement, arrangement or understanding under which—

- (a) *a woman agrees—*
 - (i) *that the woman will become, or attempt to become, pregnant; and*
 - (ii) *that a child born as a result of the pregnancy will be taken to be (whether by adoption, agreement or otherwise) the child of someone else; or*

(b) a woman who is pregnant agrees that a child born as a result of the pregnancy will be taken to be (whether by adoption, agreement or otherwise) the child of someone else.

24 Application of div 2.5

This division applies to a child if—

- (a) the child was conceived as a result of a procedure carried out in the ACT; and*
- (b) neither birth parent of the child is a genetic parent of the child; and*
- (c) there is a substitute parent agreement, other than a commercial substitute parent agreement, under which 2 people (the **substitute parents**) have indicated their intention to apply for a parentage order about the child; and*
- (d) at least 1 of the substitute parents is a genetic parent of the child; and*
- (e) the substitute parents live in the ACT.*

25 Application for parentage order

- (1) An application may be made to the Supreme Court for a parentage order about the child.*
- (2) The application may be made by either or both of the substitute parents.*
- (3) The application may only be made when the child is between the ages of 6 weeks and 6 months.*

26 Parentage order

- (1) The Supreme Court must make a parentage order about the child if satisfied that—*
 - (a) the making of the order is in the best interests of the child; and*
 - (b) both birth parents freely, and with a full understanding of what is involved, agree to the making of the order.*
- (2) However, the Supreme Court may dispense with the requirement under subsection (1) (b) in relation to a birth parent if satisfied that—*
 - (a) the birth parent is dead or incapacitated; or*
 - (b) the applicants cannot contact the birth parent after making reasonable inquiries.*
- (3) In deciding whether to make a parentage order, the Supreme Court must take the following into consideration, if relevant:*
 - (a) whether the child's home is, and was at the time of the application, with both substitute parents;*
 - (b) whether both substitute parents are at least 18 years old;*
 - (c) if only 1 of the child's substitute parents has applied for the order, and the other substitute parent is alive at the time of the application, whether—*
 - (i) the other substitute parent freely, and with a full understanding of what is involved, agrees to the making of the order in favour of the applicant substitute parent; or*
 - (ii) the applicant substitute parent cannot contact the other substitute parent to obtain his or her agreement under subparagraph (i);*
 - (d) whether payment or reward (other than for expenses reasonably incurred) has been given or received by either of the child's substitute parents, or either of the child's birth parents, for or in consideration of—*
 - (i) the making of the order; or*
 - (ii) the agreement mentioned in subsection (1) (b); or*
 - (iii) the handing over of the child to the substitute parents; or*
 - (iv) the making of any arrangements with a view to the making of the order;*
 - (e) whether both birth parents and both substitute parents have received appropriate counselling and assessment from an independent counselling service;*
 - (f) if a birth parent is dead or incapacitated or cannot be contacted—any evidence before the court that the birth parent no longer intended or intends the substitute parents to obtain a*

- parentage order about the child.*
- (4) *The Supreme Court may take into consideration anything else it considers relevant.*
- (5) *For subsection (3) (e), a counselling service is not **independent** if it is connected with—*
- (a) the doctor who carried out the procedure that resulted in the birth of the relevant child; or*
 - (b) the institution where the procedure was carried out; or*
 - (c) another entity involved in carrying out the procedure.*
- (6) *The Supreme Court must make a parentage order under subsection (1)—*
- (a) if both substitute parents apply for the order—in favour of both substitute parents; or*
 - (b) if only 1 substitute parent applies for the order, and the other substitute parent is dead or incapacitated at the time of the application (unless the court is satisfied that, at the time of death or incapacitation, the deceased or incapacitated substitute parent no longer intended or intends to apply for a parentage order about the child)—in favour of both substitute parents; or*
 - (c) if, in any other case, only 1 substitute parent applies for the order—in favour of the applicant substitute parent.*

Essentially an application can be made to the Supreme Court of ACT for a Parentage Order. This is a Court Order which is analogous to an Adoption Order in a surrogacy arrangement. With the consent of the intending parents and the surrogate mother and her partner, the intending parents can apply for a Parentage Order. The Parentage Order removes the status of legal parent from the surrogate mother and her partner and confers it upon the intending parents. It is interesting to note that these provisions do not exclude same sex couples from applying for Parentage Orders as the intending parents, or from acting as Respondents where the surrogate mother and her partner may be a lesbian couple.

There are, however, jurisdictional requirements before an application for a Parentage Order can be lodged with the Supreme Court of ACT. Those requirements are set out in Section 24 of the *Parentage Act*, and include:-

- a) The child was conceived as a result of a procedure carried out in the ACT;
- b) Neither birth parent of the child is a genetic parent of the child;
- c) There is a surrogacy agreement, other than a commercial agreement, under which the intending parents have indicated their intention to apply for parentage order about the child;
- d) At least one of the intending parents is a genetic parent of the child;
- e) The intending parents live in the ACT.

It has been recommended to the standing committee of the Attorney Generals of the States and Territories and the Commonwealth that the *Parentage Act 2004 (ACT)* be adopted as the model legislation to be implemented nationally at State and Territory level.

The author of this paper has had experience advising an opposite sex couple who were the intending parents in an altruistic surrogacy arrangement. They were resident of NSW, and the surrogate mother and her husband were also resident in NSW. However, they were seeking treatment via an IVF clinic in Canberra. Before the Canberra IVF clinic would provide treatment, it required the intending parents to obtain a legal report to be considered by its ethics committee. The legal report covered a number of different issues including:

1. What would happen if the surrogate mother refuses to surrender the child after birth;
2. What would happen if the child was born with a disability and the intending parents refused to accept the child into their care;
3. What if the surrogate mother became ill or died during pregnancy? What provision would be made for her spouse and/or her children.

For some gay male couples, particularly those with plenty of spare cash at their disposal, entering into a commercial surrogacy arrangement in an overseas jurisdiction where it is legal may be an option. If this is being considered, then it is recommended that the couple seek independent legal advice in the jurisdiction where the commercial surrogacy arrangement is being entered into as to the enforceability of such commercial surrogacy arrangements. For instance, in India, commercial surrogacy arrangements are not illegal. However, it is understood that the laws in India are not as developed as in other jurisdictions and there does not appear to be any mechanisms to enforce commercial surrogacy arrangements within that jurisdiction. Interestingly it is understood that there is a mechanism in place in India whereby the intending couple can be named as parents on the birth certificate of the child after DNA testing.

In California, commercial surrogacy arrangements are not only legal, but the laws there provide for their enforceability. In California, there are mechanisms whereby the parties agree to undergo a legal process to confer parental responsibility upon the intending parents, and to have them both named on the birth certificate of the child provided the surrogate

mother is from California. The birth certificate in California can name same sex couple as both parents.

If a commercial surrogacy arrangement is entered into in an overseas jurisdiction by a same sex couple where there is a mechanism in place for the issue of birth certificates naming them both as parents of the child, then there is an issue of whether a presumption of parentage applies pursuant to Section 69R of the *Family Law Act*. The issue is whether the birth certificate is from a prescribed overseas jurisdiction, and otherwise whether the surrogate mother was in a marriage or de facto relationship at the time of conception.

Regulation 39B of the *Family Law Regulations 1984* provides as follows:-

Extension of provisions of Act

(1) Subdivisions D (except subsection 69U (3)) and E of Division 12 of Part VII of the Act apply, subject to this regulation, to proceedings for the purposes of an international agreement or arrangement with a reciprocating jurisdiction or a jurisdiction mentioned in Schedule 4.

(2) For subregulation (1), each reciprocating jurisdiction and each jurisdiction mentioned in Schedule 4 is a prescribed overseas jurisdiction.

(3) Matters mentioned in this regulation are taken to be matters arising under the Act for the purposes of the application of section 69H of the Act in relation to those matters.

(4) Despite subsections 69S (1) and 69U (3) of the Act, the presumption of parentage provided for by subsection 69S (1) is taken, for these Regulations, to be rebuttable under subsection 69U (1) of the Act.

Upon examination on Subsection 1 of Regulation 39B, it provides that the sections contained in Subdivisions D and E of Division 12 of Part VII of the *Family Law Act* “ apply... to [an] arrangement with a reciprocating jurisdiction or a jurisdiction mentioned in Schedule 4.” Schedule 4 of the *Family Law Regulations 1984* lists what is referred to as Convention Countries. “Reciprocating jurisdictions” are dealt with in Schedule 2 of the *Family Law Regulations*. However when considering Regulation 39B(2), each reciprocating jurisdiction and each jurisdiction mentioned in Schedule 4 is prescribed overseas jurisdiction. It is therefore submitted that for the purpose of Section 69R of the *Family Law Act*, those jurisdictions listed in Schedule 2 and Schedule 4 of the *Family Law Regulations* are prescribed overseas jurisdictions.

The United States of America is a prescribed overseas jurisdiction for the purposes of Schedule 2 of the *Family Law Regulations*. Similarly British Columbia is a prescribed

overseas jurisdiction. It is submitted that the conclusion to be drawn from this is that if a birth certificate is issued from California, British Columbia, or any to her other jurisdictions mentioned in Schedule 2 or 4 of the *Family Law Regulations*, and they name both parties to a same sex couple as parents of a child, then the presumption of parentage under Section 69R of the *Family Law Act* applies. The parties will therefore prima facie be presumed *parents* for the purposes of the *Family Law Act*, and accordingly they will prima facie have parental responsibility. That is not the end of the matter, under current the state of law in Australia.

In the case of *Re Mark*, when it was decided there were no prescribed overseas jurisdictions for the purposes of Section 69R of the *Family Law Act*. In addition when the parties in that case obtained a birth certificate it named the surrogate mother and the sperm donor as parents of the child. The birth certificate was not sufficient for the sperm donor to be deemed a parent of the child for the purpose of the *Family Law Act*, as it issued from California which was not a prescribed jurisdiction at that point in time. This was one of the reasons why the parties in that case needed to apply for parenting orders under the *Family Law Act* to confer parental responsibility upon them. However, the process of obtaining parenting orders under the *Family Law Act* conferring parental responsibility upon the intending parents will now not be necessary if the intending parents are named on the child's birth certificate.

It should be noted, however, that even if a birth certificate issues from the overseas jurisdiction where the birth occurred naming both the gay male intending parents as the parents of the child born of a surrogacy arrangement, the surrogate mother and her married or de facto partner will still have a presumption of parentage applying to them under Section 60H(1) *Family Law Act*, which will prevail over the presumption of parentage applying to the intending parents under Section 69R *Family Law Act*, applying the decision in *Re Michael: Surrogacy Arrangements*.

For any persons considering entering into a commercial surrogacy arrangement overseas, it will be necessary to apply for parenting orders conferring parental responsibility upon them in either the Family Court or Federal Magistrates Court. The parties to such an Application ought to be the intending parents as applicants, and the surrogate mother and her marriage or de facto partner as respondents. It would be advisable to have each party swear an Affidavit as to the nature of the arrangements, and their roles. Orders can be made by consent. However, in these circumstances prior to making orders by consent the Court may order a Family report under Section 65G *Family Law Act*, which provides as follows: -

Special conditions for making parenting order about whom a child lives with or the allocation of parental responsibility by consent in favour of non-parent

(1) *This section applies if:*

(a) *a court proposes to make a parenting order that deals with whom a child is to live with; and*

(b) *under the order, the child would not live with a parent, grandparent or other relative of the child; and*

(c) *the court proposes to make that order with the consent of all the parties to the proceedings.*

(1A) *This section also applies if:*

(a) *a court proposes to make a parenting order that deals with the allocation of parental responsibility for a child; and*

(b) *under the order, no parent, grandparent or other relative of the child would be allocated parental responsibility for the child; and*

(c) *the court proposes to make that order with the consent of all the parties to the proceedings.*

(2) *The court must not make the proposed order unless:*

(a) *the parties to the proceedings have attended a conference with a family consultant to discuss the matter to be determined by the proposed order; or*

(b) *the court is satisfied that there are circumstances that make it appropriate to make the proposed order even though the conditions in paragraph (a) are not satisfied.*

Under Section 65G(2)(b) *Family Law Act* the Court has a discretion to dispense with the requirement of a S.65G report, and it is worth seeking dispensation of the requirement for the report, given a commercial arrangement is involved here and the surrogate mother and her marriage or de facto partner live overseas.

Same Sex Adoption

Adoption is dealt with under State and Territory based Law. Section 26 of the *Adoption Act 2000 (NSW)* makes provision for who can adopt, it provides as follows:

26 Who can adopt?

An application for an adoption order may be made in accordance with this Act solely by or on behalf of one person or jointly by or on behalf a couple

A single person or a couple may apply for an adoption. The dictionary to the *Adoption Act 2000 (NSW)* defines a couple as follows:

couple means a man and a woman who:

(a) *are married, or*

(b) *have a de facto* relationship.

The definition of a couple, whether married or in a de-facto relationship, is limited to opposite sex couples.

Therefore the odd situation currently exists whereby a single gay or lesbian person can apply to adopt a child, however a gay or lesbian couple cannot.

Adoption is not very common in the scheme of creating families. Presumably the first preference for most same sex or opposite sex couples would be to have children of their own through whatever means are appropriate or available. However, in some situations for same sex couples adoption may be a viable solution. For example, consider the situation where a woman has a child to a marriage, her husband passes away and she later forms a de facto relationship with another woman. The mother's partner then assumes a parenting role. Without adoption being available to this couple, the only option available to the couple is to obtain parenting orders conferring parental responsibility upon the mother's partner. The deficiency in this mechanism is that if the parties subsequently separated, although the mother's partner has parental responsibility by virtue of a Parenting Order, she would not have any child support liability. If adoption were available, then the effect of an adoption Order would be to treat the birth mother's partner as parent for the purposes of the *Child Support (Assessment) Act*⁸, and she could be liable for a child support assessment.

Recently the NSW Parliament Law & Justice Committee held an enquiry into same sex adoption. It is anticipated that the Labor Government will introduce a Bill into NSW Parliament to amend the *Adoption Act* to include same sex couples within the definition of couple in the dictionary to the *Adoption Act*.

Although many overseas jurisdictions do not permit same sex inter-contrary adoption of children within their jurisdictions, there is no prohibition on same sex adoption within the *Convention on Protection of Children and Cooperation in Respect of Inter-Contrary Adoption*. That convention not only does not contain any restriction on same sex adoption, it does not mention same sex couples at all. Otherwise there is no other international convention with respect to adoption.

It seems that in NSW same sex adoption may be available in the foreseeable future.

⁸ Per definition of *parent* in S.5.

Same Sex Couples and Child Support

The definition of *parent* contained in Section 5 of the *Child Support (Assessment) Act* is as follows:

"parent" means:

(a) when used in relation to a child who has been adopted--an adoptive parent of the child; and

(b) when used in relation to a child born because of the carrying out of an artificial conception procedure--a person who is a parent of the child under section 60H of the Family Law Act 1975 .

Therefore persons who are presumed a parent for the purposes of Section 60H of the *Family Law Act* are considered a parent for the purposes of the *Child Support (Assessment) Act*.

As S.60H(1) of the *Family Law Act* now presumes a co-mother in a lesbian relationship to be a parent if the child was conceived by an artificial conception procedure and the parties were in a de facto relationship at the time of conception, then she may be liable to a child support assessment in the event of separation and the child remains in the birth mother's primary care..

For the Child Support Agency to invoke a child support assessment there will be an issue of evidence of the operation of the presumption of parentage. This will be simple enough if both women are named on the birth certificate as parents of the child, noting that this facility is currently available in NSW, the ACT, Western Australia and the Northern Territory. It is understood that Victoria will be following suit shortly.

What of a circumstance where the co-mother is not named on the birth certificate as a parent of the child? Bear in mind that Section 60H(1) operates retrospectively. Potentially if a lesbian couple separated and the co-mother is not named as a parent on the child's birth certificate, and the birth mother retains the primary care of the child, she could bring an Application for a Child Support Declaration under Section 106A of the *Child Support(Assessment) Act*. This section provides as follows:

Declaration that a person is entitled to administrative assessment [see Note 3]

(1) This section applies if:

(a) the Registrar refuses to accept from an applicant an application for administrative assessment of child support for a child under subsection 30(2); and

(b) one of the reasons for the Registrar so refusing was that the Registrar was not satisfied under section 29 that a person who was to be assessed in respect of the costs of the child is a parent of the child.

Applications for declarations

(2) An application may be made to a court having jurisdiction under this Act for a declaration that:

(a) if the reason referred to in paragraph (1)(b) was the only reason for the Registrar refusing to accept the application--a person should be assessed in respect of the costs of the child because the person is a parent of the child; and

(b) if the reason referred to in paragraph (1)(b) was one of the reasons for the Registrar refusing to accept the application--the Registrar should reconsider the application under Division 2 of Part 4 because a person who was to be assessed in respect of the costs of the child is a parent of the child.

(3) The application must be made within:

(a) the time prescribed by the applicable Rules of Court; or

(b) such further time as is allowed under the applicable Rules of Court.

Parties

(4) Subject to section 145 (Registrar may intervene in proceedings), the parties to the proceeding are:

(a) if the application for administrative assessment was made under section 25--each person who was to be assessed in respect of the costs of the child; and

(b) if the application for administrative assessment was made under section 25A--the non-parent carer who made the application and the person in respect of whom the declaration is sought.

Declarations

(5) The court may grant the declaration if the court is satisfied that:

(a) if the reason referred to in paragraph (1)(b) was the only reason for the Registrar refusing to accept the application--the person should be assessed in respect of the costs of the child because the person is a parent of the child; or

(b) if the reason referred to in paragraph (1)(b) was one of the reasons for the Registrar refusing to accept the application--the Registrar should reconsider the application under Division 2 of Part 4 because the person who was to be assessed in respect of the costs of the child is a parent of the child.

(6) If the court grants the declaration:

(a) if the reason referred to in paragraph (1)(b) was the only reason for the Registrar refusing to accept the application--the Registrar is taken to have accepted the application for administrative assessment of child support; and

(b) if the reason referred to in paragraph (1)(b) was one of the reasons for the Registrar refusing to accept the application--the Registrar must reconsider the application under Division 2 of Part 4.

Curiously, S.106A(3) of the *Child Support (Assessment) Act* provides the Application must be brought within a time frame prescribed by the *Family Law Rules*, which is 60 days from

the date of a Notice issuing from the Child Support Agency. However, an Application for orders under the *Child Support (Assessment) Act* cannot be brought without obtaining and filing a S.60I certificate. Therefore, the parties will first need to organise a mediation conference, presumably to have the co-mother agree that she is a parent for the purposes of S.60H of the *Family Law Act*, and S.5 of the *Child Support (Assessment) Act*. Once the S.60I certificate issues, the 60 day limitation period will most likely have expired. It is therefore recommended an extension of the limitation period be sought in the S.106A Application.

In opposite sex cases, when such an Application is made there may be an issue of whether the male party is a parent, resulting in interlocutory orders being made for DNA testing. In a case involving a lesbian couple this would not occur. Rather, it is anticipated that the parties may be directed to file Affidavit evidence addressing the issue of whether a de-facto relationship existed at the time of conception. Although not dealing with a child support issue, see the decision in *Keaton & Aldridge [2009] FMCA fam92*.

Another possibility is inviting the co-mother to sign a statutory declaration confirming that she was in a de-facto relationship with the birth mother at the time of conception.

It is understood that the Child Support Agency is reviewing what kind of evidence it would accept to invoke an administrative assessment in cases involving lesbian couples.

What about a situation involving a gay male couple who had a child via an overseas commercial surrogacy arrangement, and both are named on the birth certificate as parents? It is the author's view that the overseas birth certificate, depending upon whether it originates from a Prescribed Overseas Jurisdiction, would give rise to a presumption of parentage under Section 69R of the *Family Law Act*. As such, this would establish both parties as parents of the child. However, when surrogacy arrangements are entered into, it involves conception via the carrying out of an artificial conception procedure. S.60H(3) deals with a man being presumed a parent of a child conceived by an artificial conception procedure, if a prescribed law of a State or Territory deems him as such. However S.60HA of the *Family Law Act* makes provision for persons in a surrogacy arrangement to be presumed parents if a prescribed law of a State or Territory makes such provision. Regulation 12CAA of the *Family Law Regulations* prescribes the *Surrogacy Act (WA)* and the *Parentage Act (ACT)*.

It is the author's view that neither of the couple is caught by Section 60H(3) of the *Family Law Act*. Although one of the couple may have provided the sperm donation, Section 60H is silent on the status of a sperm donor when he is not in a marriage or de-facto relationship with the birth mother of the child conceived by way of an artificial conception procedure. Although the couple may be deemed parents of the child if the *Surrogacy Act (WA)* or the *Parentage Act (ACT)* applies in any particular case, the definition of parent in S.5 of the *Child Support (Assessment) Act* makes no reference to S.60HA of the *Family Law Act*. Therefore, the conclusion to be drawn is that gay male couples who enter into surrogacy arrangements and are both named on a birth certificate are not caught by the provisions of the *Child Support (Assessment) Act*, and can not be subject to administrative assessments.

Where a sperm donor consents to being named on a birth certificate as father of a child conceived by way of an artificial conception procedure, he may be assessed for child support. If he was not in a marriage or de-facto relationship with the birth mother at the time of conception, then the presumption of parentage that applies to him under Section 69R of the *Family Law Act* is rebuttable and if he seeks to avoid a child support liability, he can seek a declaration under Section 107 of the *Child Support (Assessment) Act*.

Perhaps an amendment to the definition of parent in S.5 of the *Child Support (Assessment) Act* is warranted to capture children of surrogacy arrangements carried out both within Australia, and overseas.