THE BREAKDOWN OF SAME SEX RELATIONSHIPS – DECISIONS CONCERNING PARENTING

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PART 1 – INTRODUCTION

The family that is lead by same sex couples exists in various configurations. Ultimately this paper will examine parenting cases where same sex couples with children have separated. Of necessity there will be an examination of various issues relevant to starting a case, such as who is entitled to bring a parenting application.

When examining parenting cases involving same sex couples, three broad categories of family forms emerge, namely:-

1. Lesbian couples having children through an artificial conception procedure;

2. Gay male couples having children through surrogacy arrangements; and

3. Co-parenting arrangements between either a lesbian couple and a single male, or a single woman, and a gay male couple, or alternatively a lesbian couple and a gay male couple.

PART TWO - CONCEPTION – WHO ARE THE PARENTS?

Prior to contemplating any court proceedings involving a same sex couple seeking parenting orders, consideration needs to be given to who is deemed a parent in any particular case. The word "parent" is not given a definition in the *Family Law Act*. Instead the *Family Law Act* prescribes presumptions of parentage applicable in various situations.

A – Presumptions of parentage applying to lesbian couples

For the purposes of this examination, it will be assumed that a lesbian couple seeking to start a family will access an artificial conception procedure, either through an IVF clinic, or a donor insemination procedure at home.

Where a child is conceived by way of an artificial conception procedure, s60H of the *Family Law Act* prescribes presumptions of parentage 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; 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

(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.

Section 60HA of the *Family Law Act* makes provision for a child to be a child of a de facto partner of a person who conceives a child by way of an artificial conception procedure, caught by S.60H, as follows:-

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.

Upon application of Section 60H(1), a woman who gives birth to a child conceived by an artificial conception procedure will be presumed a parent of the child. By virtue of s60H(1)(c) and s60HA, the de facto partner of the birth mother is also presumed parent of the child. Section 60EA of the *Family Law Act* provides for a definition of the de facto partner as follows:-

> ***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.*

It is clear that by operation of s60H(1), s60HA and s60EA of the *Family Law Act* the de facto partner of the birth mother who conceives a child through artificial conception procedure includes a same sex partner.

Section 60H(1)(b)(i) makes provision for a condition before the de facto partner of the birth mother is presumed a parent, and that is, that the other intended parent consented to the carrying out of the procedure.

In the first instance decision in the case of *Keaton & Aldridge*[1] in the Federal Magistrates Court. Federal Magistrate Pascoe held[2] as follows:-

Time of de facto relationship

> *29. Counsel for the parties disagreed as to the relevant time a person must be in a de facto relationship with the birth mother to be ascribed parental status pursuant to s.60H(1). The respondent argued that the section requires the de facto relationship to be in existence at the time of the artificial conception procedure. The applicant argued that the language of the section is ambiguous as to whether the existence of the de facto relationship must be at the time of birth or at the time of the artificial conception procedure and stated:*
>
> - *Absent the commas, is it the born while the woman was a de facto partner, or a procedure while the woman was a de facto partner? I think it's open to either interpretation. We would say, of course, it doesn't matter because both apply. But I don't think it would be correct to say to your Honour that the only interpretation that is available is that the relevant time is the time of the conception.*
>
> 30. *I cannot agree with this interpretation. On a plain reading of the words in s.60H(1)(a) it is quite clear that the phrase "while the woman was married to, or a de facto partner of, another person" and in particular the term 'while' qualifies the phrase immediately before it which is "the carrying out of an artificial conception procedure". Therefore it is quite plain on the face of the statute that the relevant time 'the woman' must be a 'de facto partner' of another person is at the time the artificial insemination procedure is carried out. There is no comma which separates the clause and on a literal reading of the section I am not willing to impute any different meaning.*

Accordingly, for the presumption of parentage under s.60H(1) to apply to the de facto partner of the birth mother of a lesbian couple, then the parties would need to be in a de facto relationship at the time of conception, and the de facto partner will need to have consented to the procedure.

Whether or not there was a de facto relationship at the time of conception may be an issue. Section 4AA of the *Family Law Act* provides a definition of the de facto relationships as follows:-

> ***De facto relationships***

[1] [2009] FMCAfam 92
[2] At paragraphs 29 and 30

*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.

The issue of whether or not there was a de facto relationship featured in the first instance decision in *Keaton & Aldridge*.

B – Gay male couples – surrogacy arrangements

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.

There is somewhat of an inconsistency in relation to laws dealing with surrogacy arrangements as between the states and territories. Currently commercial surrogacy is prohibited in every state and territory in Australia. Commercial surrogacy is an arrangement where the intending parents enter into commercial agreement with the surrogate mother to provide her consideration for her services. However, altruistic surrogacy is not illegal, and this is an arrangement where no money exchanges hands between the parties.

A surrogacy arrangement, usually involving treatment through an IVF clinic, will usually involve one of the intending parents providing a sperm donation, and an egg being donated from a third person, other than the surrogate mother. Given an artificial conception procedure takes place, the presumptions of parentage in s60H of the *Family Law Act* apply.

Commonly, in a surrogacy arrangement the sperm donor will be named on the birth certificate. Section 69R of the *Family Law Act* prescribes a presumption of parentage arising out of birth registration 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.*

However, s.60H of the *Family Law Act* will presume the surrogate mother as a parent of the child together with her partner, whether married or de facto.

A presumption of parentage in surrogacy arrangements arises by virtue of s.60HB as follows: -

> ***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.*

In order for the presumption of parentage under s.60HB to apply, a Court order under a prescribed law of a state or territory needs to be made. Under Regulation 12CAA of the *Family Law Regulations*, the following are prescribed laws for the purposes of s.60HB:-

> ***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);*
>
> *(c) section 22 of the* ***Status of Children Act 1974*** *(Vic).*

The prescribed laws dealing with surrogacy in Western Australia, the ACT, and Victoria provide a mechanism whereby a Court order can be obtained in the Supreme Court in each place, which takes the status of legal parent from the surrogate mother and her married or de facto partner and confers it upon the intending parents. No such mechanism is currently available in New South Wales.

As is commonly the case in surrogacy arrangements which occur both within Australia and overseas, the sperm donor is named on the birth certificate as the father. This then gives rise to a presumption of parentage on his part. However, the surrogate mother's married or de facto partner also has a presumption of parentage in his favour, in conflict with that of the sperm donor. S.69U *Family Law Act* deals with conflicts between presumptions of parentage as follows: -

Rebuttal of presumptions etc.

(1) A presumption arising under this Subdivision is rebuttable by proof on a balance of probabilities.

(2) Where:

(a) 2 or more presumptions arising under this Subdivision are relevant in any proceedings; and

(b) those presumptions, or some of those presumptions, conflict with each other and are not rebutted in the proceedings;

the presumption that appears to the court to be the more or most likely to be correct prevails.

(3) This section does not apply to a presumption arising under subsection 69S(1).

In New South Wales the *Status of Children Act* also provides presumptions of parentage arising out of artificial conception procedures. In s.14 of that Act provides as follows:-

14 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 the de facto partner of 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.

***Note.** "De facto partner" is defined in section 21C of the Interpretation Act 1987.*

(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 the de facto partner of 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 the de facto partner of 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.

Section 11 of the *Status of Children Act* prescribes a presumption of parentage arising out of birth registration 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.

Significantly s.17 of the *Status of Children Act* makes provision for situations where there are conflicts between presumptions of parentage as follows:-

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.

The case of *re Michael: Surrogacy arrangements*[3] examined who is a parent in surrogacy arrangements. In this case, Paul and Sharon wished to have a child, but Sharon could not conceive. Sharon's mother Lauren, who was in a de facto relationship with Clive, agreed to act as a surrogate mother and surrender the child to Sharon and Paul upon birth. Paul provided a sperm donation and an egg was harvested from Sharon. After the birth of the child, Paul and Lauren were recorded on the birth certificate as the parents. When examining the presumptions of parentage applicable in this case, Justice Watts held as follows:-

> *32. The words "other intended parent" draws its own internal definition from the words of s 60H(1)(a) FLA. The phrase is used as an abbreviated expression to refer to, inter alia, the de facto partner of a woman who gives birth to a child as a result of the carrying out of an artificial conception procedure.*
> *33. The definition in s 4 FLA of artificial conception procedure includes the implantation of an embryo in the body of a woman and does not exclude that implantation happening in the context of a surrogacy arrangement.*
> *34. It is my view that it was the legislative intention of s 60HB FLA to 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 the provisions of a prescribed State law. In circumstances where State law did not allow an order to be made recognising the providers of genetic material as parents, it was Parliament's intention that they not be recognised as parents. Consequently the provisions of s 60H(1)(d) FLA then apply and a child is not to be considered a child of those who have provided genetic material.*
> *35. I therefore conclude that it is irrelevant that neither Lauren nor Clive intended that they became Michael's parents.*
> *36. Section 60H(1)(c) FLA says that Michael is the child of Lauren and Clive. Section 60H(1)(d) FLA says that Michael is not the child of either Paul or Sharon, who both provided the genetic material. Consequently I find, at law, that Sharon is Michael's maternal step-sister and Paul is his maternal step-brother-in-law.*
> *37. Turning to the second limb of s 60H(1)(b) FLA, there is a prescribed law of the State. It is the Status of Children Act 1996 (New South Wales) ("SCA") (see Regulation 12C; Schedule 6 Family Law Regulations).*
> *38. Section 11 SCA contains a rebuttable presumption that a child's parent is a person whose name is entered on the register of births (the presumption is in the same terms as s 69R FLA). In this case, both Paul and Lauren are named on the register.*
> *39. Section 14 SCA is in the following terms:*
>
> ***14. 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.*
>
> *.....*
>
> *(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*

[3] [2009] FamCA 691

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.

....

(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

.....

40. Section 17(2) SCA is as follows:

17 Conflicts involving irrebuttable parentage presumptions

.....

(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.

41. Applying s 60H(1)(b) FLA (which incorporates the SCA) to the facts of this case, Lauren is a woman living in a de facto relationship who has undergone a fertilisation procedure as a result of which she has become pregnant. Clive consented to the procedure, even though he did not provide any or all of the sperm used in the procedure. Clive is presumed to be the father of Michael born as a result of the pregnancy. Lauren is presumed to be the mother of Michael born as a result of the pregnancy, even though she did not provide the ovum used in the procedure.
42. Consequently, the provisions of s 60H(1)(b)(ii) FLA are satisfied in this case in that under the SCA, Michael is a child of Lauren and Clive.
43. Accordingly, under the second limb of s 60H(1)(b) FLA, s 60H(1)(c) FLA says that Michael is the child of Lauren and Clive and s 60H(1)(d) FLA says that Michael is not the child of Paul and Sharon who both provided the genetic material.
44. Both limbs of s 60H(1)(b) FLA led to the same conclusions.
45. For completeness, I comment in passing that this result mirrors the situation that exists under the New South Wales Legislation as Paul is presumed not the father (s 14(2) SCA) and Sharon is presumed not to be the mother (s 14(3) SCA). The presumption arising from the registration of Paul's name on the birth certificate is rebutted because the contest between the rebuttable presumptions in s 11 and s 14 SCA is resolved in favour of the irrebuttable presumptions in s 14 (see s 14(4) and s 17(2) SCA).
46. Given that Paul is registered on Michael's birth certificate, the next matter to address, is the status and effect of s 69R FLA which creates a rebuttable presumption of parentage arising from the registration of birth.
47. Section 69R FLA is in the following terms:-

"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."

48. Section 69U(1) FLA provides that this presumption is rebuttable. Section 69U(1) FLA is in the following terms:-

"A presumption arising under this Subdivision is rebuttable by proof on the balance of probabilities."

> *49. In this case, s 69R FLA cannot be rebutted by proof. Paul would be able to pass a parentage testing procedure.*
> *50. The question to consider is, does s 69U(1) FLA, provide an exhaustive description of the way the s 69R FLA presumption can be rebutted?*
> *51. I conclude that the presumption arising from s 69R FLA may not only be rebutted by proof but also rebutted by the operation of another provision of the FLA for the following reasons:*
>
> - *51.1. The words "if, and only if" are not used in s 69U(1) FLA (as they are for example in s 90G(1) FLA; s 90UJ(1) FLA).*
> - *51.2. Persons providing genetic material in a surrogacy arrangement could register as parents without any State order being made. If s 69R FLA then allowed them to be parents for the purposes of the FLA, the parliamentary intention behind s 60HB FLA would be circumvented.*
> - *51.3. Section 60H(1)(c) FLA and the use of the phrase "the other intended parent" in s 60H FLA seems to imply that there can only be two parents.*
> - *51.4. It would not in my view be possible for a court to make a declaration under s 69VA FLA that Paul is Michael's father based upon the presumption arising from s 69R FLA, because of the existence of s 60H(1)(d) FLA*

The case of *re Michael* occurred in New South Wales. Therefore in New South Wales at least in relation to any surrogacy arrangement, whether it occurs within New South Wales or commonly an overseas arrangement, the presumptions of parentage under s.60H will deem the surrogate mother and her married or de facto partner to be the parents of a child born through a surrogacy arrangement. Even if the sperm donor is named on the birth certificate as a father, his presumption of parentage under s.69R will be displaced by that of the married or de facto partner of the surrogate mother, by virtue of s.60H.

In 2003, Justice Brown handed down a decision in a case of *re Mark*[4]. This matter involved a gay male couple from Melbourne who entered into a commercial surrogacy arrangement in California. One of the gay male couple provided a sperm donation, and an egg was harvested from the third person. The embryo was implanted into the surrogate mother, who was married. The surrogacy agreement the parties entered into provided that the parties would all participate in any legal process necessary to confer the status of legal parent or parental responsibility upon the intending parents.

After the birth of the child the surrogate mother and the sperm donor were named as parents on the birth certificate. A Court order was obtained in the Supreme Court of California conferring parental responsibility upon the intending parents.

The intending parents subsequently filed for parenting orders in the Family Court at Melbourne, that they have parental responsibility for the child. The orders were by consent. In that case Justice Brown examined who was a parent. She reviewed previous case authorities including *B & J*[5] and *re Patrick*[6].

Justice Brown found that by applying the 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. Her Honour examined whether he would be presumed a parent for the purposes of s.69R of the *Family Law Act*. That section can presume a person to be a parent if they are named on the birth certificate as a parent and the birth certificate issued from a prescribed overseas jurisdiction. At the time the case was heard there were no prescribed overseas jurisdictions in the *Family Law Regulations* for the purposes of recognising birth certificates from overseas. Accordingly, Her Honour found that the sperm donor

[4] [2003]FamCA 822
[5] [1996] FamCA 124
[6] [2002] FamCA 193

was not a parent for the purposes of s.69R. This situation has now been remedied as there are prescribed overseas jurisdictions for the purposes of overseas birth certificates contained in the *Family Law Regulations*.

The Court order obtained in the Supreme Court of California could not be registered as an *overseas children's order* under s.4 Family Law Act, as that section provides: -

> **"overseas child order"** means:
>
> (a) an order made by a court of a prescribed overseas jurisdiction that:
>
> (i) however it is expressed, has the effect of determining the person or persons with whom a child who is under 18 is to live, or that provides for a person or persons to have custody of a child who is under 18; or
>
> (ii) however it is expressed, has the effect of providing for a person or persons to spend time with a child who is under 18; or
>
> (iii) however it is expressed, has the effect of providing for contact between a child who is under 18 and another person or persons, or that provides for a person or persons to have access to a child who is under 18; or
>
> (iv) varies or discharges an order of the kind referred to in subparagraph (i), (ii) or (iii), including an order of that kind made under this Act; or
>
> (b) an order made for the purposes of the Convention referred to in section 111B by a judicial or administrative authority of a convention country (within the meaning of the regulations made for the purposes of that section).

The definition of prescribed overseas order does not include orders for conferral of parental responsibility or guardianship, however described. Therefore the court order obtained in the Supreme Court of California in *re Mark* could not be registered with the Family Court of Australia.

Justice Brown otherwise examined whether the sperm donor in that case could deemed a parent in the absence of definition of the word *parent* or any deeming provision as to the status of sperm donor. She found she could apply the common law definition of parent in this case which is to be found in the Oxford dictionary.

Justice Brown examined the facts in *re Mark* as they pertained to the sperm donor. She found that he provided a sperm donation expressly for the purpose of conceiving a child which he would parent. She did not make any findings as to whether he actually was a parent for a number of reasons, including that there was no opposing party to the application and there may be alternative views as to whether the sperm donor could be deemed a parent. Otherwise she was mindful of the impact of finding a sperm donor to be a parent.

The status of the sperm donor, who is not in a marriage or de facto relationship with the birth mother in a surrogacy arrangement, has now been clarified by virtue of s.60H(1)(d) of the Family Law Act, and referred to in *re Michael:* Surrogacy Arrangements[7] where Justice Watts found: -

> *Accordingly, under the second limb of s 60H(1)(b) FLA, s 60H(1)(c) FLA says that Michael is the child of Lauren and Clive and s 60H(1)(d) FLA says that Michael is not the child of Paul and Sharon who both provided the genetic material.*

[7] At paragraph 43.

Accordingly, sperm donors in surrogacy arrangements are not presumed parents of the child, regardless of whether they are registered on the birth certificate as the father. The presumption of parentage will apply to the surrogate mother and her married or de facto partner, unless a prescribed law from a state or territory gives the presumption to the intending parents by operation of S.60HB *Family Law Act*.

Altruistic surrogacy arrangements will not occur commonly within Australia. Most of surrogacy arrangements, whether involving an opposite sex or same sex couple will occur overseas, in a commercial arrangement. In those cases, none of the prescribed laws for the purposes of s.60HB of the *Family Law Act* will apply. Therefore in cases involving overseas surrogacy arrangements, and a gay male couple as intended parents, neither will have a presumption of parentage under the *Family Law Act*, and the surrogate mother and her married or de facto partner will be deemed parents for the purposes of the Family Law Act. In order for intending parents in overseas surrogacy arrangements to have parental responsibility conferred upon them, they would need to apply for parenting orders to the Family Court of Australia, as was the case in *re Mark*.

C . CO-PARENTING ARRANGEMENTS

It is not uncommon within the gay and lesbian community for parties to enter into coparenting arrangements. A common situation might involve a lesbian couple wishing to conceive a child by way of an artificial conception procedure, and approaching a male to provide a sperm donation. In some cases it is agreed that all parties will have a parenting role. An alternative arrangement might involve a single woman and a gay male couple whereby one of the men provides the sperm donation to be used for a donor insemination procedure on the woman. Another arrangement might involve a gay male couple and a lesbian couple, whereby one of the men provides a sperm donation for a donor insemination procedure on one of the woman. In all of the scenarios it may be intended that all the parties involved will have a parenting role.

Although s.61C of the *Family Law Act* deals with parental responsibility 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.*
>
> *Note 1: This section states the legal position that prevails in relation to parental responsibility to the extent to which it is not displaced by a parenting order made by the court. See subsection (3) of this section and subsection 61D(2) for the effect of a parenting order.*
>
> *Note 2: This section does not establish a presumption to be applied by the court when making a parenting order. See section 61DA for the presumption that the court does apply when making a parenting order.*
>
> *Note 3: Under section 63C, the parents of a child may make a parenting plan that deals with the allocation of 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).*

it implies that there can be no more than 2 parents of a child.

However s.61D of the *Family Law Act* makes provision 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.

Under s.61D of the *Family Law Act*, there is no limit on the number of persons to whom a parenting order can apply when conferring parental responsibility.

In the case of a co-parenting arrangement involving a lesbian couple and a single man, provided that the procedure was carried out at a time when the lesbian couple was in a de fact relationship, and with the consent of the birth mother's partner, then by operation of s.60H of the *Family Law Act* both women will have a presumption of parentage. s.60H(1)(d) of the *Family Law Act* will deem the sperm donor not to be a parent. However, it is not uncommon for the sperm donor, by consent, to be named on the birth certificate. On the face of it this would give him a presumption of parentage under s.69R of the *Family Law Act*. However, by virtue of the operation s.60H, and upon the authority of *re Michael: Surrogacy arrangements,* the birth mother's de facto partner's presumption of parentage will override that of the sperm donor.

If it is intended that all the parties to a co-parenting arrangement are to have parental responsibility, then the solution is to obtain parenting orders by consent conferring parental responsibility upon all parties.

There may be cases involving a lesbian couple as to whether a presumption of parentage would apply to the birth mother's partner, if she wanted nothing to do with the parenting arrangements. Did she not consent to the procedure? If not, then a presumption of parentage under s.60H may not apply to her. If the sperm donor is then registered on the birth certificate, then he will have a presumption of parentage under s.69R and then no presumption of parentage under s.60H is in conflict with it. His presumption of parentage would then prevail.

D – ADOPTION

In New South Wales, same sex couples are now able to adopt children. S.60HA *Family Law Act* deals with adopted children of de facto couples as follows: -

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.

(4) In this section:

***"this Act"** includes:*

(a) the standard Rules of Court; and

(b) the related Federal Magistrates Rules.

An adoption order will confer parentage upon the adopting parents.

For same sex couples wishing to start a family, the adoption of a child via an adoption agency will most likely be a less common option pursued given time, uncertainty and the scrutiny involved. It is more likely for a step-parent adoption to occur in a same sex couple where one party had the child from a previous relationship (whether same sex or opposite sex), and it is proposed the new partner adopt the child. This would require the consent of the child's other parent and the Court granting leave to proceed with an adoption pursuant to S.60G *Family Law Act*.

PART THREE – SEPARATION, STANDING TO BRING AN APPLICATION

The first issue that needs to be considered when an application for parenting orders is contemplated after separation in whatever family configuration is being examined, is who has standing to bring an application.

Section S.65C of the *Family Law Act* provides as follows:-

Who may apply for a parenting order

A parenting order in relation to a child may be applied for by:

(a) either or both of the child's parents; or

(b) the child; or

(ba) a grandparent of the child; or

(c) any other person concerned with the care, welfare or development of the child.

In addition Rule 6.02(2) of the *Family Law Rules* makes provision as follows:-

> ***Necessary parties***
>
> *(2) If an application is made for a parenting order, the following must be parties to the case:*
>
> *(a) the parents of the child;*
>
> *(b) any other person in whose favour a parenting order is currently in force in relation to the child;*
>
> *(c) any other person with whom the child lives and who is responsible for the care, welfare and development of the child;*
>
> *(d) if a State child order is currently in place in relation to the child — the prescribed child welfare authority.*
>
> *(3) If a person mentioned in subrule (2) is not an applicant in a case involving the child, that person must be joined as a respondent to the application.*

Accordingly, in a case involving a same sex couple, whether a gay or a lesbian couple, or a coparenting arrangement, a determination will need to be made as to who is entitled to be a party by virtue of either being a parent, a party to previous orders, or a person being concerned with care, welfare, and development of the child.

A. Lesbian couples

The presumption of parentage under s.60H will apply to deem both women to be parents of a child conceived through an artificial conception procedure. This will usually be self evident where both women have availed themselves of being named on the child's birth certificate as the parents. However, there will be cases where it may be asserted by the birth mother, where her partner is not named on the birth certificate, that she is not a parent. This arose in the case of *Keaton & Aldridge*[8] in the first instance hearing in the Federal Magistrates Court.

In that case the parties were in a relationship for a number of years. The birth mother's partner, Keaton, was not named on the birth certificate as parent of the child. The child was conceived with a sperm donation from anonymous donor. Prior to the artificial conception procedure occurring, the parties did live in separate residences, however Keaton vacated her residence to live in Aldridge's residence. When the parties were living together Keaton's residence was being renovated to accommodate both parties and the child after the birth occurred. The parties did not mix their finances and they kept their household duties fairly separate. They once had a sexual relationship, however that ceased prior to the time when conception occurred. The parties were attending a relationship counselling at the time of conception. Prior to conception, the birth mother's partner said to her words to the effect *"I will be as much of or as little part of your child's life as you want me to be."*

[8] [2009] FMCAfam 92

The parties both gave their consent to IVF treatment occurring upon Aldridge. They attended counselling with one another for the purposes of the IVF treatment, medical tests and the conception procedure.

When the matter went to hearing it was argued that although she was not named on the child's birth certificate, Keaton was nevertheless a parent of the child by virtue of the presumption of parentage applying under s.60H of the *Family Law Act*. Aldridge argued that she was not a parent, as they were not in a de facto relationship at the time of conception. Federal Magistrate Pascoe found that the parties were not in a de facto relationship at time of conception, after examining the definition of de facto relationship in s4AA of the Family Law Act, and the evidence relevant to each of the factors. He found[9] as follows:-

> *96. In the circumstances, I find that at the time the respondent underwent the artificial conception procedure the role of the applicant in relation to the child had not been mutually agreed between the parties. There is too much ambiguity to make a finding otherwise. Much of the evidence as to the applicant's role relate to occasions after the respondent had become pregnant and particularly prior to her moving in with the applicant.*
> *97. There is no doubt the applicant demonstrated commitment to the respondent both before and after conception and after the birth of the child as evidenced by the applicant's attendance at various prenatal activities, her involvement on the day of birth, and sharing the care of the child at her residence. However, this is consistent with her encouragement of the respondent to have a child and support her through the process without any commitment to co-parenting.*

Although the court found that Keaton not a parent of the child since they were not in a de facto relationship at the time of conception, it was nevertheless conceded that Keaton was a person concerned with the care, welfare and development of the child.

Making a finding as to whether or not Keaton was a parent had a significant influence on the outcome of the case. If there was a finding that she was a parent, then the Court would be required to follow the legislative pathway in the *Family Law Act* as prescribed in *Good & Good*[10]. If Keaton was deemed to be a parent, then the Court would be required to apply the presumption of equal shared parental responsibility[11], and then ask whether an equal time arrangement is in the child's best interests or otherwise reasonably practicable[12]. If the answer to this was in the negative, then the Court will need to consider a substantial and significant time arrangement[13].

As Federal Magistrate Pascoe found Keaton was not a parent, he did not need to apply a presumption of equal shared parental responsibility nor any consideration of an equal time arrangement. Nevertheless he was required to examine the factors set out in the s.60CC of the *Family Law Act*.

Although it was argued many of the subsections of S.60CC *Family Law Act* did not apply to Keaton as they only applied to a parent, His Honour found that he could nevertheless take into consideration the proceeding subsections to s.60CC when considering any other factors in s.60CC[14].

In the absence of the birth mother's partner being named on the child's birth certificate, upon any application for parenting orders being filed the parties' evidence will need to address in detail not only the facts surrounding the conception of the child, but also the nature of the parties' relationship as being a de facto relationship.

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[9] At paragraphs 96 and 97
[10] [2006] FamCA 1346
[11] S.61DA Family Law Act
[12] S.65DAA(1) Family Law Act
[13] S.65DAA(2) Family Law Act
[14] S.60CC(3)(m) Family Law Act

B. Gay male couples – surrogacy arrangements

If the intending parents live in a jurisdiction in Australia where a mechanism exists to confer the status of legal parent upon them, such as Western Australia, the ACT or Victoria, then both parties will be presumed parents of their child by virtue of s.60HB of the *Family Law Act*. In these places, if a gay male couple who have a child through a surrogacy arrangement separate, and they previously accessed local laws to have the status of parent conferred upon them, then they have standing to bring an application for parenting orders under the *Family Law Act* as parents.

In the more common cases where an overseas commercial surrogacy arrangement occurs, there will not be any presumption of parentage applying to the intending parents.

For those parties residing in a jurisdiction where no such legal mechanism exists, or where the surrogacy arrangement took place overseas, then they will need to rely upon evidence that they are concerned with the care, welfare and development of the child. This should not be a difficulty, however the parties' evidence ought to address in detail that a surrogacy arrangement resulted in the conception of the child and then the parties being surrendered the care of child. In addition, since in these cases the surrogate mother and her married or de facto partner would be deemed the parents of the child by virtue of s.60H of the *Family Law Act*, they will also need to be joined as parties to an application for parenting orders. However, they may not participate in the case. Nevertheless as they are deemed the parents of the chid, they are caught by S.65C Family Law Act and Rule 6.02(2) of the *Family Law Rules* requiring them to be joined as parties.

C. Co-parenting Arrangements

Where a co-parent arrangement involves a lesbian couple with a single male or a male couple, the application of the presumption of parentage in s.60H in the *Family Law Act* will need to be examined. Were a lesbian couple in a de facto relationship at the time conception? Is the sperm donor named on the birth certificate as a father of the child? If so, does the birth mother's de facto partner have a presumption of parentage which displaces his?

If in a case involving a lesbian couple with a single male or a gay male couple, the single man or couple will need to give evidence that they were concerned with care, welfare and development of the child if a presumption of parentage does not apply to them. The Federal Magistrate Court decision of *Halifax & Fabian & Ors*[15] examined this issue. In relation to the issue of whether a person is concerned with the care welfare and development of a child, it provided[16] as follows:-

> *34. The relevant legal principles are succinctly stated by Burr J in KAM v MJR; JIG (Intervener) (1999) FLC 92-847 at para 5 as follows:*
>
> - *5.1.1. Any person may **file** an application for a parenting order.*
> - *5.1.2. A parenting order may be made in favour of a person other than a parent (sec 64C).*
> - *5.1.3. In order to proceed beyond the mere making of the application, the Applicant for a parenting order must demonstrate that they are a "person concerned with the care, welfare or development of the child". In my view this imposes a threshold test, it being a test to be determined on the individual facts and circumstances of each case.*
> - *5.1.4. That the degree or strength of the nexus or **concern with** the care, welfare or development of the child is again an issue for determination in each case, depending upon the facts and circumstances of each case. For example, as mentioned*

[15] [2009] FMCAfam 972
[16] At paragraphs 34 and 35

*earlier in my reasons, it may be appropriate for a complete stranger, say in the form of an aunt who resides overseas, to be granted a parenting order by this Court in the event of the death or incapacitation of the child's parents. The nature and degree of her **concern with** the care, welfare or development of the child in that case, would be defined and determined by entirely different circumstances than those which exist in this matter. I do not find the authority to which Ms Vanstone referred me, to be of benefit or assistance in the context of Part VII of this Act where the Court must regard the best interests of the child as the paramount consideration (sec 65E). There may well be circumstances in this Court where a mere "interest in" or "concern about" the child in question is sufficient to satisfy the threshold test. Once the threshold stage has been passed, the individual facts and circumstances of the matter again must be viewed in order to determine whether or not a parenting order is appropriate and in the best interests of the child, as would be the nature and form of any such order.*

- *5.1.5. The specific wording of sec 65C(c) appears to require demonstration of a **concern with** only one of the issues of care, welfare or development. ...*

35. In Venkatesan & Pawar [2007] FMCAfam 1109, Altobelli FM after reviewing the case law observed:

- *9. ... what is interesting about these cases is the common feature. That is that there has to be some relationship between, or involvement with, the child in a meaningful sense in order that the person who makes the application can have standing...*

What of a case where there is lesbian couple where only one party is interested in having a child and the birth mother's partner says she wants no parenting role? S.60H(5) gives some guidance, providing as follows: -

> *(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.*

How can it be proved on the balance of probabilities that a birth mother's partner did not consent to the donor insemination procedure being carried out on the birth mother, when this is the birth mother's decision? If the applicant for parenting orders is a single male or a gay male couple, their evidence will need to be specific as to the conversations and any written communications or agreements concerning who will have a parenting role. In addition, if the sperm donor is named on the birth certificate and the birth mother was in a same sex relationship, it ought to be argued that the birth mother's partner's consent implicitly does not exist.

In a co-parenting arrangement where the sperm donor is not named on the birth certificate, he can still argue his a person concerned with the care, welfare and development of the child. If it was intended that his partner have a parenting role, then the evidence ought to address the discussions between the parties prior to conception, and any written communications between the parties as to their intended parenting roles.

Commonly in co-parenting arrangements some parties enter into a written parenting agreement, which does not create any legal obligations or authorities. However, it may be evidence of the parties' intentions and certainly ought to be used in evidence when there is an issue about whether a person is entitled to bring an application being a person concerned with the care, welfare and development of the child.

It is submitted that in gay and lesbian community co-parenting arrangements are not uncommon. Whilst being concerned with the care, welfare and development of a child will turn on the individual facts of each case, it is submitted that as co-parenting arrangements are not uncommon within the gay and lesbian community, then the parties to these arrangements are all concerned with the care, welfare and development of a child.

PART 4 – POST SEPARATION PARENTING DECISIONS

This part of the paper will be divided into two sections. Firstly, those cases where the sperm donor has provided a sperm donation to a lesbian couple, and later seeks parenting orders in relation to the child.

Secondly, those cases involving a lesbian couple who have a child through an artificial conception procedure, and have separated.

There will not be an examination of decisions involving gay male couples with children through surrogacy arrangements, and have separated, as no such cases have occurred.

A. Sperm donor cases

Re Patrick: An application concerning contact[17] involved an application by a male who provided a sperm donation to a lesbian couple wishing to have a child by way of a donor insemination procedure. The Applicant provided a sperm donation, and after conception the birth mother gave birth to the child, named Patrick. Prior to the birth of Patrick the parties entered into a written informal parenting agreement, setting out the various roles and responsibilities of the parties. It was intended that the Applicant donor would play some parenting role in Patrick's life in what is commonly referred to in the gay and lesbian community as a co-parenting arrangement.

After Patrick's birth, the parties entered into Consent Orders which made provision for the donor to spend time with Patrick. The relationship between the parties subsequently deteriorated, and then the birth mother and her partner filed an Application in the Family Court at Melbourne seeking orders to discharge the previous parenting orders making provision for the sperm donor not to spend time with Patrick.

The case was heard at a time prior to the amendments to s.60H of the *Family Law Act* which provided the birth mother's partner with a presumption of parentage, or otherwise clarified the position of the sperm donor who is not in a marriage or a de facto relationship with the birth mother.

Justice Guest examined the position of the sperm donor in this case and concluded that the operation of s.60H of the *Family Law Act* precluded the sperm donor from being a parent of Patrick[18].

In the context of whether the sperm donor in the case *re Patrick* was entitled to bring an application, there was no issue. Under s.65C of the *Family Law Act* and Rule 6.02(2) of the Family Law Rules, a parent can bring an application for parenting orders, as well as the person concerned with the care, welfare and development of the child, or a party to a previous parenting order. In *re Patrick*, it was clear the sperm donor ought to have been joined as parties to the proceedings as he was already a party to previous parenting orders.

Re: Patrick was then decided as any other parenting case would have been decided at the time by having regard to the best interests of the child upon an examination of the then S.68F(2) factors.

In the case of *re Mark: an application relating to parental responsibilities*[19], although not involving a co-parenting arrangement or a separated couple, nevertheless it is of relevance in examining who is entitled to bring a parenting application.

The case essentially involved an application for consent orders in the Family Court of Australia at Melbourne, whereby the orders would confer parental responsibility on the gay male couple from Melbourne. During the course of her judgment Justice Brown examined the issue of who is parent, although this was not required when deciding the case. Justice Brown held:[20]

> *79. In the face of Mark's genetic make-up and a birth certificate naming Mr. X as his father, a finding that Mr. X is not Mark's parent for the purposes of the Family Law Act sits awkwardly with the*

[17] [2002] FamCA 193
[18] At paragraph 301.
[19] (2003) FLC 93-173
[20] At paragraphs 79 to 81.

realities of Mark's life. In daily life a birth certificate is often the principal document used to establish the parental relationship; illustrations of that include enrolling a child at school or making an application for a passport. A finding that Mr. X is not a parent for the purpose of the Family Law Act would mean that in life Mr. X is Mark's father, but in federal law he is not his parent. However anomalous that might be, if such is the effect of the law that finding must be made.

80. If Mr. X is not Mark's parent, who is or are? Ms. S is named as Mark's mother on his birth certificate but, as with Mr. X, the failure to prescribe any overseas jurisdictions for the purposes of s.69R means that the presumption does not operate in her favour. She bore the child, so is within the definition adopted in Tobin, but is not his biological mother. On their face the provisions of s.60H(1)(a) and (b)(i) are satisfied; if they apply Mark is the child of Mr. and Ms. S for the purposes of the Family Law Act. When considering parental responsibility s.61C(3) requires s.61C(1) to be read subject to any order of a court for the time being in force, whether or not made under the Family Law Act. The USA order expressly provides that Mr. S is not the father of Mark. No submissions were directed to the effect the USA order would have (if any) on the allocation of parental responsibility in s.61C, in the event s.60H(1) results in Mark being the child of Mr. S for the purposes of the Act, but it is unlikely the USA order would operate to qualify the parental responsibility conferred by s.61C(1).

81. Having regard to the provisions of the Family Law Act and authorities cited, it may well be that Mr. X is Mark's parent for the purposes of the Family Law Act. The fact that construction, if followed, might lead to the imposition of responsibilities or entitlements on a class or classes of people who previously considered themselves immune from such responsibilities or entitlements would not be a reason for a trial judge to come to an otherwise logical conclusion. However, I am mindful of the fact there is no respondent or contradictor in this case. In an area as legally and socially complex as this there may well be other arguments which should be put. In these circumstances I do not make that positive finding.

Whereas at the time *re Mark* was decided the status of a sperm donor not in a marriage or de facto relationship with a birth mother was uncertain, the issue of the status of sperm donor has now been clarified by virtue of the amendments to s.60H(1)(d) of the *Family Law Act*.

Anecdotally it is common, when a gay man provides a sperm donation for a lesbian couple in a co-parenting arrangement, for the donor to be named on the birth certificate as the father of the child. When a child is conceived with the consent of the birth mother's lesbian partner, and they were in a de facto relationship at the time of a conception, then by virtue of the operation of s.60H(I) of the *Family Law Act*, the birth mother's partner has a presumption of parentage. This presumption of parentage is irrebuttable. However, the sperm donor being named on the birth certificate will have a presumption of parentage by way virtue of s.69R of the *Family Law Act*.

Whilst not involving same sex couples, the decision of Justice Watts in *re Michael: surrogacy arrangement*[21], provided that the second limb of s.60H(1)(b) of the *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 purpose for the purposes of s.60H of the *Family Law Act.* Therefore, if a presumption of parentage arising out of an artificial conception procedure applies to s.14 of the *Status of Children Act (NSW)*, and therefore under s.60H of the Family Law Act, then by virtue of the provisions of s.17 *Status of Children Act (NSW)*, it will prevail over any presumptions of parentage which may apply out of the birth registration under s.11 of the *Status of Children Act (NSW)* or s.69R of the *Family Law Act*.

Therefore if the sperm donor is named on the birth certificate and he provided the sperm donation to a woman who is in a same sex de facto relationship, then there may be an issue of either whether the birth mother's

[21] [2009] FamCA 691

partner has a presumption of parentage by virtue of there being a de facto relationship at the time of conception, and secondly whether she consented to the procedure. S.60H(5) provides the de facto partner of the birth mother is presumed to have consented to the procedure, unless proved otherwise on the balance of probabilities. What is evidence that the de facto partner did not consent to the procedure? As yet there is no judicial authority on this point. It is submitted that there will need to be evidence that the birth mother's partner clearly did not wish to play a parenting role in order for her to be considered not to have consented to the procedure, and therefore not have a presumption of parentage applying to her. This may be a significant threshold issue as it may go to the issue of the standing of a sperm donor to bring an application. If the birth mother's partner does not have a presumption of parentage in her favour, and the sperm donor is named on the birth certificate, then it is submitted there will be no presumption of parentage to displace his under s.69R of the *Family Law Act*. He would therefore be deemed a parent of the child, and entitled to bring in an application for parenting orders.

In the alternative, if there is was a finding that the birth mother's partner was a parent of the child, then a sperm donor may be entitled to bring an application for parenting orders if he can overcome the threshold that he is concerned about the care, welfare and development f the child. This threshold issue was dealt with in the case of *Halifax & Fabian and Ors*[22], a decision of Federal Magistrate Purdon–Sully in the Brisbane Federal Magistrates Court. The facts of this case involved two young children who are not biologically related. The applicant, Ms Halifax, and the First Respondent, Ms Fabian lived in a same sex relationship. They each had a child during the relationship, Ms Halifax giving birth to Y and Ms Fabian giving birth to X. The children had no biological connection, and they were both conceived by way of an artificial conception procedure during the course of their respective biological mother's relationship with one another. For the conception of Ms Halifax's child Y, she used the sperm donation of her friend, the Second Respondent Mr Dalton. In the case of Ms Fabian's child X, she used the sperm donation of anonymous donor. In 2005, Mr Dalton commenced a same sex relationship with his partner, the Second Respondent, namely Mr Ballard.

The First Respondent Ms Fabian wished to relocate with X to New South Wales. The Applicant and the Second Respondents, Mr Dalton and Mr Ballard, opposed the relocation.

As a preliminary issue the Court was asked to decide whether the Second Respondents, the gay male couple, have any standing to seek any parenting orders with respect to the child X.

Her Honour noted that under s.65C of the Family Law Act, a parenting order in relation to a child may be applied for by any person concerned with the care, welfare and development of the child. The issue was then whether the Second Respondents were concerned with the care, welfare and development of the child X. Her review of relevant case law is referred to at pages 19 and 20 herein.

Upon examining the facts of this case, Her Honour concluded that the Second Respondents were concerned with the care, welfare and development of the child X in that they had some relationship and some involvement with the child in a meaningful sense.

Getting over the threshold of being entitled to bringing a parenting application by being concerned with the care, welfare and development of a child is one matter. What result is obtained is going to be an entirely different matter. As yet, the outcome in *Halifax & Fabian and Ors* is pending as the case has been transferred to the Family Court and has not reached final hearing. Given the current state of the *Family Law Act* with respect to the legislative pathway contained in Part VII, the Court will need to determine who is considered a parent in each case.

Say a sperm donor files an application seeking parenting orders, including orders to spend time with the child, it is submitted the court will first need to make a determination as to whether or not he has the presumption of parentage. If he is presumed a parent and the birth mother's partner is found not to have consented to the artificial conception procedure, then by virtue of the provisions of s.61DA of the *Family Law Act*, the court must

[22] [2009] FMCA FAM 972

apply presumption of equal shared parental responsibility when making parenting orders. In any application for parenting orders, s.60CA provides that the Court must regard the best interest of the child as a paramount consideration. Section 65DAA then provides as follows:-

> ***Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances***
>
> *Equal time*
>
> *(1) If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:*
>
> *(a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and*
>
> *(b) consider whether the child spending equal time with each of the parents is reasonably practicable; and*
>
> *(c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.*
>
> *Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend equal time with each of the parents, the court will regard the best interests of the child as the paramount consideration.*
>
> *Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.*

Then the Court needs to decide what is in the child's best interest having regard to the primary considerations and additional considerations as outlined in s.60CC of the *Family Law Act*, as in any other parenting case.

Therefore if a court makes a finding that the sperm donor does have a presumption of parentage in his favour which is not rebutted, then it is to apply a presumption of equal shared parental responsibility, and then examine whether an equal time arrangement will be in the child's best interest. If and equal time arrangement is not in the child's best interest, then the Court will need to examine and whether substantial or significant time spent by the donor will be in the child's best interests. This will then involve an examination of the primary and secondary considerations in s.60CC. If the sperm donor is found not to have a presumption of parentage, by virtue of the birth mother's partner having a presumption of parentage, then s.65DAA will not apply, but the Court will still be required to determine what is in the best interests of the child having regard to the s.60CC factors.

Although *re Patrick*[23] involved an application by a sperm donor for contact with a child, this was before the 2006 amendments to the Family Law Act. There is currently no case authority involving an the application of the 2006 amendments legislative pathway upon an application for parenting orders by a sperm donor in either a co-parenting arrangement involving a donor and a lesbian couple.

B. Decisions involving same sex couples who have separated

The most recent significant case involving same sex couple who have separated seeking parenting orders in relation to a child is that of *Aldridge & Keaton*[24]. At the first instance decision in Keaton & Aldridge[25] Federal Magistrate Pascoe found that presumption of parentage in s.60H(i) of the Family Law Act applies if the parties

[23] (2002) FLC 93-096
[24] [2009] FamCAFC 229 - note the decision of the Full Court of the Family Court
[25] [2009] FMCAfam 92

were in a de facto relationship at the time of conception, and the birth mother's partner consented to the artificial conception procedure.

The facts of that case, and a discussion of the reasoning, are set out at pages 17 and 18 herein.

His Honour made orders granting Ms Keaton time with the child, albeit not as extensive as she sought.

Ms Aldridge subsequently appealed to the Full Court of the Family Court which handed down a decision on 22 December 2009[26]. During the appeal it was submitted on behalf of Aldridge that the ordering of s.65C, in relation to who has standing to bring a parenting application, implied a hierarchy of importance of the potential applicants. It was argued that an application by a parent was deserving of greater weight then an application by a grandparent and lesser weight of importance or importance should be forwarded to an application by a non-relative.

The Court found that at paragraph 59 as follows:-

> *The principles to be applied in parenting cases determined prior to the amending Act, both before and after the 1995 amendments, involving a non-parent were discussed by the Full Court in Rice & Miller [1993] FamCA 87; (1993) FLC 92-415 and Re Evelyn (No 2) (1998) 23 Fam LR 73. In Rice & Miller the Full Court (Ellis, Lindenmayer and Bell JJ) explained:*

> *... We are thus of the view that the fact of parenthood is to be regarded as an important and significant factor in considering which of the proposals best advances the welfare of the child. We would reiterate, however, that the fact of parenthood does not establish a presumption in favour of the natural parent nor generate a preferential position in favour of that parent from which the Court commences its decision making process. Each case must be determined according to its own facts, the paramount consideration always being the welfare of the child whose custody is in question.*

The Court further noted at paragraph 65 as follows:-

> *The potential uncertainty as to the weight to be afforded to the additional and primary considerations in an application involving a person other than a parent was raised by Finn J in Mulvany & Lane (2009) FLC 93-404. At paragraphs 15 and 16 of her reasons, her Honour said:*

> *It is indeed unfortunate that given the now very detailed provisions of Part VII and the acknowledgement in that Part of the important roles that persons who are not natural parents of a child can have in a child's life (see, for example, s 60B(2)(b)), that the legislation does not give some clearer indication of the weight to be attached to the child's relationship with a person other than his or her parent, compared with the child's relationship with the natural parent in the determination of proceedings between a parent and a person other than a parent.*

> *As the legislation currently stands, and assuming that it is correct that "parent" means only a natural or adoptive parent, it would seem that in a case such as this, the court can only reach its determination in parenting proceedings on an application of s 60CC(2)(b) (protection from harm) and of the additional matters in s 60CC(3) so far as they expressly or impliedly refer to a person other than a parent.*

It further went on to hold at paragraph 75 as follows:-

[26] Aldridge & Keaton [2009] Fam CAFC 229

> *While there can be no doubt that the amending Act has placed greater emphasis on the role of both parents in the upbringing of their children, as we are presently advised, all applications for parenting orders remain to be determined with the particular child's best interests as the paramount but not sole determinant. Our reasons for upholding this view include the following matters:*
>
> - *the unaltered provision dealing with best interests (s 60CA) and the positioning of the section in the Act;*
> - *the recognition in s 65D(1) that ultimately a court should make such parenting order as it thinks proper; and*
> - *that no provision was included in the Act suggesting greater or lesser weight should be given to any particular applicant.*

At paragraph 83 the Court held as follows:-

> *In summary we would answer the questions posed at paragraph 52 as follows:*
>
> *(i) a two step approach is appropriate in dealing with an application for parenting orders brought by a person other than a parent, a child, or a grandparent. In other words is the applicant a person concerned with the care, welfare or development of the child (step 1) and if so, what order should be made in the best interests of the child. This consideration may lead to an order for parental responsibility, an order a child live with, spend time and or communicate with the person, or that no such order be made (step 2);*
>
> *(ii) s 65C does not prescribe a hierarchy of applicants. The application falls to be determined under s 60CA guided by the objects and principles in s 60B(1) and s 60B(2) and based on consideration of relevant matters under s 60CC(2) and s 60CC(3); and*
>
> *(iii) there was no appealable error by the Chief Federal Magistrate in his approach to the applicant's application.*

The Court did not find any preferred hierarchy of applicant was created by S.65C. Apart from the issue of whether Keaton was in a de facto relationship with Aldridge and was therefore a parent, and of whether being a parent should afford a party greater weight in parenting applications, *Aldridge & Keaton* was otherwise a straight forward parenting decision to determine the best interests of the child.

What of a case involving a lesbian couple where each party has a child by way of an artificial conception procedure, and later separates. In such a case there may be an issue as to who is the primary attachment figure of each child. Commonly the birth mother is the primary attachment figure of a child and if it is a case that each child has a different primary attachment figure, how would a Court deal with this? Would a Court make orders for each child to primarily reside with their primary attachment figure, thereby separating them? Or would a Court take an approach to keep the children living together? Or would a Court seek to impose an equal time arrangement?

Such a situation arose in the case of *Simpson & Brockmann*[27], where the first instance decision was made in the Federal Magistrates Court at Brisbane before Federal Magistrate Jarrett[28]. The first instance decision was made prior to the amendments to s.60H of the *Family Law Act*. The case concerns parenting arrangements for 2 children, B and S. B's biological mother was the Respondent Ms Brochman and S's biological mother was the Applicant Ms Simpson.

[27] [2010] FamCAFC 37
[28] [2008] FMCA fam 763

The parties were in an intimate relationship where they lived together between early 1994 and April 2003. The children were both conceived and born during that period, and conception occurred using an IVF clinic and the same sperm donor for each pregnancy, although his identity was unknown.

When the parties separated in April 2003 Ms Brockmann left the parties' home in northern New South Wales with B and Ms Simpson stayed in that home with S. The parties had subsequently made parenting orders made between them reflecting the arrangements they had themselves implemented post separation. However, Ms Brochman and B moved from where they lived in New South Wales to Sydney, meaning that the parenting orders that were in place became unworkable. Ms Simpson subsequently instituted proceedings.

Ms Simpson sought orders that B and S primarily live with her in northern New South Wales and they spend time with Ms Brochman where she was living from time to time.

Federal Magistrates Jarrett made orders that the child B continue to live with her mother, who was not required to move from Sydney, and that the child S continue to live with his mother in northern New South Wales. Each child was to spend some time in the household of the other child and that child's mother.

The matter came on for appeal to the Full Court where it was argued that the Federal Magistrate should apply the law as it now stands, post the amendments to s.60H of the *Family Law Act*, and that the appeal should be dealt with by way of rehearing.

The Full Court rejected the arguments concerning rehearing the matter on the basis of the change in the law which would have given each parent a presumption of parentage in relation to the other's chid, a presumption of equal shared parental responsibility, and then an application of the legislative pathway in Part VII post the 2006 amendments. The appeal was dismissed.

Federal Magistrate Jarrett's decision followed the legislative pathway, with a consideration of the relevant factors as set out in S.60CC. He concluded it was in each child's best interests to remain with their birth mother, essentially not disturbing their current arrangements.

What of a situation where one parent "cannot cope"[29] with the care of a child, in the context of a same sex relationship? It is submitted that the fact the case involves a same sex relationship does not mean any different principles will be applied to any other case, if the Full Court's decision in *Aldridge & Keaton* is any indication. Once the threshold question is overcome in respect of a party being entitled to bring an application for parenting orders, the Court is then required to follow the legislative pathway described in *Goode & Goode*[30], as in any other matter. A party's inability to cope in the face of the other party to a same sex couple spending time with the child will be but one factor to be taken into account by the Court, and ultimately each case will turn on its own unique facts.

C – Co-Parenting Cases

Most recently, *Wilson & Anor & Roberts & Anor*[31] was a decision by Justice Dessau involving two couples, a gay male couple and a lesbian couple in a four way parenting arrangement of a child E. The child E was conceived by way of an artificial conception procedure where one of the Applicants, Mr Wilson, provided the sperm donation. His partner was Mr Farmer, with whom he had been in a relationship for 12 years. The child's birth mother was Ms Roberts, who was in a relationship with Ms Boston for about 12 years and lived with one another for about 10 years.

[29] As in *B-v-B*
[30] [2006] FLC 93-286
[31] [2010] Fam CA 734

E was born in July 2008. Although the men were from Queensland, they relocated to Melbourne, where the women lived, to be close to E. After E's birth, the men saw him regularly in the women's home. From early 2009, they were caring for him two full days per week, and seeing him on one evening. Within a few months the parties fell into disagreement, and they all went into mediation with a view to resolving their differences.

Initially the men filed in the Federal Magistrates Court and Federal Magistrate Hughes made interim orders restoring the two days per week the men spent with E. It was then transferred to the Family Court, and the final hearing was expedited.

Her Honour's approach to this matter was informed by the Full Court's decision in *Aldridge & Keaton*[32] where Her Honour noted[33]: -

> *43. In Aldridge and Keaton (2009) FLC 93-421, Bryant CJ, Boland and Crisford JJ considered the appropriate approach in dealing with an application for parenting orders brought by a person other than a parent, a child, or a grandparent. At paragraph 83, the Full Court set out a two-step approach, for the Court to first decide if the applicant is a person concerned with the care, welfare or development of the child, and secondly to consider the orders in the best interests of the child.*
>
> *44. In Aldridge and Keaton, the Full Court made it clear that this consideration may lead to an order for parental responsibility, an order a child live with, spend time and/or communicate with the person, or no order at all. Their Honours noted that s 65C does not prescribe a hierarchy of applicants. The application must be determined under s 60CA, guided by the objects and principles in s 60B(1) and s 60B(2), and based on consideration of relevant matters under s 60CC(2) and s 60CC(3) of the Act.*

Her Honour went on to note[34]: -

> *49. As to the application of s 60CC to non-parents, I note the Full Court's decision in Donnell and Dovey (2010) FLC 93-428. In that case Warnick, Thackray and O'Ryan JJ observed that s 60CC maintains "clear distinctions" between a parent and a non-parent. They observed that s 60CC(2)(a), as to maintaining a meaningful relationship with the child, relates only to "parents". However, their Honours went on to say that it did not give rise to any difficulty in ensuring that all relevant matters are taken into account, in that:*
> *"…In a particular case, the maintenance of a meaningful relationship with a non-parent may be equally important or more important than the maintenance (or establishment) of such a relationship with a parent. As with the additional considerations, it is not necessary to classify a non-parent as a "parent" to ensure that clearly relevant mattes are given appropriate weight."*
>
> *50. The Full Court described the various factors contained in s 60CC(2) and (3) as "a series of sign posts" for the Court in exercising its very wide discretion, and noted:*
> *"…the legislature has recognised that it cannot provide an exhaustive set of sign posts as the destination is uncertain and the routes by which it may be FamCA Reasons Page 14*
> *reached are as infinite as the factual circumstances that present themselves in court rooms every day."*

[32] [2009] FLC 93-421
[33] At paragraph 43
[34] At paragraphs 49 - 52

> *51. The Full Court then dealt with the "catch-all" provision in s 60CC(3)(m) "which ensures the Court can take into account every factor that may assist in reaching the right destination." The provision refers to "any other fact or circumstance that the Court thinks is relevant." The Full Court pointed out that s 60CC(3)(m) is contained within the set of factors deemed to be "additional considerations" and therefore any matter not captured by s 60CC(2) cannot be a "primary consideration", regardless of how important it may be in determining the outcome.*
>
> *52. It had noted however that although the benefit to the child of a meaningful relationship with a non-parent could never be a "primary consideration" under the Act, that did not mean, of itself, that it would be of any "less significance" than the benefit to the child of a meaningful relationship with a parent.*

Being satisfied the men in this case were concerned with the care welfare and development of E, Her Honour proceeded to decide this case like any other applying the legislative pathway contained in Part VII *Family Law Act.* Her Honour was critical of the evidence of the women in this case, and made orders granting them parental responsibility for E, that E live with them, and that E spend time with the men incrementally increasing over time.

Co-parenting cases, it is anticipated, will raise some interesting and challenging issues for the Courts to determine. Consider these scenarios: -

1. A gay male couple and a lesbian couple agree to a co-parenting arrangement which is recorded in a "Parenting Agreement", which sets out the roles and responsibilities of each party, much like in *Re: Patrick*. One of the men provides the sperm donation. The birth mother is in a de facto relationship at the time of conception. The birth certificate names the birth mother and sperm donor as the parents. It emerges shortly after the child's birth that he co-parenting arrangements will not work. The men have had very little time with the child. Who are the "parents" here for the purposes of the *Family Law Act*? Applying the S.60H presumption, both women are parents, and their presumption of parentage prevails over that of the sperm donor pursuant to S.69R. Do the men get over the threshold of being concerned with the care welfare and development of the child? Although "parenting agreements" of the type seen in *Re: Patrick* are common within the gay and lesbian community where co-parenting arrangements are concerned, is it of itself sufficient to establish the men are concerned with the care welfare and development of the child?

2. One of a lesbian couple wants to have a child, but her partner does not. The birth mother undergoes an artificial conception procedure at home where a gay male friend (who is also in a same sex relationship) provides the sperm donation in a syringe. The birth mother's partner assists with the home insemination procedure in the absence of both men. The birth mother and the sperm donor are named on the birth certificate as the parents. Who are the parents here? Pursuant to S.60H the birth mother is a parent. Her partner is also a parent if she was in a de facto relationship with the birth mother at the time of conception and she consented to the procedure. She is deemed to have consented to the procedure, unless there is evidence to the contrary on the balance of probabilities. Did the birth mother's partner not consent? What does she have to do to not consent to the birth mother having a child? Could it be argued she did not consent, and therefore the sperm donor's presumption of parentage under S.69R is not displaced, and therefore he is a parent entitled to bring a parenting application? If not is he concerned with the care welfare and development of the child, even if he has had very little time with the child?

Again it is submitted the outcome of these cases are unpredictable and will turn on their own facts. The difference with the examples given above and *Wilson & Anor & Roberts & Anor* is that in the latter the men were already spending regular time with the child and a relationship with the child had been established.

It is anticipated that the family law jurisdictions will be seeing more cases involving same sex couples in parenting cases, with families of differing configurations, leading to some very interesting case law.