

Who is a Parent?

by Belle Lane

Advancements in, and greater access to, assisted reproductive technology (ART), together with greater social acceptance of same sex parenting, have led to an increase in the diversity of families. This in turn has led to people who are part of more diverse family structures coming before the Family Courts.

Families created through ART may fall into the following categories:

- Both biological parents;
- One biological parent;
- A biological parent and a non biological parent of the opposite sex;
- A biological parent and a non biological parent of the same sex;
- Two lesbian parents, each of whom has had a biological child within their relationship;
- More than two parents (a lesbian couple and the biological father¹ or a gay male couple and a surrogate mother who maintains a relationship with the child).

There is likely to be even greater diversity of family structure with the allowance of non-commercial surrogacy in some States of Australia. We are already seeing families created through commercial surrogacy arrangements, principally from the United States and India where commercial surrogacy is legal. The purpose of this article is to review the impact of recent family law reforms to the definition of parent.

The Family Law Amendment (De facto Financial Matters and Other Measures) Act 2008 introduced amendments to s60H of the Family Law Act (FLA) which sets out persons who are considered to be parents of children born from artificial conception procedures.

The amendments were aimed at addressing the discrimination against same sex de facto couples who were using artificial conception procedures to conceive children.

Prior to December 2008, s60H provided as follows (emphasis added):

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“s60H Children born as a result of artificial conception procedures

(1) If:

- (a) a child is born to a woman as a result of the carrying out of an artificial

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- conception procedure while the woman was married to a man; and
- (b) either of the following paragraphs apply:
- (i) the procedure was carried out with their consent;
 - (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 man;²

then, whether or not the child is biologically a child of the woman and of the man, the child is their child for the purposes of this Act.”

Section 60H(4) extended the definition to women in de facto relationships, but at that time a de facto relationship only included heterosexual relationships. Therefore, the pre-2008 version of s60H provided that if a woman underwent an artificial conception procedure while she was in a marriage or de facto relationship, which by its very nature was only considered to be a heterosexual one, then the child was considered to be “their child” if one of two conditions were met. The alternate conditions were that either both the woman and the man had consented to the carrying out of the procedure, or the child had to be considered to be a child of the parties under State or Commonwealth law. If either of those conditions were met then the child was considered to be a child of the woman and the man, regardless of their biological relationship to the child.

In recent years there has been an increase in the number of same sex (principally lesbian) couples having children. This is likely to be because of women’s increased access to infertility treatment in various Australian States, and a growing social acceptance of same sex families.

However, family law has been slow to catch up to the changing face of the family. This created very real problems for non birth mothers and, often, the men who donated sperm to assist them.

Status of non birth mothers prior to the 2008 legislative changes

As the non birth mother was not considered to be a parent, she had to apply to the Court under the FLA as a “person concerned with the care, welfare and development of the child” (s65C(c) FLA) to have any parenting orders made in her favour. The process was by its very nature expensive and intrusive, as it subjected lesbian families to a level of scrutiny not required of heterosexual families who

had parental responsibility automatically afforded to them by legislative presumption.

If the parenting order was to be made by consent, the couple could make an application under s65G FLA to have a parenting order made in favour of a “non-parent”. However, before the Court was able to make the order, a report had to be prepared by a Court Counsellor or Consultant and provided to the Court. The Court would then decide whether or not to make the orders. Some couples obtained orders; others didn’t apply.

The non birth mother and the children of the relationship were left in a more vulnerable position without an order. The non birth mother had no legally recognised relationship with the child without an order. This was regardless of whether she was in fact the primary parent to the children. This left her particularly vulnerable in the event of the death of the biological mother.

The non birth mother’s legal position became more difficult if the lesbian couple separated. She then had to apply to the Court for a parenting order. She had standing as a “person concerned with”. However she did not have the benefit of any of the presumptions afforded to parents, which include the right to bring proceedings, the presumption of equal shared parental responsibility, and the consideration of equal time (or substantial and significant time). The non birth mother was not guaranteed to obtain an order for shared parental responsibility.

Vulnerability of children

Children were vulnerable in the case of death of their legal parent and separation of their parents if they been conceived other than by sexual intercourse because they only had one legal parent. For example, in the case of separation, the birth mother was in a stronger legal position *vis-à-vis* the non birth mother to dictate parenting arrangements after separation, regardless of whether they were in the children’s best interests.

Financial vulnerability of birth mothers

The birth mother was left in a vulnerable financial position if the parties separated. The definition of parent in the Child Support (Assessment) Act (CSAA) relied upon the definition of parent in the FLA: s7, CSAA. The birth mother was a parent under the FLA and CSAA; however the non birth mother was not. Therefore, if the parties separated, and the non birth mother had at least shared care of the child, she could claim child support from the birth mother as “an eligible carer”.

(ss7B(1) and 25A CASAA. In contrast, the non birth mother had no liability under the CSAA. Nor could the birth mother claim child maintenance under the FLA, as the non birth mother did not have a duty under s66C(1) or s66D(1) to pay child maintenance under the FLA as she was not a parent or a step parent, as the latter only covered marriage relationships. The birth mother's only avenue to obtain child support was to make a claim through the State Courts in equity.³

The inability to claim child maintenance through the Family Court was confirmed by the Full Court in *Tobin v Tobin* (1999) FLC 92-848, where Finn, Kay and Chisholm JJ held, at 85,940-1:

- "1 There is no power under the Child Support (Assessment) Act for a court to require the payment of child support by a person other than a natural parent of a child, an adoptive parent of a child or a person deemed to be a parent because of the carrying out of an artificial conception procedure.
- 2 There is no power under the Family Law Act to make an order for the maintenance of a child against a person other than a parent, an adoptive parent, a person deemed to be a

parent because of the carrying out of an artificial conception procedure, or a step-parent (a person who is or has been married to a parent of the child)."

Sperm donors

The position of men who had donated sperm to a lesbian couple has been the subject of judicial decision, in particular whether they could be considered to be "parents" and if so, for what purpose.

Justice Fogarty in *B v J* (1996) FLC 92-716 held that a known sperm donor who donated sperm to a lesbian couple was not a parent under s5 of the Child Support (Assessment) Act. Section 5 was held by his Honour to provide an exhaustive definition of "parent" as the section starts with the words "parent means". His Honour considered the definition of parent under the FLA, and held that as the FLA did not use the word "means", s60H could potentially enlarge the categories of person who could be considered to be a child's parents. This would have left an unusual situation of a person being a parent under the FLA but not the CSAA.



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Justice Guest in *Re Patrick: An Application Concerning Contact* (2002) FLC 93-096, concluded that a known man who donated sperm to the lesbian couple was not a parent for the purposes of the FLA. His Honour relied upon s60H(3) which said:

“s60H(3) [Where a child is a child of man whether biologically or not]

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.”

At the time there was no relevant Victorian or Commonwealth legislation, and Guest J considered the status of parent was only to be conferred upon a sperm donor if such prescribed law existed. His Honour held therefore that s60H was an exhaustive definition.

In *Re: Mark: An Application Relating to Parental Responsibility* (2003) FLC 93-173, Brown J considered the position of a gay male couple regarding a child conceived through a surrogacy arrangement in the United States. The child was the biological child of one of the applicants. Brown J expressed the view (*obiter*) that the provisions of s60H enlarged rather than restricted the categories of persons to be considered the child's parents. Her Honour followed the decision of Faulks J in *S v B* (2000) FamCA 1280 (28 February 2000, unreported).

In *S v B*, Faulks J found that s60H principally extends the definition of a child to include persons who would not normally be considered to be parents. His Honour noted that there was no legislative presumption that the person supplying semen in that case was not a parent.

Justice Brown also expressed the view that it was not so easy to distinguish the Full Court's decision in *Tobin v Tobin (supra)* which had relied upon the natural meaning of the word parent as being the biological mother or father. Brown J distinguished the position of the applicant in the case before her from the position of a sperm donor. In the case before Her Honour, the man provided sperm with the express intention of fathering a child he would parent. Ultimately Brown J did not decide the issue as there was no respondent or contradictor, and no countervailing arguments were put. Her

Honour followed a more cautious approach, finding that each of the couple were persons concerned with the child's care, welfare and development and making orders granting them joint parental responsibility.

It is clear that the application of s60H was problematic for birth mothers, non birth mothers and known sperm donors prior to the 2008 legislative changes. The Court was indicating the need for legislative reform to rectify the above-mentioned problems and provide greater certainty to the parental status of children born to same sex couples. Unfortunately, whilst the new s60H does provide greater certainty to non birth mothers, it has made the position of men who donate sperm and intend to have an ongoing parenting relationship with the child less certain.

The new section 60H

In December 2008 s60H was amended to provide (emphasis added):

“60H(1) [Where child is born as a result of artificial conception]

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.”

Section 60H only applies if the Court is satisfied that at the time of the child's conception, the parties were either married or in a de facto

relationship. Riethmuller FM held in *Baker v Landon* [2010] FMCAfam 280, that if the Court is satisfied that the parties were in a de facto relationship at the relevant time, then s60H is not engaged, and the person who provided the genetic material is not excluded from being a parent of the child by way of s60H.⁴

Who is a prescribed parent?

Regulation 12C of the Family Law Regulations 1984 sets out the prescribed laws for the purposes of s60H(1)(b)(ii) of the FLA. The prescribed laws are as follows:

- Status of Children Act 1996 (NSW);
- Status of Children Act 1974 (Vic), specifically ss10A, 10B, 10C, 10D, 10E, 13 and 14;
- Status of Children Act 1978 (Qld), specifically ss14A, 15, 16 and 17;
- Artificial Conception Act 1985 (WA);
- Family Relationships Act 1975 (SA), specifically ss10A, 10B, 10C, 10D and 10E;
- Status of Children Act 1974 (Tas), specifically Part III;

- Parentage Act 2004 (ACT), specifically s11;
- Status of Children Act (NT), specifically ss5A, 5B, 5C, 5D, 5DA, 5E and 5F.

For example, in Victoria, s13 of the Status of Children Act 1974 presumes that a woman's female partner is the legal parent of any child born as a result of a pregnancy if the partner was the woman's partner at the time of the conception procedure and if she consented to the procedure.

Is an "intended parent" a parent?

The new s60H does not refer to the woman's partner as a "parent". Rather, the legislation refers to her as an "other intended parent". Interestingly, the definition of a parent in s4 of the FLA was not amended to include an "other intended parent" as a parent for the purposes of the FLA. The failure to expand the definition of a "parent" to include "an intended parent" is potentially problematic because some provisions of the FLA exclusively apply to parents, such as:

- ss60B(1)(a), (1)(d), (2)(a), (2)(c) and (2)(d) (objects and principles of Part VII);

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- ss60CC(2)(a), (3)(c), (3)(e) and (3)(i) (best interests of the child);
- s61C (parental responsibility);
- s61DA (presumption of equal shared parental responsibility).

There is thus an inconsistency between s60H and other provisions of the FLA because whilst, for example, a non birth mother is considered to be an "other intended parent" under s60H, she may not be a "parent" for the purposes of other provisions of the Act.

The Full Court has recently examined the operation and effect of these inconsistencies in *Aldridge and Keaton* [2009] FamCAFC 229 and *Mulvany v Lane* (2009) FLC 93-404.

Aldridge and Keaton involved an appeal from a decision of the Chief Federal Magistrate. The case concerned a lesbian couple who were in a relationship when the mother commenced fertility treatment, but did not commence a de facto relationship until just prior to the birth of the child B. This was a significant fact which meant that under the FLA, the birth mother's partner was found to not be the other intended parent under s60H. The Chief Federal Magistrate found that she was a person concerned with the care, welfare and development of the child, and made orders which allowed her to spend time with the child. These orders were challenged on appeal before the Full Court comprising Bryant CJ, Boland and Crisford JJ.

The central issue before the Full Court was whether it was appropriate for a person with no biological connection to a child to have a parenting order made in their favour. In dismissing the appeal and finding that the Court must apply a two step approach when dealing with an application for parenting orders brought by a non-biological parent (step one being a determination of whether the person is concerned with the care, welfare and development of the child and step two – if step one is answered in the affirmative – being a consideration of what orders should be made in the child's best interests) the Full Court examined the legislative amendments and language of the Act.

The Full Court stated that the question of whether an "other intended parent" is a "parent" for the purposes of Part VII is "not without some doubt". However, their Honours commented that they would adopt a purposive approach to this section, and regard *both* the birth mother and the "other intended parent" as the parents of the child

for the purposes of Part VII proceedings. The Full Court recognised that this purposive approach is inconsistent with other provisions of the Act (as detailed above) and stated that further legislative amendments may be required to clarify the status of non-biological parents.

The status of the non birth mother, was questioned by the birth mother, who argued that the language of the FLA placed greater importance on applications brought by a parent than it did upon applications brought by other persons. For example, s65C lists the people who can apply for a parenting order. Parents are listed first. Persons concerned with the care, welfare and development of the child are listed last. The Full Court held this section does not imply or create any hierarchy of applicants in children's proceedings.

The birth mother also contended that the Chief Federal Magistrate had erred by having regard to s60CC considerations which expressly refer to "parents". The Full Court found that s60CC(3)(m) provides sufficient scope for a consideration of any other relevant fact or circumstance that may otherwise have been considered in the sub-sections which exclusively apply to parents.

In *Mulvany v Lane* (a decision involving a non-biological father who, during his marriage, had been led to believe that he was the child's biological father) Finn J also acknowledged the limitations of the current FLA when her Honour said at paragraphs 15 and 16:

- "15 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, s60B(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.
- 16 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 s60CC(2)(b) (protection from harm) and of the additional matters in s60CC(3) so far as they expressly or impliedly refer to a person other than a parent."

Members of the judiciary have recognised that further reform is needed to clarify the status and role of a person who has no biological connection to a child.

The legislation has also resulted in some unusual findings of parentage. In *Re Michael: Surrogacy Arrangements* [2009] FamCA 691, Watts J considered a complex case in which a child was born as a result of a family surrogacy arrangement. His Honour had to determine who the child's parents were. Sharon and Paul are married to each other. Sharon's mother Lauren was in a de facto relationship with Clive. Sharon became infertile, and her mother offered to carry a child which was biologically Sharon's and Paul's for them. When the child Michael was born, Lauren was listed on Michael's birth certificate as his mother and Paul as his father. Watts J found that the starting position at law was that Lauren is Michael's mother and Clive is his father. Watts J held that Michael was Sharon's maternal step-brother and Paul was his maternal step brother in law. Sharon and Paul wanted to adopt Michael. The fact that Paul was on Michael's birth certificate created a rebuttable presumption under s69R FLA that he was Michael's parent. Watts J held that the presumption was rebutted by the operation of s60H(1) FLA. Sharon and Paul's application for leave to adopt was dismissed as they were found not to fall within the definition of a "prescribed adopting parent" under s60G FLA. Essentially neither of them was found to be Michael's parent.

Limited scope of s60H

Section 60H only provides scope for a child born as a result of artificial conception to have two parents. This restriction is problematic for children born to multi-parent families, or children born to gay male couples.

If a child is born to a woman, who is in a same sex de facto relationship, using a known sperm donor, the child is the lesbian couples' child at law regardless of any intention between the same sex couple and the known sperm donor. In this scenario, the known sperm donor, who may also be an intended co-parent, is excluded from being a legal parent of the child. As such, he only has standing under the FLA as a person concerned with the care, welfare and development of the child. In this way, arguably s60H has worsened the legal position of the known and involved sperm donor.

Section 60H does not assist the children of a gay male couple who have a child or children under a surrogacy arrangement as it does not apply.

Of course, this issue is not problematic for all persons to whom s60H applies. The new s60H has been welcomed by many lesbian couples because the status of the non birth mother is now more certain. It also removes concerns that the sperm donor is more likely to be recognised as a parent than the non birth mother. Nonetheless, in a number of cases, s60H is not sufficiently flexible to recognise the various forms of a family that exist in today's society. It seems that inevitably the Commonwealth will need to consider how the Family Law Act can be amended to recognise the multiplicity of family constellations for the benefit and security of the children living within them.

NOTES

- 1 "Outcomes for Children Born of A.R.T. in a Diverse Range of Families." Dr Ruth McNair Department of General Practice, The University of Melbourne. Law Reform Commission of Victoria.
- 2 A list of the prescribed laws is set out in Regulation 12C of the Family Law Regulations 1984.
- 3 See *W v G* No. 4607 of 1994 Equity – Estoppel [1996] NSWSC 43 (4 March 1996).
- 4 *Baker v Landon* [2010] FMCAfam 280, at paragraph 30. His Honour also provides a useful synopsis of the Court's approach to determining when a de facto relationship exists.



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