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“I have two mums, one dad and two parents”

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Introduction

Rapid changes in technology and society in the past 25 to 30 years have challenged the way in which we define “parent” and “family”. Formerly, in the Western world the term “parent” almost always referred to parents who were both biological and psychological parents. They were usually a heterosexual legally married couple. In a relatively short period, the term “parent” has become an uncertain and complicated concept. Assisted reproductive technology (ART) has made tremendous advances in that time and there is greater social acceptance of it. There is also more openness about the fact that babies and families are created in many different ways. In 2020, babies and families will undoubtedly be created in ways not foreseen now by scientists, lawyers and social planners, nor by the community generally.

What has changed?

As recently as 1978 the first IVF baby was born in England. In 1986 in Australia the first baby was born using a frozen egg. In 2000 the first babies were conceived and born using both frozen eggs and frozen sperm. In the current year, 2002, a lesbian couple in the United States deliberately conceived a deaf baby.¹ Also in 2002, the Victorian Infertility Treatment Authority consented to the selection of embryos to create a child who is not deaf² and in another case, to create a child who has the best chance of being able to give a compatible cord blood transfusion to a terminally ill sister.³

Society is changing too, although more slowly. The High Court considered an appeal regarding access by single women to ART and the Family Court delivered its decision on an application by a mother and co-mother to stop contact between a child and a sperm-donor father. The rights of single and lesbian women to access ART are being debated and either denied or allowed. Although still controversial, it was unthinkable 25 years ago that such a debate could ever occur. In 2000, about 30% of babies were born outside of a heterosexual legally married relationship.⁴ No longer

¹ Liam Bartlett “It’s wrong to have designs on babies” *The Sunday Times* 28 April, 2002; Karen Kissane “Hear no evil” *Sydney Morning Herald* 13 April, 2002

² Dan Silkstone “Embryo ruling triggers debate” *The Age*, 22 Sept 2002 found at www.theage.com.au/text/articles/2002/21/1032054999080.htm

³ “Father defends ‘designer baby’ to save sick child” *Sydney Morning Herald* 16 April, 2002

⁴ Australian Bureau of Statistics Australian Social Trends 2002. Family-National Summary Tables

can we assume that children will mainly be born into heterosexual legally married couples or single heterosexual women.

The variety of legal problems arising from the conception of children has increased. There are still the familiar complaints regarding traditional conception from men who feel they did not have a choice about whether or not to become a father⁵ and babies being accidentally switched at birth.⁶ DNA parentage testing not only enables the biological parents to be ascertained but makes it more likely that mistakes in IVF and deceptions in sexual relationships are uncovered.

DNA parentage tests are occurring in Australia without the consent of both parents. Children of sufficient age and maturity to understand the questioning of paternity, may find it difficult after the test confirms biological paternity to resume the former psychological relationship.⁷ Making it a criminal offence to obtain or provide DNA parentage testing without the appropriate consents, of caregivers or the Family Court, will not solve the problem. The Australian Law Reform Commission⁸ acknowledged that heavy regulation of parentage testing in Australia is likely to encourage the use of overseas laboratories, particularly those marketed on the internet. A solution, however, is far from clear.

The right or otherwise of a child born now to information about or the identity of an egg-donor mother, sperm donor father or embryo donor parent including identity is legislatively clear. Many related issues, though, remain unresolved.⁹ In the past, records of donors were not kept. Will these children try to find their biological parent or parents? Apparently, only one in ten children born by donor insemination are told about their biological father.¹⁰ Many of these children may not know how they were conceived.

In the future, we face issues such as using sperm, eggs or embryos created artificially, by cloning or by gene splicing including sperm created from female tissue or eggs from male tissue or sperm created by transplanting testicular tissue.¹¹

⁵ Eg. See the websites of: www.glennjsacks.com, www.nas.com/c4m and www.dadsusa.com

⁶ For example the Rebecca Chittum case in the United States. See: www.ishipress.com/babysues.htm

⁷ Larry Schwartz "Paternity: Stop DNA by 'Stealth'" *The Age* 26 May, 2002; Inga Gilchrist "Paternity test review" *Sun-Herald* 19 July 2002

⁸ ALRC "Protection of Human Genetic Information Discussion Paper" (Commonwealth of Australia, 2002) p96.

⁹ *Rose v Secretary of State for Health* [2002] EWHC 1593 (26/7/2002)

¹⁰ Amy Cooper "The sperm that got away" *The Sunday Age* 18 August 2002.

¹¹ Art Caplan "Sperm Transplants should spur debate" 15 August 2002 found at www.msnbc.com/news/794365.asp?cp1=1

Babies and families are now created in many different ways. The law is struggling to keep up, not only with technology, but also with the creation of babies through informal, even illegal but nevertheless effective ways. Family law disputes about children are no longer just about the rights and responsibilities of parents and the rights of children.

Courts may first have to determine who is the mother, the father and the parents, both biological and psychological. Many of these disputes will probably be decided under the *Family Law Act 1975*.

Legislative Background

Since June 1996¹², each parent has parental responsibility for children under 18¹³ unless changed by court order.¹⁴ An order for parental responsibility can be applied for by a parent or “any other person concerned with the care, welfare or development of the child”.¹⁵ The object of Part VII of the Act is:

“to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.”¹⁶

The principles underlying the object include “that, except when it is or would be contrary to a child’s best interests:

- (a) children have the right to know and be cared for by both their parents ...
- (b) parents share duties and responsibilities concerning the care, welfare and development of their children; and
- (c) parents should agree about the future parenting of their children.”¹⁷

¹² For useful discussions of the *Family Law Reform Act 1995* discussions see Hon. Justice Chisholm “Reforming custody law: recent Australian experience” Third World Congress of Family Law and the Rights of Children and Youth: Bath, September 2001; M Pagani “B and B: The Aftershock: 1.5 on the Richter Scale?” 8th National Family Law Conference

¹³ Sec 61C(1)

¹⁴ Sec 61C(3) In this paper, except in relation to particular judgments, the term “Court” includes both the Family Court and the Federal Magistrates Service. Under sec 69H(1) and (4) *Family Law Act 1975* each have full jurisdiction regarding responsibility and parenting orders.

¹⁵ Sec 65C *Family Law Act 1975*

¹⁶ Sec 60B(1)

The clear assumption is that there are two parents – no more and no less.

Unless there is a contrary order, parental responsibility can be exercised by each parent.¹⁸ Applying these provisions to traditional families has proven difficult.¹⁹ What does it mean to “share” parental responsibility? How do you enforce the rights of children?

We talk about the rights of children but there is no way to properly enforce them. Are the responsibilities of parents merely parental rights dressed up? New methods of creating babies and families exacerbate these problems. What are a child’s rights to know his or her biological parents?

Assisted Reproductive Technology

Until 1997 ART was legally unavailable to heterosexual de facto couples. The Equal Opportunity Commission held that the denial of ART to three heterosexual women in long term heterosexual defacto relationships was discriminatory on the ground of their marital status.²⁰ As a result, the *Infertility Treatment Act (Vic) 1995* was changed to allow heterosexual couples to use ART.²¹ More recently in *Re McBain; Ex parte Australian Catholic Bishops Conference*²² the High Court dismissed a challenge to a Federal Court finding that the Victorian Act discriminated against single and lesbian women. A Federal bill permitting the states to pass such discriminatory legislation is before Parliament but has not yet been passed.²³ In the meantime the Western Australian Parliament has passed legislation which not only allows ART to be accessed by lesbian women but allows both the mother and co-mother to be recognised as parents.²⁴

There are at least four known cases world-wide of mix-ups at IVF clinics causing a child to be born who is biologically not the child of one or both intended parents although the genetic material of both was meant to be used. The first publicised case occurred in 1993 in the Netherlands. One twin was black and the other white. Due to the failure to properly clean out a pipette, one twin biologically was the child of the intended mother and a man who was not her partner. The

¹⁷ Sec 60B(2)

¹⁸ Sec 61C

¹⁹ J. Campbell, Peeling off the Paint: Parental Responsibility or Parental Rights? 10th National Family Law Conference, Family Law Council of Australia, Family Law Section, Melbourne, March, 2002.

²⁰ *MV v Royal Women’s Hospital* (1997) EOC 92-886

²¹ *Infertility Treatment (Amendment) Act (Vic) 1997*

²² [2002] HCA 16 (18 April, 2002)

²³ *Sex Discrimination Amendment Bill 2002*

²⁴ *Acts and Amendment (Lesbian and Gay Law Reform) Act 2002 (WA)*

psychological father considers him as much a son as his biological son. Interestingly, the psychological parents contacted the biological father. They told the child that he has two daddies. The biological father visited and the family intends to go “on a roots trip” to the Dutch Antilles for the family to learn more about where their son’s biological father comes from. The detected cases reported in the media have all involved children of a different colour to their parents. Similar mix-ups are likely to have occurred fairly frequently but not been detected.²⁵ A well-publicised case involving black twins occurred recently in England. It has yet to be resolved.²⁶

Surrogacy

Surrogacy is not a well-publicised issue in Australia. Commercial surrogacy is illegal. This, combined with the reluctance of courts to enforce surrogacy agreements has, perhaps discouraged both the arrangements or their enforcement.

One of the earliest surrogacy cases to receive considerable media attention was *In re Baby M*.²⁷ The surrogate mother carried a child created from an egg of the surrogate mother and the sperm of the intended father. At first instance the surrogate mother’s parental rights were terminated, the biological father’s rights upheld and his wife allowed to immediately adopt the baby. On appeal this ruling was overturned, the surrogacy contract invalidated, the adoption annulled and the surrogate mother’s parental rights restored. Custody was given to the biological father and the amount of visitation which the surrogate mother would enjoy was referred to the trial judge.

In the United States the enforceability of surrogacy seems to be a bit of a lottery. The outcome is significantly dependant upon the state which has jurisdiction. California is one state which tends to uphold surrogacy contracts. In an early and well-known Californian case the court ordered that the surrogate mother have no parental rights to a child who was biologically the child of the intended parents.²⁸ Later Californian cases have also upheld surrogacy contracts. In the *Beasley* case a British woman contracted for \$20,000 with a Californian couple to carry a child to term.²⁹ Eight

²⁵ Tracey Lawson “Black and white, they are both my sons” in *The Scotsman* 10 July, 2002 found at [www. News. Scotsman. Comindex.fcml?id=742542002](http://www.News.Scotsman.Comindex.fcml?id=742542002) Gethin Chamberlain, “Clinics’ ever – present fear of IVF mix-ups” *The Scotsman*, 9 July, 2002

²⁶ Jill Higgins “Gene tests revealed IVF mix-up mother?” 31 July 2002, BBC News, found at www.news.bbc.co.uk/2/hi/health/2164301.stm; Dea Birkett “IVF errors and questions of race: Why has the response to the black IVF twins born to white parents been so hysterical?” *The Guardian* 10 July 2002 found at www.guardians.co.uk/0,3858,4458276,00.html

²⁷ 537 A.2d 1227, 19 N.J. 396 (N.J. 1988)

²⁸ *Johnson v Calvert* (1993) 5 Cal. 4th 84

²⁹ Lesley Blum “Landmark Fertility Cases - Legal Battles in the State Courts” found at [www.abnews.go.com/sections/nightline/Daily; News/cases - 0/0828 - fertility.html](http://www.abnews.go.com/sections/nightline/Daily;News/cases - 0/0828 - fertility.html); Jamie Wilson “Surrogate twins find new parents” 14 August 2001 in *The Guardian* found at www.

weeks into the pregnancy she discovered she was carrying twins. She refused to abide by a contractual term that she undergo a "selective reduction" so that she carried only one child to term. Although acknowledging that she had no legal rights to the children the surrogate Beasley did not want the intended couple to have them. Another couple took over the surrogacy contract.

Another Californian case, *In re Buzzanca*,³⁰ involved a couple contracting with a surrogate mother to carry a child biologically unrelated either to the Buzzancas or the surrogate. Shortly before the birth the Buzzancas separated. Mr. Buzzanca claimed that there were no children of the marriage and that he had no responsibility for the child.

At one level the case was complicated by the existence of several potential parents in addition to the intended parents.³¹ Although they did not seek custody they were:

- The surrogate said that she agreed to be a surrogate on the understanding that the baby would be brought up in a stable, two-parent home. She alleged that the mother kept the separation secret.
- The woman who donated the egg claimed that her egg had been used without her permission and against her wishes. She did not, though, seek custody.
- The sperm donor and his wife also said that the sperm had been used without permission. Later, they said that their consent was inadvertent.

The lower court held that the child Jaycee had no legal parents. This decision was overturned on appeal. The Supreme Court found that the determining factor was the intention of the parties rather than any genetic tie. Mrs. Buzzanca succeeded in obtaining custody of the child and Mr. Buzzanca was required to pay child support. Another way of looking at the result is that it was not until three years after Jaycee's birth that the court determined that the intended mother have custody of Jaycee.

In *Re Evelyn*³² the Full Court of the Family Court of Australia upheld the trial Judge's decision that Evelyn live with her biological (and surrogate) mother, three half-siblings and her mother's husband

Guardian.co.uk / print/ 0, 3858, 4238555, 00.html.

³⁰ 1998 Cal. App. Lexis 180, 72 Cal. Rptr. 2nd 280, 61 Cal. App. 4th 1410 (1998)

³¹ "A High-Tech Orphan" www.cbsnews.com/stories/1998/65/13/48hours/printable9352.shtml

rather than her biological father, his wife and their adopted son. Evelyn lived with the intended parents for seven months before her biological mother removed her from their care. At an early interim hearing Evelyn was returned to the intended parents but had significant contact with her biological mother and half siblings. It is difficult not to read the judgment as a “win” for biological mothering over biological fathering and psychological parenting. The trial Judge considered that living with her biological mother and three half-siblings would cause fewer problems long-term for Evelyn.

Conception after death or divorce

Another unresolved question is who owns embryos after death or divorce? Are they “property”? Can one person make a decision about whether or not they will be used? Can someone become a “parent” after death?

In an English case,³³ sperm was removed from Diane Blood’s dying husband. She eventually obtained permission to take the sperm to Belgium so that she could undergo ART. In July 2002 she gave birth to the second of two sons, both conceived using the sperm of her husband after his death. A newspaper reported that she saw her next challenge as legislative change to enable their biological father’s name to be on their birth certificates.³⁴ The article went on to speculate that there were up to 40 women in Britain in a similar situation.

In a similar Victorian case, sperm was removed from a dying man.³⁵ The man’s wife is hoping that the Victorian government will change the legislation to allow her to take his sperm interstate for ART.

In England a couple are arguing over the ownership of six frozen embryos.³⁶ Their relationship broke up after the embryos were frozen and the woman's ovaries and fallopian tubes removed due

³² (1998) FLC 92-807

³³ *In the matter of an Application for Judicial Review R v Human Fertilisation & Embryology Authority. Ex parte D B* [1997] EWCA Civ 946 (6 February (1997)); see also *Mrs U v Centre for Productive Medicine* [2002] EWCA Civ 565 (24 April, 2002)

³⁴ “Dianne Blood gives birth to second son” Press Association in *The Guardian* 18 July, 2002 found at www.guardian.co.uk/Print/0,3858,4463629,00.html

³⁵ Gabrielle Costa “Dead Man’s baby in doubt” *The Age* 17 September 2001

³⁶ This is not the only case, see “IVF wrangle cases go to court” 11 September, 2002, BBC News from www.news.bbc.co.uk/1/hi/health/2249442.stm

to cancer. Natallie says that the embryos are her only hope of having children. She regrets not freezing the eggs instead. She feels she was misled by her former fiance's consent to the procedure. Howard is not necessarily opposed to the embryos being used but wants a full release from child support. Natallie agreed but presumably Howard discovered that such a release, as in Australia, is unenforceable. He wants the legislation changed so that he can contract out of fatherhood before the embryos are used.³⁷

Same Sex Parenting

The definitions of mother, father, parent and family are important for the children born in non-traditional ways or in non-traditional families for legal issues such as residence and contact disputes, child support, inheritance rights and superannuation. Many Australian states have extended the statutory property rights of defacto heterosexual couples on relationship breakdown to same sex couples.³⁸ However, the rights of their children have so far been largely ignored.

His Honour Justice Fogarty in *B v J*³⁹ in dicta considered that a same sex co-parent had no child support liability. He held that the man who donated sperm to a lesbian couple and was listed on the birth certificate as the father was not the father for the purposes of the *Child Support (Assessment) Act 1989* (Cth).

The Supreme Court of New South Wales in *W v G*⁴⁰ enforced an implied promise by the co-parent to support the children. It ordered payment of a lump sum to the biological mother for the children's future expenses. The Court also ordered that a copy of the judgment be sent to Centrelink. It is possible that in the future, the desire to protect the public purse may increase pressure to recognise same sex parenting at least in the area of financial responsibility.⁴¹

Re Patrick

The problem of defining parents was dealt with at length in the Family Court earlier this year. In *Re Patrick*⁴² a biological mother and her lesbian co-parent applied to discharge orders for contact

³⁷ "Ex-couple 'wrangle' over IVF embryos", 2 August 2002 found at www.news.bbc.co.uk/2/hi/health/2167590.stm

³⁸ Eg *Property (Relationships) Act 1984* (NSW)

³⁹ (1996) FLC 92-716

⁴⁰ (1996) 20 Fam LR 49

⁴¹ The financial obligations of sperm donors and co-parents were examined by Dr. Dorothy Kovacs in "The AID child and the Alternative Family: Who pays? (or Mater semper certa est – That's easy for you to say!)" (19797) 11 AJ FL 141.

⁴² *Re Patrick: An application concerning contact* (2002) FLC 93-096

between Patrick and his sperm-donor father. His Honour Justice Guest not only ordered that Patrick continue to have contact with his father but ordered a gradual increase to “regular” contact including every second weekend, half of all school holidays and every Father’s Day.

The Court accepted that the father was intended to be a “known” father figure. For example, he demonstrated a significant commitment to the conception and to the child by taking part in at least 27 attempts at artificial insemination.

The father consented at an early stage of the proceedings to an order that the mother and co-parent have long-term and day-to-day responsibility for Patrick. This was to help the mother and co-parent feel less threatened by him. Ironically, this concession actually worked in the father’s favour. He showed respect for the position of the mother and co-parent as “parents” and a high level of “parental responsibility” in its non-legal definition. Legally, Patrick had two mothers and one father but only two parents.

The Court accepted that the father was a “father” without being a “parent”. He could even have contact on Father’s Day. The mother and the co-parent said that he could only have contact if he did not “act like a parent.” By contrast, Dr John McBain, a Victorian IVF specialist, described anonymous sperm donors at the time not as dads in the social sense, but as parents.⁴³

The Family Court recommended legislative reform to:

- clarify the rights and responsibilities of sperm donors, noting that those of known sperm donors may be different from unknown sperm donors.
- allow parties to register parenting plans (an alternative to court orders) before conception or at least before the birth.
- give greater recognition to the mother's partner.
- consider “the nature of parenthood, the meaning of ‘family’ and the role of the law in regulatory arrangements within the gay and lesbian community”.⁴⁴

⁴³ Inga Gilchrist, “Sperm Donor peace plan” *Herald-Sun*, 29 January 2002.

⁴⁴ (2002) FLC 93-096 at p.88,929

To the best of the writer's knowledge, legislation is not forthcoming. These recommendations deserve to be considered.

The Future

Other jurisdictions are grappling with the same or similar issues. Few, if any, governments are prepared to legislate comprehensively. Many countries, like Australia, make certain behaviour illegal or criminal. This is not necessarily a solution. For example, the three adults in *Re Patrick* made their own arrangements as the law did not cover their circumstances. If people cannot use IVF clinics in Victoria they can go to Albury. If they cannot obtain DNA parentage testing, donor eggs or arrange a commercial surrogate in Australia, they can look overseas. The internet means that information about international services is very accessible.

The Court in *Re Patrick* suggested legislative reform to enable a legally enforceable agreement to be made prior to the birth. Of course, these agreements would still be variable if the best interests of the child required it, but they might reduce the risk of litigation. Unfortunately entering into agreements before conception might raise constitutional problems for the Commonwealth.

The American Academy of Pediatrics issued a Policy Statement in February 2002 recommending that adoption be available to co-parents or second parents in same sex relationships.⁴⁵ In July 2002 the Swedish Government proposed similar reforms.⁴⁶

One model is the United States *Uniform Parentage Act, 2000* (UPA) which provides for gestational agreements. It has been adopted in part or whole by some states. The UPA is, however, restricted to surrogacy arrangements where the intending parents are legally married, and are either unable to have children through sexual intercourse or ART or are unable to do so without unreasonable risk to the mother or the child. The surrogate mother must have had at least one previous pregnancy and delivery. Gestational agreements operate similarly to adoption but court approval is obtained prior

⁴⁵ www.aap.org

⁴⁶ In a press release found at: www.regeringen.se

to conception. After the birth the Court directs the birth registration agency to issue a birth certificate naming the intended parents of the child as the parents.

The UPA uses the term “gestational mother” but other possible terms include gestational surrogate, surrogate, surrogate mother, gestational carrier or gestational host. Fathers can be described as natural, biological, step, non-legal, equitable, presumed, de facto and alleged. The New South Wales Law Reform Commission proposes that the terms legal parent, functional parent, birth mother, and co-parent be used.⁴⁷

Re Patrick raises problems with the definitions of “family”, “parent”, “father”, “mother” and “parental responsibility”. As a community we need to develop new language for the relationships of adults who help create children other than through the traditional method or the so-called traditional family unit.

*In re Buzzanca*⁴⁸ the Californian Court of Appeal made a strong statement which is just as applicable to Australia:

“A child cannot be ignored. Even if all the means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts would still be called upon to decide who the lawful parents are and who – other than the taxpayers – is obligated to provide maintenance and support for the child. These cases will not go away. Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. ... Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme ... Or, the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques”.

⁴⁷ *Review of the Property (Relationships) Act 1984 (NSW)*. Discussion Paper 44, Law Reform Commission of NSW, 2002

⁴⁸ 1998 Cal. App. Lexis 180, 72 Cal. Rptr. 2nd 280, 61 Cal. App. 4th 1410 (1998)

Conclusion

The United States has over 120 sperm banks and many surrogacy websites. Some services cater specifically for lesbian women and homosexual men. It is easy to dismiss some of the problems which have arisen overseas by saying that “it could only happen in America” but this is not true. Thousands of children have been conceived in Australia by unknown sperm and egg donors. They continue to be conceived by known ones. Surrogacy occurs in Australia, lesbian and gay couples formally or informally arrange sperm and egg donation and it is unlikely that there have not been mistakes in IVF.

Some of the issues and challenges of 2020 are already here. To a large extent we are ignoring them. In this era of rapid scientific development and social change, legislative change is hindered by ethical disputes, complexity and the speed of change. As a result, we are often dependent upon courts to interpret and make law. The community debates we are having about how we should and should not create babies is distracting us from a more important issue. Making it a criminal offence to create a baby in a particular way or have a baby brought up in a particular family structure does little to help these children. A baby born amidst litigation and uncertainty about which adults he or she can call mother, father and parents surely does not have the best start in life.

