



Parental Responsibility in Same Sex Relationships

The rights of both biological and non-biological parents in gay and lesbian relationships

Pursuant to the Family Law Act 1975 ("the Act") both biological parents of a child are deemed to have joint responsibility for the care, welfare and development of the child irrespective of whether they are married, separated or never actually lived together.

Prior to recent changes to the Act, lesbian couples did not have the same parental rights as heterosexual couples, with the non biological mother excluded as the child's other parent. This meant that without a Court Order, the non biological mother had no legal right to make decisions regarding the child, including most importantly, medical decisions. Fortunately, this is no longer the position with law reform now bringing parental rights of gay and lesbian couples into line with those of heterosexual couples.

Lesbian Partnerships

If a child is conceived through artificial insemination by a lesbian couple, the non biological mother is, subject to some conditions, now legally considered to be the other parent of that child. The Act provides however provides that this is subject to the couples establishing that they have been living together in a domestic relationship at the time the child was conceived, and that there was informed consent by both parties for the procedure to be undertaken. These conditions must be met in order for there to be legal recognition of the non-biological mother.

Donors

Under the Act, a Donor has no legal responsibility for any child born as a result of artificial insemination. However, in circumstances where there is a known Donor, it would be prudent for both parties to execute a "Donor Agreement" which outlines the intention of the parties prior to conception.

Although a Donor Agreement is not legally binding, it provides evidence of the intention of all parties when the child was conceived and can be used by parties in Court proceedings where one (or both) parties question the role of the Donor in the child's life.

A Donor Agreement will to a certain extent, protect both the donor's rights and protect the rights and role of the non-biological parent. Although a Donor will still be able to bring an application before the Court seeking contact with the child, the Agreement can be used as evidence of the parties' intention at the time the child was conceived. This will limit the Donor's scope of argument, and more

specifically any argument that he is in fact the biological father of the child. It also must be noted a Donor will legally be the biological father and liable for the child in circumstances where the child is conceived through sexual intercourse, regardless of the intentions of the parties.

Gay Couples

A gay couple who conceive a child with a woman via artificial insemination are not legally deemed to be the parents of that child, even though the partner who donated the sperm is the child's biological father. Rather, the biological mother and her partner (if she has one) will be deemed to be the child's parents. This applies regardless of the intentions of the parties. This scenario

is common in situations where a gay couple and a lesbian couple seek to have a child together. In that situation, the gay couple has no legal rights to the child and will only be able to see the child would be by applying to the Family Court as a "significant person" in the child's life. The gay couple will not be deemed to be the other parents of the child and their role in the child's life will depend on the circumstances of each individual case.

Although the law in relation to lesbian couples and parenting appears to now be in line with the laws applicable to heterosexual couples, this is unfortunately not the case for gay couples. If it was the intention of a gay couple to have a family, they would have to look at other options such as surrogacy, rather than artificial insemination, as legally they have no rights to see the child or be in the child's life.

At the moment, the only option available for gay couples wanting to start a family, is by adopting a child (which can be a long and expensive process) by obtaining a parenting order with the Family Court or by surrogacy.

Summary

Gay and lesbian couples who are thinking about starting a family should first obtain legal advice. At Nicholes Family Lawyers, we have extensive experience in children's matters for gay and lesbian couples. We welcome your enquiries.

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