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My child calls me a parent, why doesn't the law?

Gay Dads Alliance

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Abstract

At present, both Federal and State legislation does not afford gay co-fathers the same rights as other intended parents when children are either born as a result of assisted reproductive methods or surrogacy arrangements. This paper will explore the various pieces of legislation that are prohibiting gay fathers from being legally recognised as parents to their children, including analysis of the Family Law Act 1975 and corresponding State and Territory legislation. It will further outline proposed recommendations for legislative amendment.

Who is a parent pursuant to the provisions of the Family Law Act 1975 (Cth)?

The Family Law Act 1975 (Cth) ("the FLA") provides at sections 60H, 60HA and 60HB an exhaustive definition as to who is deemed a parent.

In December 2008, s60H (1) of the FLA was repealed and replaced with retrospective legislation in the following terms:

(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.

Implications of the amendments to s60H

The implications of the repealed and now amended s60H are vast. Although the amended s60H provides non biological parents in lesbian relationships the status of legal parentage, the amendments failed to have regard to the legal rights of gay co-fathers who, prior to the amendments, were considered the legal parents of their children born through assisted reproductive technology.

The amendments resulted in outcomes that in the writer's view were not the intention of the legislatures and implications on parents that were not considered prior to the amendments being enacted.

In conjunction with amendments to state legislation, which occurred contemporaneously with the amendments at Commonwealth level, it resulted in intended gay co-father's being removed from their children's birth certificates; removal of parental responsibility previously afforded to gay co-father's and consequently, the removal of parental responsibility to make decisions regarding their child(ren); no avenue of recourse for gay co-fathers to pursue their parental rights to their children; and, retrospectively prohibiting the recognition of a child's biological father.

The inherent problems with the amendments to s60H were highlighted in the recent case of Wilson and Anor & Roberts and Anor (No.2)[2010] FamCA 734 (19 August 2010).

In this case, Ms Roberts and Ms Boston ("the mothers") who had been in a relationship for approximately 12 years, approached Mr Wilson and Mr Farmer ("the fathers") and requested that they donate sperm in an attempt to conceive a child of which any child born would be co-parented jointly by the mothers and fathers. Although the intention of the parties prior to conception was in dispute throughout the case, the Court accepted that it was the mutual agreement of the parties that the fathers would play a significant role in the child's life. In July 2008, Baby E was born.

From the time of Baby E's birth, the fathers played a significant role in his life caring for him two (2) full days per week and on one other evening per week. The mothers formed the opinion that Baby E's relationship with the fathers was causing upset to Baby E and unilaterally suspended contact between Baby E and the fathers. On 9 September 2009 the Fathers issued proceedings before the Federal Magistrates Court of Australia at Melbourne to reinstate their time with Baby E.

Dessau J who heard the matter on appeal was satisfied that the mothers and fathers did initially set out with a shared decision, as two couples, to create and contribute to the raising of a much-wanted and much-loved child. Dessau J did however conclude that Baby E could not successfully be parented in an equal division of parenting roles between all four adults due to the high conflict between the parties and the threat that the mothers perceived the fathers to be to their family unit. Dessau J further found that Baby E's primary attachment was to the mothers. Dessau J also concluded that she was "satisfied that E should have the benefit of the men's loving involvement in his life, and that it should be a meaningful relationship". She further concluded that she was not satisfied that "it should be at a level, time-wise, whereby the women would inevitably feel that their family unit is severely compromised, nor should their freedom of movement be so restricted that they cannot relocate" overseas. In this case parental responsibility was afforded to the mothers pursuant to s60H of the FLA and they were at liberty to relocate overseas with Baby E, with the Fathers to have specified time with Baby E. This was despite the initial intention of the parties.

This case is on point and highlights the problematic legislation governing gay fathers and co parenting arrangements. As evidenced in this case, s60H of the FLA affords the co-father no protection or parental status of their child, regardless of the intentions of the parties at the date of conception.

The inclusion of s60HA in the Family Law Act 1975 – Children of Defacto Partners

For the purposes of the FLA, a child is deemed to be a child of a person's defacto if the following conditions are met;

- (1) (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.

Although this paper will not be exploring the laws pertaining to adoption, it is noted that Section 60HA does nothing to enhance the parental rights of gay co-fathers. Firstly, s60HA(1)(a) is clearly intended to apply to heterosexual defacto couples as two men are unable to conceive a child together. Secondly, it is illegal in many states of Australia for a same sex couple to adopt a child which are the requirements pursuant to s60HA(1)(b), and thirdly, s60HA(1)(c) defines a child of a defacto relationship if the child was conceived through artificial conception procedures as governed by s60H, which we have already seen grossly undermines gay co-fathers rights.

The inclusion of s60HB – Children born under surrogacy arrangements

Section 60HB provides that if a Court has made an order under a prescribed law of a State or Territory to the effect that either a child is a child of one or more persons; or each of one or more persons is a parent of a child, then for the purposes of the FLA, the child is the child of each of those persons.

This means that if State based legislation confers parental rights upon a person then for the purposes of the FLA, the child will be deemed a child of those persons.

The impact of this addition to the FLA has caused outcomes

that in the writer's view were not considered prior to the amendments being enacted.

This is highlighted in the recent case of *Re Michael (Surrogacy Arrangements)-(2009) 41 Fam LR 694*, where the Family Court of Australia had to consider who was a "parent" within the meaning of s60H of the FLA after the 2008 amendments referred to above.

Watts J held that ss60H (1) and 60HB of the Family Law Act now provides an exhaustive definition as to who is legally a parent.

In *Re Michael*, Watts J dismissed the application of intended parents of a surrogacy arrangement to commence proceedings to adopt the child born from this arrangement as they were not the child's parents pursuant to ss 60H(1) and 60HB of the Act, which in Watts J view, provided an exhaustive definition of a "parent".

In this case, the surrogate 'Lauren' was the mother of the intended mother, Sharon who was married to Paul. Sharon was diagnosed with cervical cancer and prior to commencing treatment, which would render Sharon infertile, her eggs were harvested. An embryo was produced using her husband, Paul's sperm. The embryo was implanted into Sharon's mother, Lauren who carried Michael in utero and gave birth to him. Lauren and Paul were registered as Michael's parents on his birth certificate. Paul, Lauren and Sharon made an Application to the Family Court of Australia seeking orders that leave be granted for them to commence adoption proceedings for the adoption of Michael.

The Application was dismissed by the Court because there was no law in the state of NSW which would allow Paul and Sharon to have an order made in their favour to the effect that they were Michael's legal parents. Watts J stated (at [34]) that it was the legislative intent of s60HB of the FLA to only 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 state legislation. Thus, as there is no law in NSW allowing such order, it was parliament's intention that they not be recognized as parents. Consequently the provisions of s60H (1) (d) of the FLA apply and a child is not to be considered a child of those who have provided genetic material.

The impact of Watt J's judgment is two fold. Firstly, His Honour's conclusions indicate that the exact same fact scenario could potentially lead to different results in other states of Australia depending on legislation governing surrogacy arrangements in each state, and secondly, there needs to be serious consideration given to the provisions of the Family Law Act and how they are read with other prevailing sections of the Act.

This case means that even if there is a surrogacy arrangement in place, and it is agreed that the intended parents are to be the legal parents of any child born as a result of the surrogacy arrangement, depending on the state based legislation, there may be no option for the intended parents to be granted legal parentage of their child.

We are seeing more surrogacy arrangements being utilized by gay men internationally due to the restrictions with surrogacy arrangements in Australia. Putting aside the potential ethical and moral dilemmas that international surrogacy in some countries may attract, the reality is, surrogacy arrangements are being undertaken every day in international countries with parents bringing their children to Australia after the child is born. This legislation and the amendments to the FLA result in a father's biological child not being recognized as a parent of their child pursuant to the provisions of the FLA. This therefore leads to the question as to the legal parentage of a child born through a surrogacy arrangement where the surrogate remains overseas and seeks no involvement with the child, and the biological father of the child has no legal parentage is this child parentless?

So what happens to a child in this situation? Unfortunately, there are a number of families that are currently facing this dilemma, with their children having no legal parents in Australia, and the parents they know, are, "persons concerned with their care, welfare and development" pursuant to s65C of the FLA and require parenting orders to confer parental responsibility upon them to allow them to make decisions for their children. However, obtaining parenting orders in these circumstances can be problematic, costly and timely. The surrogate must be joined as a party to the proceeding and consent to an order being made. In circumstances where the surrogate may be from overseas, attempting to effect service on them can be expensive, timely and can result in more procedural hearings rather than substantive hearings relating to the child. If the primary intention of the FLA is the

child's best interest is the paramount consideration, then the current legislation conflicts with this intention. How can it be in a child's best interest to not have a legal parent?

Presumption of parentage arising from registration of birth

Section 69R of the FLA provides as follows:

"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"

Strictly speaking, one could argue that s69R should provide the intending parent and gay co-father with a presumption of parentage if they are named on their child's birth certificate. This is however unfortunately not the case and gives rise to a conflict between presumptions of parentage at state and commonwealth levels.

By virtue of s60H(1)(a)-(c) of the FLA, a surrogate mother's married or de facto partner has a presumption of parentage. However, s60H(1)(d) provides that if a person other than the woman and her married or de facto partner provide the genetic material for the child, then the child is not a child of that person. s60H(1)(d) has the unfortunate impact of precluding a gay co-father and intending parent from being identified as a "parent" under the provisions of the FLA unless they are married to or in a de facto relationship with the surrogate mother.

It should be noted that the presumption of parentage under s60H is irrebuttable however the presumption of parentage under s69R is rebuttable. This means that the presumption of parentage under s60H will prevail over the presumption of parentage under s69R. Accordingly, even though a gay co-father may be registered on a birth certificate of their child as the Father, this will not afford them the presumption of parentage and the child's birth certificate can be retrospectively amended to remove him.

The conflict within the provisions of the FLA was identified in *Re Michael* above, which resulted in the surrogate and her partner having the presumption of parentage of what in reality was their grandchild, and which was not the intention of the intending parents or the surrogate and her partner.

In *Re Michael*, Watts J concluded [at 51] :

1. Section 69U is rebuttable not only by proof but also by other provisions within the FLA by virtue of the fact that the words "if and only if" are omitted from the section; and
2. That persons providing genetic material in a surrogacy arrangement could register as parents without any state order being made. Section 69R of the FLA then allowed them to be parents for the purposes of the FLA, which in turn means that the parliamentary intention behind s60HB of the FLA would be eluded.

In summarizing his conclusions, Watts J made the following recommendations for amendments to the FLA and companion regulations made under the Family Law Regulations;

1. Amend s60H to make it clear that s60H of the FLA is subject to the provisions of s60HB of the FLA;
2. Amend s 69U of the FLA to make it clear that parentage presumptions can be rebutted by the operation of other parts of the FLA;
3. If it is intended that s 60H of the FLA has no application to surrogacy arrangements, to amend s60H of the FLA to make that clear or alternatively amend the definition of "artificial conception procedures" to exclude surrogacy arrangements from that definition.

It is the writer's view that these amendments are essential in ensuring that surrogacy arrangements are properly governed and correctly identify the parentage of children born as a result of surrogacy arrangements. *Re Michael* highlighted the need for such amendments and Watts J correctly identified the sections that require legislative change. The writer further proposes that the definition of 'parent' as outlined in section 4 of the FLA be amended to define a parent as;

1. the biological parents of a child conceived through intercourse;
2. the parents of a child lawfully adopted by them;
3. parents recognized under s 60H of the FLA; and
4. parents recognized under state laws prescribed by the FLA

Recent developments in Surrogacy Laws

On 1 June 2010, the Surrogacy Act 2010 (QLD) received the Royal Assent thereby repealing the Surrogate Parenthood Act 1988. Under the repealed legislation, the QLD parliament prohibited both commercial and altruistic surrogacy and went as far as to make both forms of surrogacy a criminal offence.

Fortunately, with the implementation of the Surrogacy Act 2010 (QLD) the decriminalisation of altruistic surrogacy was introduced and now affords the opportunity for the child's parentage to be transferred to the intended parents (regardless of gender and sexuality) upon the birth of the child.

On 11 May 2010, Connor Harris was the first child to be born under the altruistic surrogacy laws to his parents, Bentley and Matt Harris. Pursuant to the amended legislation, Connor's birth certificate lists Bentley as his father and Matt as his other parent.

Further developments to the laws governing surrogacy in NSW were enacted on 16 November 2010, when NSW parliament followed suit and passed the Surrogacy Act 2010 (NSW) which affords parents of children born through surrogacy arrangements legal recognition regardless of the gender of the parents. Under this legislation, intended parents are now able to apply to the

Court for orders to recognise the parentage of their child. This affords parents the rights that previously were only available pursuant to an Order of a Court exercising jurisdiction under the FLA for parental responsibility without transferring the parentage of the child.

In order to attract the legislation and the presumptions under the Surrogacy Act 2010 (NSW), the Court must be satisfied that the arrangement was entered into prior to conception, there was no payment to the surrogate other than for associated medical expenses and all parties consent to the Orders being made.

Unfortunately, other states are yet to enact similar legislation and gay co-fathers still face the obstacles which have been canvassed in this paper.

A Historical analysis of the Court's position - 2002 to present

As discussed, questions as to the parentage of children arise when a child is conceived through either assisted reproductive procedures or surrogacy arrangements. The issue of who is a parent under these circumstances has been addressed in many cases and most notably in 2002 in the case of *Re Patrick* (2002) 28 Fam LR 579; FLC 93-096.

In *Re Patrick*, Guest J considered an application for contact by a man who had provided genetic material to a lesbian couple and conceived a child through an artificial insemination procedure. Guest J held that under s60H(3) a child was to be regarded as the child of the biological father, and the biological father is to be regarded as a "parent" of the child, only if there was a specific state or territory law which expressly conferred that status on a sperm donor for the purposes of the Act. At that time there was no such prescribed law and therefore the man fell outside the meaning of a "parent" under the FLA.

At this time Guest J urged for legislative reform. He stressed that it was time for state laws to be enacted to make available to lesbian women and their known donors a "well regulated scheme with all the safeguards, medical and otherwise, available to heterosexual couples". Little was done to affect legislative change at this time despite the clear problems with the law and the lack of recognition of co-parenting arrangements within lesbian and gay co-parenting arrangements.

In 2003, this issue again came before the Family Court of Australia in the case of *Re Mark* (2003) 31 Fam LR 162; [2003] FamCA 822. In this case Brown J agreed with Guest J that law reform was desired but disagreed that a "biological" father should be regarded as a "parent" only if there is a specific state or territory law that expressly confers that status on a sperm donor for the purpose of the FLA. The facts of this case did however differ to *Re Patrick*. In this case there was a surrogacy arrangement in the USA and a child was born to a surrogate mother, using a donated egg and the sperm of the applicant. The child born as a result of this surrogacy arrangement was brought up by the applicant and his gay partner.

Brown J held (in obiter) that a man who had "provided his genetic material for the express purpose of fathering a child he would parent" was a "parent" in the ordinary meaning of the word and thus a "parent" for the purpose of the Family Law Act 1975". Brown J further stated that s60H is not an exhaustive definition of "parent", but instead enlarges rather than restricts the categories of people who may be regarded as parents.

Co-Parent recognition

We are increasingly seeing arrangements between gay fathers (whether single or in a relationship) and mothers (whether single or in a relationship) entering into private co-parenting arrangements in order to conceive a child. This is a common practice when lesbian mothers seek a known donor to conceive a child through assisted reproduction technology (including self-insemination). Although in theory these arrangements appear to work for all parties with a child born to two parents (or four, depending on their relationship status), it leaves gay co-fathers vulnerable to the co-mother to determine their relationship with the child despite the parties intention at the date of conception.

As previously outlined, section 60H of the FLA deals with children born as a result of artificial insemination procedures. Unfortunately, a gay co-father's legal recognition for any child born as a result of an artificial insemination procedure is non-existent. At best under the current legislation, gay co-fathers could be considered a person concerned with the 'care welfare and development' of the child pursuant to section 65C(c) of the FLA but not as a 'parent'.

Section 65C of the FLA outlines who may make an application for a parenting order in relation to a child. However, a parenting order does not transfer the parentage of a child but will provide for who a child will live with and how much time the child will spend with either the other non resident parent or other person in whose favour an Order is made.

The inherent problem with this legislation is that there is no way to ensure that the gay co-father will play a role in the child's life. It may be the intention of both the co-mother and co-father for the child to spend regular, consistent and significant time with both parents, but the reality is that there is no legal process to protect this intention. The parties can execute a "Donor Agreement" which outlines their intention as co-parents to their child but it is not legally binding. This means that if the co-parents relationship breaks down prior to the birth of the child, or the co-mother decides to change her mind about the co-father's role in the child's life, they have no recourse other than to make an application under the FLA pursuant to section 65C(c) of the FLA as a person concerned with the care, welfare and development of the child.

The Donor Agreement can be produced to the Court as evidence of the intention of the parties when the child was conceived but nothing more. It is not legally binding and if the gay co-father is unable to form a relationship with the child after the child's birth, then they would be hard pressed in being successful in making an application pursuant to section 65 of the FLA.

Proposed Amendments

Accordingly, there should be further amendments to both State and Federal laws to allow recognition of gay co-fathers. Such recognition can only be affected if there is uniform reform to the FLA, state laws and the recognition at a federal level of anyone who is recognized as a parent pursuant to both state and federal laws. This would involve;

1. An introduction of uniform federal and state laws that allow transfer of parentage in altruistic surrogacy arrangements, similar to the provisions under QLD and NSW state legislation;
2. Recognition of parentage in co-parenting arrangements and acknowledgment of paternal parentage in co-parenting arrangements;
3. Implementation of 'Binding Co-Parenting Agreements' at both state and federal level as conclusive evidence of a child's parentage and the parental responsibility of the parties;
4. Amendments to the FLA to recognize parental status conferred by state laws;
5. Amendments to the definition of 'child' pursuant to the FLA to include children born through intercourse, children lawfully adopted, children of parents recognized under section 60H (as amended to include co-parenting arrangements under a Binding Co-Parenting Agreement as proposed above);
6. Extension to the FLA definition of 'child' to apply to all federal laws that grant rights or obligations based on a parent-child relationship.

In the absence of the above reforms, gay fathers will continue to experience unjust and unfair outcomes which will ultimately impact on the best interests of children, which the Family Law Act 1975 promotes as the paramount consideration when determining matters involving children.