

Family & Relationship Law

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GLBTI* RELATIONSHIPS AND THE LAW: Parental Responsibility

Are you in a relationship and thinking of starting a family? For couples in this position, there are legal issues surrounding parental rights that should be considered before starting a family. This article will explore the rights of both biological and non-biological parents, in gay male and lesbian relationships.

What the Family Law Act means by “parent”

Under the Family Law Act (**the Act**) both parents of a child are responsible for the care, welfare and development of the child – regardless of whether they are married, separated or have never lived together.

Historically, the Act defined a parent as a biological and/or adoptive parent and therefore non-biological parents were not considered “parents” unless they had either:

- a) legally adopted the child/children; or
- b) obtained a parenting order formalising their rights and responsibilities in respect of the child/children.

Recent amendments to the Act have given lesbian couples the same parental rights as heterosexual couples. These amendments do not, however, apply to gay male couples who must still either adopt or obtain parenting orders to legally formalise their parental rights.

Gay male partnerships

It is important to be aware that, under the Act, a sperm donor is not deemed to be a parent of any child conceived through an artificial insemination procedure.

This means that a gay male 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 sperm is biologically the child’s 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 intention of the parties and whether the biological mother’s partner is male or female.

In this situation, the only way for a gay male couple to formalise their parental rights is by adopting the child - which can be a long and expensive process - or by obtaining parenting orders from the Family Court (**the Court**).

* Gays, Lesbians, Bisexual, Transgender, Intersex

Lesbian partnerships

A lesbian couple who conceive a child through artificial insemination are, subject to certain conditions, legally considered to be the parents of that child. This is provided that the couple has been living together in a domestic (formerly known as de facto) relationship at the time the child was conceived, and that both parties have consented to the procedure being undertaken. If these conditions are not met, then the non-biological mother will not legally be deemed the other parent of the child.

Donor agreements

If a child is conceived through a donor who is known to the parents, it would be prudent for all parties involved to obtain independent legal advice and create a donor agreement. A donor agreement is not legally binding, however it provides evidence of the intention of all parties when the child was conceived and will avoid any doubt as to the donor's role 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. It will not prevent a donor from being able to bring an application in the Court seeking contact with the child, however the agreement can be used as evidence of the parties' intention at the time the child was conceived.

Parenting rights

Traditionally, parenting orders have been used to formalise child care and living arrangements following the breakdown of a marriage or domestic relationship. They are now also increasingly used by gay male and lesbian couples who wish to formalise their parental rights in respect of their child (or children).

Although the rights of lesbian parents are now protected by law, it is still prudent for couples to apply for parenting orders to protect the non-biological parent's role within the child's life. This ensures that the non-biological parent has the same rights under law as the biological parent, such as the legal right to make decisions in relation to schooling, medical care, religion etc.

Gay couples will need to either obtain parenting orders or adopt in order to legally be deemed the parents of their child. Gay male couples who do not formalise their parental rights in this way will not have the legal right to make decisions in relation to their child (ie decisions in relation to schooling, medical care, religion etc).

Equal parenting rights when a relationship breaks down

Under the Act, couples must try to reach agreement about what happens to the child (or children) if their relationship breaks down.

Where there is agreement reached as to the amount of time each parent spends with the child, this agreement can be drawn up as a parenting order and lodged with the Court. This formalises the non-biological parent's legal rights and responsibilities for the child.

However, if a shared parenting arrangement cannot be reached and the parties dispute either:

- a) the amount of time each parent should have with the child; or
- b) whether a parent should be able to share equal parental responsibility for the child,

then either parent can apply to the Court for a parenting order.

In a gay male relationship where there has been no formal adoption or there are no orders specifying parental responsibility for the child, either party may apply to the Court as a "person concerned with the care, welfare and development of the child".

In this instance, the Court will usually order the parties to attend a conference with a family consultant. Family consultants are qualified social workers or psychologists, with expertise in working with children and families, and are appointed by the Court.

The family consultant will present a report to the Court containing their recommendations for what arrangements will best meet the future care, welfare, and developmental needs of the child. This will include recommendations as to who the child should reside with and what time they should spend with the other parent.

It is important to remember that the Court will always make the child's best interests their primary consideration when making a decision. This will include taking into account:

- The nature of the child's relationship with each parent.
- The capacity of each parent to provide for the needs of the child, including emotional and intellectual needs.
- The likely effect on the child of changes in the child's circumstances.
- The need to protect the child from physical or psychological harm.
- Any family violence involving the child or a member of the child's family.
- The child's maturity, sex and background, including any need to maintain a connection with a lifestyle or culture.

If the child is old enough, his or her wishes may be taken into account.

In summary

There are important factors that couples with children, or who are planning to have children, need to consider.

The fact that a gay male couple whose child was conceived via an artificial insemination procedure are not recognised under law as "parents" - unless they legally adopt the child or obtain a parenting order that formally recognises their rights - can have huge implications for a family. For example, it can impact on their right to make decisions about emergency medical treatment in the absence (or death) of the biological parent.

Gay and lesbian couples who are thinking of starting a family should consider executing a donor agreement and obtaining parenting orders when their child is born to legally formalise their shared parental responsibility for their child.

Lander & Rogers has extensive experience dealing with children's matters for gay male and lesbian couples in both the Family Court and State Courts. We welcome any enquiries that you may have.

For further information please contact a member of our Family & Relationship Law group on +61 3 9269 9000.

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