SUBMISSION TO LAW COUNCIL OF AUSTRALIA: PARENTAGE LAWS UNDER THE FAMILY LAW ACT

Dr Olivia Rundle

Thank you for the opportunity to contribute to this important and interesting investigation of issues related to parentage under the Family Law Act 1975 (Cth) (FLA). My submission starts by highlighting some of the problems with the current legislative framework. I then identify potential approaches to law reform. My three main arguments, which are developed throughout my submission, are as follows:

1. There should be consistency in who is regarded as a child’s parent; ideally consistency between state, territory and Commonwealth laws but at least consistency for the purposes of all Commonwealth law.

2. **A biological test of parentage is problematic** where a child has been conceived via Assisted Reproductive Technologies (ART). ²

3. Because of the great diversity of intended family forms created via ART, the intention of participants at the time of conception should be relevant in determining parentage questions in these circumstances.

   (i) Whether the provisions of Part VII of the FLA that deal with the parentage of children lead to outcomes that are appropriate, non-discriminatory and consistent for children.

I believe that the answer to the first part of the Attorney-General’s reference is emphatically “no”: that, for some children, the current provisions in Part VII of the FLA lead to outcomes that are inappropriate, discriminatory or inconsistent.

**IMPORTANCE OF PARENTAGE TO A CHILD**

The question “who is my parent” has enormous relevance and significance to children.³ The High Court in *G v H⁴* has recognised that a declaration of parentage is a serious matter and of great significance to children in establishing their lifetime identity.⁵ A child’s parents are legally responsible to care for, protect and support the child financially,⁶ a child may inherit from his or her parents,⁷ a child has an internationally recognised right to know and be cared for by his or her parents,⁸ a child’s right to the protection of the state is derived from his or her parents,⁹ and

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¹ Lecturer in Law, University of Tasmania, Olivia.Rundle@utas.edu.au
² Including: artificial insemination (DIY or at a clinic), in vitro fertilisation, traditional surrogacy (insemination of a surrogate mother) and gestational surrogacy (IVF of a surrogate mother with no genetic connection to the child).
³ *Aldridge & Keaton* (2009) 42 Fam LR 369; FLC 93-421 at [16]-[22].
⁴ (1994) 181 CLR 387.
⁵ As noted in *Ellison & Karnchanit* (2012) 48 Fam LR 33 at [34]-[37].
⁶ Sections 61B, 61C, 66B, 66C.
⁷ State and territory laws.
⁸ UN Convention on the Rights of the Child, Article 7.
some of the FLA parenting provisions apply only to parents, not others who stand in *loco parentis* to the child.\(^{10}\)

Confusion or inconsistency in who is treated as a child’s parent in law is highly undesirable, and arguably potentially damaging to children, whose parentage is recognised as being inextricably linked to identity.\(^ {12}\) However, confusion and inconsistency is a real danger where a child has been conceived via ART.

Whether or not a person is treated as a child’s parent in law, a biological parent has an undeniable genetic connection to the child. There are calls for children’s right to information about their biological parentage to be more adequately facilitated, particularly where children have been born via ART.\(^ {13}\) However, the recognition of genetic connection and provision of information about genetic heritage may be achieved without necessarily treating the genetic parent as the parent of the child in law. For example, openness about family of origin is encouraged in adoption without the parents of origin being seen at law as parents of the child.

**SOME PROBLEMS WITH THE CURRENT PARENTAGE FRAMEWORK**

**CHILDREN CONCEIVED BY SEXUAL INTERCOURSE**

It is clear and consistent that when a child is conceived through sexual intercourse, the parents of that child are the man and woman who are the child’s biological mother and father. This rule applies whether or not they intended to conceive, were ever in a relationship and regardless of who actually parents the child. The common law assumes a genetic connection between parents and children, because it developed in medieval times when sexual intercourse was anticipated to be the sole means of procreation.\(^ {14}\) The FLA supplements the common law concept of parent, and the rebuttable presumptions of parentage and paternity in Part VII, Div 12, Subdivision D of the FLA assume indicators of biological parentage, including relationship status,\(^ {15}\) entry on a birth record\(^ {16}\) and acknowledgement.\(^ {17}\) Doubts about parentage may be rebutted by proof on the balance of probabilities,\(^ {18}\) which is usually provided by evidence of biological parentage through parentage testing procedures.\(^ {19}\) Evidence of biological parentage trumps all other indicators of parenthood (except where parentage has been formally transferred by adoption).\(^ {20}\) This will occur even where a non-biological parent has accepted the responsibility

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\(^{10}\) Including sections 60B(1)(a), (1)(d), 2(a), 2(c), 2(d); 60CC(2)(a), (3)(c), (3)(e), 3(i); 61C; 61DA; Belle Lane, “Who is a Parent?” (2010) 21 (2) *Australian Family Lawyer* 3, 7-8.


\(^{15}\) Sections 69P, 69Q.

\(^{16}\) Section 69R.

\(^{17}\) Section 69T.

\(^{18}\) Section 69U.

\(^{19}\) Part VII, Division 12, Subdivision E “Parentage Evidence”.

\(^{20}\) Section 4(1) definition of “parent” includes adoptive parents.
of parenthood and from the child’s perspective is his or her parent. Unless a legislative provision provides otherwise, the common law rule that biology determines parentage applies.

**INADEQUACY OF PARENTAGE RULES IN THE CONTEXT OF ART**

The definition of parent in s 4(1) of the FLA includes adoptive parents but, rather unhelpfully, does not specify who else is included in the definition.

The common law rules are inadequate when it comes to children conceived via ART, because the result would so often be that a child conceived via ART would not be “a child of” the intended parents. Application of a biological definition of parentage would mean that the man whose sperm was used (whether husband or partner of the gestational mother, intended father or donor) and the woman whose ovum was used (whether gestational mother, intended mother or donor) would be the parents of the child. Clearly, a biological definition of parentage leads to illogical and unhelpful outcomes for many children born via ART. The legislature has intervened to enable automatic recognition of relationship between a child and a non-biological parent in ART cases, for some limited purposes.

**CHILDREN CONCEIVED BY MEANS OTHER THAN SEXUAL INTERCOURSE**

The relevant provisions of the FLA are summarised as follows:

<table>
<thead>
<tr>
<th>Provision</th>
<th>Child conceived via ART and born to a woman:</th>
<th>Outcome re parentage for the purposes of the FLA</th>
</tr>
</thead>
<tbody>
<tr>
<td>S60H(1)</td>
<td>Married or in a de facto relationship at the time of conception + where the partner and donors consented to the ART procedure; or + where a prescribed law provides that the child is “a child of” the woman and her partner at the time of conception (relevant laws from all states and territories are prescribed).</td>
<td>Parents are woman who gave birth and her partner (male or female). Donors of genetic material (who are not the above) are not parents.</td>
</tr>
<tr>
<td>S60H(2)</td>
<td>Where the child is “a child of” the woman under a prescribed law (relevant laws from all states and territories are prescribed). = single women or women whose situation did not satisfy s60H(1) requirements. = whether or not the woman who gave birth is genetically related to the child.</td>
<td>Parent is the woman who gave birth. The provision makes no determination of other people's claims to parentage.</td>
</tr>
<tr>
<td>S60H(3)</td>
<td>Where the child is &quot;a child of&quot; a man under a prescribed law (no laws are</td>
<td>The man would be a parent, regardless of his genetic connection to the child.</td>
</tr>
</tbody>
</table>

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22 It is, however, relevant to note that the common law rule has at times been applied so that, in order to conclude that a person is a child's biological parent, common sense has been abandoned. See for example Anthony Dickey's reference to Jones v Preston-Jones [1951] AC 391 where it was accepted that a 360 day gestation period was possible (above n 2, 220).
The provision makes no determination of other people’s claims to parentage.

<table>
<thead>
<tr>
<th>Provision</th>
<th>Child born under surrogacy arrangements:</th>
<th>Outcome re parentage for the purposes of the FLA</th>
</tr>
</thead>
<tbody>
<tr>
<td>S60HB</td>
<td>Where a court has made an order under a prescribed state or territory law that a child is “a child of” one or more persons or that one or more persons are parents of a child. = prescribed laws in Vic, Qld, WA, ACT, SA and NSW.</td>
<td>The child is the child of each of the persons as determined in the order.</td>
</tr>
</tbody>
</table>

It must be emphasised that the provisions discussed here only provide who is a child’s parent for the purposes of the FLA, not for general Commonwealth law. Where, for example, immigration authorities accept genetic connection as sufficient evidence of parentage, there may be inconsistency in parentage between Commonwealth laws. Furthermore, s60H has been applied in the context of surrogacy, which leads to a conclusion about parentage that is contrary to the surrogacy agreement between the parties.

It is, arguably, unclear who is to be treated as a parent where a child has been conceived via ART. The current provisions of the FLA (particularly s 60H), as interpreted and applied by the judiciary, do not fully extinguish the common law claim of a biological father to paternity of a child. Some judges, including the Full Court, have raised questions about whether these provisions determine parentage at all. Section 60H and the common law rule of biological

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23 Surrogacy laws in Australia require an application to a court for an order reflecting the intended parentage of the child, rather than automatic recognition of parentage at birth.

24 Compare, for example, the Full Court of the Federal Court’s discussion in H v Minister for Immigration and Citizenship (2010) 272 ALR 605 of the “ordinary” meaning of parent (accepting a functional rather than biologically determined meaning) and the meaning under the Australian Citizenship Act 2007 (Cth), with the Full Court of the Family Court’s discussion in Tobin v Tobin (1999) 150 FLR 185 of the meaning of parent under the Child Support (Assessment) Act 1989 (Cth), and with the Full Court of the Family Court’s discussion in Aldridge v Keaton (2009) 42 Fam LR 369 of the meaning of “parent” under the FLA.

25 Including: artificial insemination (DIY or at a clinic), in vitro fertilisation, traditional surrogacy (insemination of a surrogate mother) and gestational surrogacy (IVF of a surrogate mother with no genetic connection to the child).

26 This conclusion has been reached in the context of surrogacy, discussed below.

27 Aldridge v Keaton (2009) 42 Fam LR 369; (2009) FLC 93-421 per Bryant CJ, Boland and Crisford JJ at [14]-[22]; Donnell & Dovey (2010) 42 Fam LR 559; (2010) FLC 93-428 at [92], [101]; Richard Chisolm,
parentage have been applied to surrogacy cases,\textsuperscript{28} which were not anticipated in the development of either legal rule.\textsuperscript{29}

**CONFUSION AND INCONSISTENCY IN APPLICATION OF S 60H**

Problems with s 60H include:

- Whether s 60H(1) defines who are a child’s parents or whether it provides some other recognition to the “other intended parent”.
- Whether s 60H excludes persons other than a woman who gives birth and her partner (where applicable) from parentage.
- No provisions are prescribed under s 60H(3), which may lead to unintended outcomes.

**Whether s 60H(1) defines who is a parent**

Despite general agreement that, through the 2008 amendments to s 60H, the legislature intended to extend legal recognition of parentage to partners of birth mothers, some doubt has been raised by the Full Court as to whether the legislation actually has that effect.

The assumption that the provision determines parentage is reflected in the Explanatory Memorandum to the Family Law (De Facto Financial Matters and Other Measures) Bill 2008:

“110. Subsection 60H(1) sets out the rules relating to parentage of a child born to a woman as a result of an artificial conception procedure while the woman was married to a man.” [emphasis added]

Some judges and Federal Magistrates have applied s 60H(1) to determine parentage for the purposes of the FLA.\textsuperscript{30} However, in *Aldridge & Keaton* the Full Court expressed a view that is not absolutely clear from s60H(1) whether the provision provides that non-biological parents who satisfy the meaning of “other intended parent” should be treated as a “parent” for the purposes of other provisions of the Act.\textsuperscript{31} Nowhere in the Act is “other intended parent” stated to fall within the meaning of “parent”.\textsuperscript{32} Furthermore, s 60H uses the words “the child is a child of” rather than “a parent of the child.”\textsuperscript{33}

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\textsuperscript{28} See *Re Michael: Surrogacy Arrangements* (2009) 41 Fam LR 694; [2009] FamCA 691 at [71] where Watts J called for legislative clarification on whether such application is appropriate, given the potential conflict with s 60HB.


\textsuperscript{30} See for example *Knightley & Brandon* [2013] FMCAfam 148 per Harman FM at [62]; *Dent & Rees* [2012] FMCAfam 1303 per Terry FM at [244]; *Halifax & Fabian* (2010) FamCA 1212 per Cronin J at [21].

\textsuperscript{31} *Aldridge v Keaton* (2009) 42 Fam LR 369; [2009] FamCAFC 229 per Bryant CJ, Boland and Crisford JJ at [14]-[22].

\textsuperscript{32} Belle Lane, “Who is a Parent?” (2010) 21 (2) Australian Family Lawyer 3, 7.

\textsuperscript{33} This issue was earlier identified by the Full Court in *Tobin & Tobin* (1999) 150 FLR 185; (1999) FLC 92-848; [1999] FamCA 446 per Finn, Kay and Chisolm JJ at [39]. The same issue of language arises from s 60HB, which presents two alternatives; a state or territory court has ordered that “a child is the child of one or more persons” or that “one or more persons is a parent of a child,” which implies that there may be a distinction between the two kinds of order. For the purposes of the *Family Law Act* it is provided that “the child is the child of each of those persons” not that “each of those persons is a parent of the child”. See *H v Minister for Immigration and Citizenship* (2010) 272 ALR 605 at [66] for the Full Court of the Federal
The Full Court went on to note the following issues in statutory interpretation of s 60H:

- The s 4 definition of parent makes no reference to children born through ART;34
- Section 60H does not use the term "parent";35
- The Revised Supplementary Explanatory Memorandum indicated that the drafters intended that an "other intended parent" should be treated in the same manner as a parent;36
- However, the intention of the drafters was not reflected in a revised definition of parent in s 4.37

The Full Court noted that "further legislative amendment may be necessary to clarify the non-biological person's status as parent."38

Judicial disagreement is apparent.39 In Connors & Taylor, Watts J respectfully disagreed with the Full Court's obiter analysis of s 60H(1).40 Deputy Chief Justice Faulks in Maurice & Barry, said that even if the drafting fell short of ideal, a purposive construction of s 60H(1) and the Explanatory Memorandum suggested that an "other intended parent" was a "parent" for the purposes of the FLA.41 Watts J went further in Connors & Taylor to suggest that the Full Court had inaccurately paraphrased the Explanatory Memorandum when it concluded that the drafters intended a birth mother's partner under s 60H(1) to be "treated as a parent."42 The words of the Memorandum were "recognised as a parent" and according to Watts J, therefore the legislature had achieved its intention of recognising parentage through s 60H.43

Whether s 60H determines parentage of children conceived via ART exclusively or whether other rules apply

The second question about s 60H is whether, in the ART context, people other than a child's birth mother and her partner can be treated as parents under the Act. Jenni Millbank has identified this "enlarging" argument as being one that produced inconsistent judicial interpretation of s 60H for 15 years prior to the 2008 amendment.44 There has been no Full Court consideration of this question since the 2008 amendments to s 60H(1). However, it has arisen numerous times in first instance cases involving surrogacy, and some judicial disagreement is evident from these decisions.45

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34 Aldridge v Keaton (2009) 42 Fam LR 369 per Bryant CJ, Boland and Crisford JJ at [17].
35 Ibid at [18].
36 Ibid at [18].
37 Ibid at [18].
38 Ibid at [22].
39 Compare Aldridge v Keaton (ibid) with H v Minister for Immigration and Citizenship (2010) 272 ALR 605 at [66].
40 Connors & Taylor [2012] FamCA 207 at [81].
42 Connors & Taylor [2012] FamCA 207 at [85].
43 Ibid at [87].
44 Millbank, above n29, at 173.
The wording of s 60H(1) as well as the purpose explained in extraneous materials reveals that the subsection only applies to couples and not to single women.46 This leaves open the circumstances where a single woman or a woman in a relationship other than a married or de facto relationship gives birth to a child conceived via ART. In such cases, paternity may be determined by biology, because if s 60H(1) does not apply, the exclusionary provision s 60H(1)(d) does not prevent a sperm donor from claiming parentage.47

Absence of prescribed provisions
To encourage consistency in who is treated as a parent in Commonwealth, state and territory law, it is desirable that state and territory parentage laws be recognised in Commonwealth law. There is scope for this recognition in subsections 60H (1)(b)(ii), (2) and (3) of the FLA. However, the Family Law Regulations 1984 (Cth) make no provision for recognition of state or territory laws under subsection (3).48 This leaves the door open for a man to claim paternity on the basis of biology, even where he would not be treated as a father under state or territory law. In Ellison & Karnchanit the commissioning biological father was not excluded from recognition as the father of the children born pursuant to a surrogacy agreement. If the state law had been prescribed, he would have been so excluded, as the provider of sperm who was not the partner of the birth mother.49 This therefore resulted in inconsistency in recognition of the man as a parent in Commonwealth and state law (he was a father for the purposes of Commonwealth law and not for the purposes of state law).

DECLARATIONS OF PARENTAGE
Another area of confusion is whether or not the family courts can make a declaration of parentage for the purposes of all Commonwealth laws regarding a child who has been born via ART. There is no inherent jurisdiction to make a declaration of legitimacy, paternity or parentage, meaning that legislative provision is required to empower courts to make such a declaration.50

Section 69VA of the FLA empowers the family courts to make a declaration of parentage “that is conclusive evidence of parentage for the purposes of all laws of the Commonwealth.” The obvious advantage of such a provision is that parentage can be conclusively determined for all Commonwealth laws, providing certainty and consistency. Parentage may be relevant under Commonwealth law for family law parenting matters, child support and maintenance, (parent’s) employment entitlements under Commonwealth law, taxation, social security entitlements, superannuation law and migration law. Matters such as wills and inheritance, education, health law and employment under state or territory law fall within the jurisdiction of the states.

Judicial commentary has indicated that the provision only applies to cases where parentage evidence has determined biological parentage.51 In the Full Court decision of Tryon &

46 Explanatory Memorandum to the 2008 Family Law (De Facto Financial Matters and Other Measures) Bill 2008, para [111].
47 Millbank, above n 29, at 190.
48 Identified by Ryan J in Ellison & Kanchanit (2012) 48 Fam LR 33 at [64].
49 Ibid at [64].
Clutterbuck (No 2) Finn J raised uncertainty about the circumstances in which it would be appropriate for the family courts to make a declaration under s 69VA:

“... the precise circumstances and manner in which a declaration of parentage can, or should, be made are, in my view somewhat unclear given the language of s 69VA itself.”

In Aldridge and Keaton the Full Court noted that s 69VA appears in Sub-division E alongside provisions for ordering parentage testing, and when it was originally inserted the provision was not intended to enable declarations in terms of lesbian co-mothers.

If s 69VA only applies to biological parents, then family courts have no capacity to make a declaration of parentage for general Commonwealth law in favour of non-biological parents whose child has been conceived via ART. The provision cannot be applied to declare the partner of a woman who gives birth to a child or a commissioning parent in a surrogacy case to be that child’s parent for the purposes of all Commonwealth law, unless the person is also a biological parent. This includes non-biological fathers and co-mothers who were partners (at the time of conception) of women who gave birth and who consented to the ART procedure. On the other hand, section 69VA has been applied to declare a man whose sperm was used in an ART procedure, but who was not the partner of the woman who gave birth, to be the child’s parent. Such a declaration has been made in surrogacy cases to declare the commissioning and biological father to be the child’s parent, but a court could also declare a sperm donor to be a child’s parent where the elements of s 60H(1) are not present.

WHAT THE LAW SHOULD ACHIEVE

Here, I elaborate upon each of my three arguments, in light of the discussion above. These recommendations cross over paragraphs (ii), (iii), (iv) and (v) of the FLC’s reference.

CONSISTENCY IS NECESSARY AND DESIRABLE

A child should have certainty about parentage and ideally, the same people should be the child’s parents for all legal purposes. At the moment there is potential inconsistency in who is treated at law as a child’s parent for the purposes of the FLA, immigration and citizenship, child support, and between Commonwealth and state laws.

The potential for a man to be treated as a father in Commonwealth law for the purposes of immigration, but not under the FLA results in inconsistency. The potential for a man to be

53 Tryon & Clutterbuck (No 2) (2009) 42 Fam LR 118; (2009) FLC 93-412 per Finn J at [29].
54 Aldridge v Keaton (2009) 42 Fam LR 369 per Bryant CJ, Boland and Crisford J at [19].
55 Who are treated as parents for the purposes of the FLA (s 60H(1)).
56 Ellison & Karnchanit (2012) 48 Fam LR 33 at [102].
57 Section 69VA could be applied where the donor was not excluded from recognition by s 60H(1)(d), because the woman who gave birth was not partnered at the time of conception.
58 For example, a commissioning father in transnational surrogacy who is allowed by Australian immigration authorities to bring the child to Australia on the basis of biological connection.
59 In the above example, if the surrogate mother was partnered at the time of conception and her partner consented to the ART procedure, thereby satisfying s 60H(1) and excluding the commissioning father from recognition as a parent under the FLA pursuant to s 60H(1)(d).
excluded from a claim to parentage under state or territory law but treated as a parent under Commonwealth law because of his biological connection to a child is also inconsistent. The FLA should be amended to:

- Define clearly who is a “parent” (s4(1));
- Define what is meant by the term “a child of” (s 4(1));
- Clarify that where s 60HB applies (a surrogacy order has been made under a prescribed law), s 60H does not (general ART provision); and
- Enable a declaration of parentage for the purposes of all Commonwealth laws in ART cases (mirroring or explicitly enabling use of s 69VA where parentage is determined by means other than biological parentage evidence).

Parentage should be determinable for all purposes under Commonwealth law. Consistency between Commonwealth and state law would also be fostered by prescription of state and territory laws under s 60H(3).

Two further amendments are required, although the detail of how these matters ought to be resolved is discussed in further detail below:

- Clarify who are a child’s parents where a woman who is not married or in a de facto relationship at the time of conception gives birth via ART; and
- Make provision for children born overseas to Australian parents via surrogacy.

All of the above improvements should together avoid the possibility of none of the parentage provisions of the FLA applying to a child. In such a case the common law would apply. However, the common law has not developed to take account of ART practices. Some judicial comment has suggested that the “ordinary meaning” of parent is broader than biology, but this has not translated to a broad common law meaning.

A Biological Test of Parentage is Inappropriate in the ART Context

In the ART context the people who a child would consider to be his or her parent, and who caused the child to be conceived with the intention of being a parent, may be treated at law as a stranger to the child (or at best, as a person “concerned with the care, welfare and development of the child”). This is despite the fact that in reality, the (biological) parent of the child may for all intents and purposes be a stranger to the child.

ART breaks the link between parentage and biology. The law should recognise this reality. Some ART scenarios are summarised below, to demonstrate the diversity in intended family forms and the inadequacy of current provisions to recognise parents in many of those families.

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60 As a man whose sperm was used by who is not the partner of the woman who gave birth.
61 Because s 60H(1) does not apply and so the biological test applies and a declaration can be made for the purposes of all Commonwealth laws.
62 Where a child is “a child of” a person, this should mean that the person is the child’s “parent”.
63 See for example the Full Court of the Federal Court’s discussion in H v Minister for Immigration and Citizenship (2010) 272 ALR 605.
<table>
<thead>
<tr>
<th>ALL SCENARIOS ASSUME CHILDREN CONCEIVED VIA ART</th>
<th>This person’s intention</th>
<th>This person’s partner’s intention</th>
<th>Other intended parent(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Partnered woman (married or de facto at the time of conception) who gives birth, regardless of genetic parenthood</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Partners are the only intended parents</td>
<td>Yes. s 60H(1)</td>
<td>Yes. s 60H(1)</td>
<td>Yes. s 60H(1)(d) excludes any biological claims to parentage</td>
</tr>
<tr>
<td>Partners intend to parent together with a genetic parent (eg a man whose sperm was used by a lesbian couple)</td>
<td>Yes. s 60H(1)</td>
<td>Yes. s 60H(1)</td>
<td>No. s 60H(1)(d) excludes any biological claims to parentage</td>
</tr>
<tr>
<td>Neither partner intends to parent, as the child is born pursuant to a surrogacy agreement</td>
<td>?? s 60H(1) (but s 60HB may apply and conflicts with s 60H(1))</td>
<td>?? s 60H(1) (but s 60HB may apply and conflicts with s 60H(1))</td>
<td>?? s 60H(1)(d) (but s 60HB may apply and conflicts with s 60H(1))</td>
</tr>
<tr>
<td><strong>Unpartnered woman (at time of conception) who gives birth</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intends to parent with married or de facto partner at the time of birth</td>
<td>Yes. s 60H(2)</td>
<td>?? s 60H(3).65 presumptions may apply (ss 69Q-69T) but subject to rebuttal</td>
<td>No. Genetic claim to parentage is not excluded.</td>
</tr>
<tr>
<td>Intends to parent with a genetic parent (who is not her partner)</td>
<td>Yes. s 60H(2)</td>
<td>n/a</td>
<td>?? presumptions may apply (ss 69Q-69T)</td>
</tr>
<tr>
<td>Intends to parent with a non-genetically related person (who is not her partner)</td>
<td>Yes. s 60H(2)</td>
<td>n/a</td>
<td>No claim to parentage</td>
</tr>
<tr>
<td>Does not intend to parent, as the child is born pursuant to a surrogacy agreement</td>
<td>?? s 60HB may apply, s 60H(2)</td>
<td>n/a</td>
<td>?? s 60HB may apply, genetic commissioning parent not excluded, presumptions may apply (ss 69Q-69T)</td>
</tr>
<tr>
<td><strong>Genetic mother who does not give birth</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Partner of woman who gives birth at time of conception, intend to parent together</td>
<td>Yes. s 60H(1)</td>
<td>Yes. s 60H(1)</td>
<td>Yes. s 60H(1)(d) excludes any biological claim to parentage</td>
</tr>
<tr>
<td>Partner of woman who gives birth at time of birth, intend to parent together</td>
<td>?? presumptions may apply (ss 69R &amp; 69S) but subject to rebuttal</td>
<td>Yes. s 60H(2)</td>
<td>?? Genetic claim to parenthood is not excluded, leaving open the possibility of the sperm donor claiming parenthood</td>
</tr>
<tr>
<td>Not ever the partner of the woman who gives birth, but intends to co-parent</td>
<td>?? some presumptions may apply (ss 69R &amp; 69S) but subject to rebuttal</td>
<td>?? No claim of parenthood available to partner of this person, unless he</td>
<td>?? Genetic claims to parentage are not excluded</td>
</tr>
</tbody>
</table>

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64 Theoretically, the third person might also include a known egg donor to a heterosexual or lesbian couple, or a known sperm donor to a heterosexual couple.

65 Applies to men only, no laws prescribed at present.
<table>
<thead>
<tr>
<th>genetic father who is not the partner of the woman who gives birth (at either conception or birth)</th>
<th>is the biological father, in which case presumptions may apply (ss 69Q-69T).</th>
<th>depends on the relationship status of the woman who gives birth</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does not intend to parent</td>
<td>Yes, not a parent</td>
<td>Yes, not a parent</td>
</tr>
</tbody>
</table>

### Intends to parent together with a woman who had a partner at the time of conception (who consented to the ART)

<table>
<thead>
<tr>
<th></th>
<th>No. s 60H(1)(d)</th>
<th>No claim of parentage available to partner of this person</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intends to parent together with a woman who was unpartnered at the time of conception</td>
<td>?? s 60H(3), presumptions may apply (s 69Q-69T) but subject to rebuttal</td>
<td>No claim of parentage available to partner of this person</td>
</tr>
<tr>
<td>Intends to parent, either alone or with a partner, as child born pursuant to a surrogacy agreement</td>
<td>?? s 60HB may apply, otherwise presumptions may apply (s 69Q-69T) but subject to rebuttal</td>
<td>?? s 60HB may apply, otherwise no claim of parentage available to partner of this person</td>
</tr>
</tbody>
</table>

The table demonstrates clearly the problems with application of the provisions as currently constructed to emerging family forms. There is clearly a need to:

- Clarify who are a child’s parents where a woman who is not married or in a de facto relationship at the time of conception gives birth via ART; and
- Make provision for children born overseas to Australian parents via surrogacy.

However, the table demonstrates that unless the intention of participants at the time of conception is taken into account, a determinative provision would fail to accommodate at least some intended family forms. This raises the question of whether it is defensible to prefer some family forms over others. At the moment where a (legally recognised) couple conceives a child via ART with the intention of raising that child as a two parent family, the law reflects the parenting intentions of the family. Otherwise, it does not. Multiple claims may be made to parentage, and at the end of the day a biological claim is prioritised over others. Parentage depends largely on the relationship status, at the time of conception, of the woman who gives birth. This is a problematic criteria, as it doesn’t reflect the diversity of circumstances in which children are conceived via ART.

In New Zealand parentage no longer depends upon the relationship status of the woman who gives birth. The distinction between parentage of children conceived via ART to women who were married or unmarried at the time of conception was removed by the New Zealand

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66 No laws prescribed at present.
67 No laws prescribed at present.
legislature in 2004 when it amended the *Status of Children Act 1969*. Judicial discussion had demonstrated a view that the distinction was warranted on the basis that there was a need to protect children conceived to unmarried women from “fatherlessness.” Notwithstanding the judiciary’s concerns, the *Status of Children Amendment Act 2004* (NZ) inserted a Part 2 with the stated purpose of removing uncertainty and facilitating recognition of co-mothers. The Amended Act extinguishes the parental status of a donor “for all purposes” (ie, not restricted to the Act) regardless of whether the woman who gives birth is partnered (married, in a civil union or a de facto relationship with a man or a woman) or a single woman acting alone. A male or female partner of a woman who gives birth, who consented to the ART procedure, is “for all purposes” the parent of the child.

The diversity of intended family forms outlined in the above table raises two issues with an approach that imposes a blanket inclusion of the partner of the woman who gives birth and exclusion of other donors of genetic material. First, it does not account for surrogacy arrangements. Secondly, it does not account for situations where a donor who is not the partner of the woman who gives birth intends to parent the child (either as a second or third parent). The first problem could be avoided by enabling courts to treat surrogacy cases separately to other ART situations, and take account of the intentions of the participants in determining parentage. The second problem would require a shift from the two parent assumption that underlies parentage laws. It may be appropriate to take into account whether donors were known or unknown, whether there were clear agreements about parentage intentions, and what determination about parentage would support the child’s best interests.

**RELEVANCE OF INTENTION**

In the ART context, a person who is not a biological parent has often arranged for the child’s conception. The person has intended *from the time of conception* to be the parent for the child, and this intention has usually been discussed and agreed by the other participants. Intention to parent or acceptance or performance of parental responsibilities has no weight in determining parentage. Section 60H(1) suggests a notion of intended parentage through the use of the phrase “other intended parent”. This is because the reality in ART is that intended parenthood is not determined by biology. However, the law as it currently stands (a) only takes account of the “intention” of partners of woman who conceived via ART and (b) assumes the intention rather than taking account of actual intentions. The obvious question is whether or not, in the ART context, the subjective intention of the participants should be relevant to questions of parentage. Participants might include: genetic parents (intended parents, known or unknown donors), gestational mother (intended parent or surrogate), and the partners of the gestational mother and genetic father (male or female).

There are dangers in inviting evidence of intention in parentage cases, as there may be cases where there were misunderstandings or lack of clarity about intentions. It may become a

68 The New Zealand case law is examined in more detail in Olivia Rundle, “Following the Legislative Leaders: Judicial Recognition of Same Sex Couples in Australia and New Zealand” Chapter 5 in Daniele Gallo, Luca Paladini and Pietro Pustorino (eds.) *Same-Sex Couples Before National, Supranational and International Jurisdictions* (forthcoming 2013) Springer. I can provide copy of the chapter on request.


cumbersome investigation in some instances. However, I argue that where a child has been conceived via ART the actual intention of the participants should be more explicitly relevant to the court's determination in addition to evidence of biological parentage. It is inappropriate to determine the matter by biology alone, as this is often contrary to the parenting reality for the child.

Because of the approach that has been taken to surrogacy in Australia, it is not necessary to deal with it in the same provisions as apply where the woman who gives birth intends to parent. As noted above, surrogacy involves a transfer of parentage after the birth of the child. Therefore, s 60H only needs to deal with parentage at birth. There does need to be clarity that when a surrogacy provision applies, s 60H does not.

There is a clear need for the FLA to enable courts to determine parentage of children born overseas via surrogacy. These arrangements fall outside the jurisdiction of the state and territory surrogacy laws. Specific provisions are necessary, as the application of other provisions has proved inadequate.

**CONCLUSION**

In considering law reform regarding parentage at birth of children conceived via ART, I recommend that the following be taken into account:

- That there be no blanket distinction depending upon the *relationship status* of the woman who gives birth.
- That the *intention* of participants be *explicitly relevant* to determination of parentage (in addition to biological parentage).
- That special legislative provisions be constructed to deal *comprehensively* with children conceived via ART so that the biological presumptions do not apply to these cases.
- That in *appropriate cases* it be possible for *more than two people* to be treated as parents (at least for the purposes of the FLA, ideally for all purposes).

Additionally, there is a need for:

- Commonwealth laws to recognise state and territory parentage provisions;
- Commonwealth agencies (eg Immigration, Social Security, Family Services) to recognise parentage consistently;
- Family Court determination of parentage in surrogacy cases where no state or territory parentage order has been made; and
- Declarations of parentage to be made for all purposes (not just for FLA) in ART cases.

The families who are affected by the current uncertainties in the FLA are a small proportion of Australian families. However, the children born into these families deserve certainty and sensible outcomes when it comes to the question of their parentage. The judiciary must be provided with a legislative framework that enables them to grant children their fundamental human right to know and be cared for by their parents. When it comes to the benefits of parentage (as opposed to the separate question of knowledge of genetic heritage), I argue that children need to know – “who made me?” and “who brought me into the world wanting to care for me?” These are the questions that parentage at law should answer for children. Like
adoption, it is appropriate that surrogacy continue to be dealt with by a transfer of parentage after birth. The family courts should be equipped to determine such applications where the state and territory provisions have not.

Thank you again for the opportunity to contribute to the FLC’s consideration of these issues. I hope that this submission has been of some assistance in your important work.

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