WHAT IS A PARENT IN 2020?

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FOLEY'S LIST

It might seem like a simple question, "What is a parent?" In 1975 when the *Family Law Act 1975* (Cth) ("the Act") was passed, our law makers did not consider it necessary to define what a "parent" is, and to this day, the term in still not expressly defined in the Act. However, in 1975, the world was a different place. Over the past 45 years there have been significant social, medical and legal changes in our community.

In some cases, "What is a parent?" is not a simple question. It is a question that the Full Court of the Family Court and the High Court have recently grappled with. Cases involving blended families, artificial conception procedures, informal gamete donation and surrogacy have become increasingly common in our practices.

THE LEGISLATION

Under the Act, to find out who can be a parent, it is apposite to start by considering the definition of a child. A "child" is defined in s.4 of the Act to be a person under the age of 18 and includes adopted and stillborn children. This definition is broad and comprehensive. Conversely, in that same section, "parent" is defined to include an adoptive parent but the term is otherwise left open and undefined.

Apart from those definitions, we are directed by s.4 of the Act to Subdivision D of Division 1 of Part VII. That subdivision is headed, "**Interpretation – how this Act applies to certain children**". It defines the situations in which a child is a child of a person, or a child of a marriage, or other relationship. Section 60F defines children of a marriage to include adopted children, children born before marriage and a child deemed to be a child of the husband and wife under s.60H(1) or s.60HB. Note, s.60HA provides a similar definition for children of de facto partners.

Section 60H deals with children born as a result of artificial conception procedures. The upshot of s.60H is that a child born by IVF is the child of the birth mother and her husband or de facto partner (called "the other intended parent") whether or not the child is biologically their child, and, as we will discuss later, regardless of the gender of the other intended parent. This is subject to either:

1. the procedure being carried out with the consent of the birth mother, the other intended parent and the donor of the genetic material; or
2. Alternatively, the child being their child under a prescribed law of the Commonwealth, or of a State or Territory.

Note, consent to artificial conception procedures by the birth mother's live-in partner is presumed, unless on the balance of probabilities, the person did not consent. So, if a person is living with the birth mother in a de facto relationship (as defined by s.4AA of the Act) and she gets pregnant by IVF, consent is presumed.

Importantly, s.60H expressly says that if a person other than the birth mother and the intended parent provides genetic material, the child is not a child of that other person. Therefore, if a "sperm donor" is not in a de facto relationship with the birth mother, the child is not his child and he does not have rights and responsibilities in relation to the child, unless the court orders to the contrary.

Section 60H also says that irrespective of whether or not the birth mother is married or in a de facto relationship, the child born by IVF will be the child of the birth mother, regardless of whether or not the child is biologically her child, if a prescribed law of the Commonwealth, a State or Territory says so. It also says that the child will be the child of a man, regardless of whether or not the child is biologically his child, if a prescribed law of the Commonwealth, a State or Territory says so. In other words, a sperm donor can be a parent for the purposes of the Act if a state law recognises him as such. In Australia, no States or Territories have passed laws to that effect.

Section 60HB applies to surrogacy arrangements. This is a short and problematic section of the Act. It says that for the purposes of the Family Law Act, if a court has made an order to

this effect under state law, then a child is a child of one or more persons, or each of one or more persons is a parent of a child. In other words, s.60HB leaves it up to the States and Territories to legislate on parentage of children born under surrogacy arrangements. Unlike s.60H, this section does not make any reference to biology or living arrangements.

If a child is born from international commercial surrogacy, which is not legally recognised in the State of Victoria, then the child's carers have no status as parents. The child's parents under the Act are the birth mother and her husband/partner, if she has one – usually people who have no physical, emotional or cultural connection with the child after the child is born. They typically sign a contract in which they relinquish all rights and responsibilities for the child in favour of the child's surrogate "parents" who become the child's primary carers.

The child's primary carers, one of whom may typically have provided genetic material for conception of the child, are obviously people who are significant persons in the child's life and can apply for orders for parental responsibility and for the child to live with them. Under s.64C, a parenting order can be made in favour of a parent of a child or "some other person". Parenting orders are widely defined in s.64B to include orders about persons with whom a child lives, spends time and communicates, orders about the allocation and exercise of parental responsibility and orders dealing with any other aspect of the care, welfare or development of the child.

If an order is proposed to be made in favour of someone who is not a parent, grandparent or other relative of the child, special conditions apply under s.65G of the Act. The parties must have a conference with a family consultant to discuss the matter, unless the court is satisfied that there are circumstances that make it appropriate to enter the parenting order sought without the involvement of a family consultant. This is obviously a protective measure to ensure that the court has independent evidence about the child's best interests. Bearing in mind there are typically no contradictors in proceedings about children who are born from artificial conception procedures, a Family Report is usually required in such cases.

One of the purposes of meeting with a family consultant may also be to explore how the "parents" intend to educate the child about the way they were conceived and, if relevant,

their ethnic and cultural background. Consideration must also be given by the court to the appointment of an Independent Children's Lawyer.

The *Family Law Rules 2004* (Cth) ("the Rules") set out detailed requirements that must be met for parenting orders to be made in relation to children born under surrogacy arrangements: see rules 4.32 to 4.37. The evidence required includes the surrogacy agreement, information about the applicant's circumstances, the surrogate mother's circumstances, proof of the surrogate's informed consent and receipt of legal advice and documents to verify the child's identity and legal status. This includes DNA test results, birth certificate, citizenship certificate and proof of legal entry to Australia. In a relatively unregulated industry in which there is scope for exploitation, it is not surprising that the Family Court is meticulous in requiring compliance with its Rules.

The upshot of all of this is that whilst there is a presumption of equal shared parental responsibility under the Act in favour of the biological parents of a child, regardless of whether or not they involved in the care of the child, the primary carers of a child born out of surrogacy have no presumption in their favour of parental responsibility. They must bring evidence before the court in support of their application for parenting orders to have legal responsibility for the child.

When it comes to equal shared parental responsibility, that has long been the case. It's an evidentiary question. In the case of *Re Mark: an application relating to parental responsibilities* [2003] FamCA 822 at [83], Brown J held that the court will look at the degree to which a person has "shared the responsibilities which routinely fall upon parents". This suggests that it is worthwhile establishing boundaries around the participation of donors (of genetic material) and other caregivers in children's lives as early and as consistently as possible.

But the question remains, once all of the legal requirements have been met, can the applicant, or applicants, be the child's "parents" if a child is born from surrogacy arrangements? At present, the answer is no. They are not parents under s.60H and whilst they can have parenting orders made in their favour, they cannot apply for a declaration under the Act that

they are "parents". The only sections of the Act that could be relied upon to seek such a declaration are s.69VA or s.67ZC.

Section 69VA is contained in Subdivision E – Parentage Evidence in Division 12 of Part VII of the Act, which deals with parentage testing procedures. It says that:

> *As well as deciding, after receiving evidence, the issue of the parentage of a child for the purposes of proceedings, the court may also issue a declaration of parentage that is conclusive evidence of parentage for the purposes of all laws of the Commonwealth.*

There are two problems with relying on this section to seek a declaration of parentage in this context. First, there must be parentage evidence, which in the context of Subdivision E means evidence resulting from parentage testing (such as DNA sampling and testing). Such evidence would not support the case of a non-biological parent, and biology is usually not the issue because the child's genetic relationship to each of its carers is known. Secondly, deciding the issue of parentage must be for the purposes of the proceeding. In other words, the declaration of parentage is a corollary to the main issue, for example, child support. If the main purpose of uncontested proceedings is to obtain a declaration of parentage, then the Full Court has said that s.69VA cannot apply.[1]

The other potentially useful section of the Act, s.67ZC, is like a *parens patriae* power. It says that the court has the jurisdiction to make orders relating to the welfare of children, having regard to the best interests of the child as the paramount consideration. Is a declaration that a person is a child's parent an order that relates to the welfare of that child? The Full Court in *Bernieres and Anor & Dhopal and Anor* [2017] FamCAFC 180 said this section could not be relied upon to obtain a declaration of parentage in relation to a child born from surrogacy. First, s.67ZC arguably only applies to a "child of the marriage" and secondly, s.60HB specifically relates to surrogacy arrangements and therefore covers the field.

This is not settled law. As the Full court acknowledged in *Bernieres*, s.67ZC has been relied upon in cases about children with gender dysphoria who were not technically "a child of the

[1] *Bernieres and Anor & Dhopal and Anor* [2017] FamCAFC 180 at [98] – [99]

marriage": see for example *Re Lucy (gender dysphoria)* (2013) Fam LR 540. In that case, Murphy J made an order under s.67ZC authorising the hormonal treatment of a child in circumstances where the child had no parents and was under the guardianship of the Chief Executive of the Department of Community, Child Safety and Disability Services in Queensland (being a referring state under s.69ZE and s.69ZH of the Act). The "bundle of rights" that the head of the Department had as guardian of the child equated to parental responsibility and therefore was sufficient to attach to s.67ZC. So, arguably, if a person has full parental responsibility, they could come within the ambit of s.67ZC. Also, applying the reasoning of the High Court in the subsequent decision of *Masson v Parsons* (discussed below), it may be arguable that the express provisions of s.60HB are not exhaustive.

From a practical perspective, how much does a formal declaration of parentage matter? Does it really matter if a person can call himself or herself a parent when they can legally have all of the rights and responsibilities of parents granted to them by the court? The answer to that question may well be "yes", as there are some provisions of the Act and presumptions that only apply to parents. For example, s.60B(1) provides that one of the objects of the Act is to ensure that children have the benefit of *both* of their parents having a meaningful involvement in their lives. When determining what is in a child's best interests, s.60CC says a primary consideration is the benefit to the child of having a meaningful relationship with *both* of the child's parents.

There is also the practical reality that separating same-sex couples can – and do – obtain parenting orders under Division VII of the Act for parental responsibility and live with and spend time with arrangements, however, the pathway to those orders is potentially made more complex by reason of the parties not being legal parents. An example of that is s.61C of the Act. As we know, many practitioners do not pursue orders for parental responsibility at an interim stage. Partly that is because s.61C says that, as a basic position, parents share all of the rights, duties and responsibilities of parenthood, so there is no acute need for an interim order. Also, evidentiary issues, and the presumptions under s.65DAA, mean that this is often more appropriately dealt with at final hearing. However, for families in which one or both parents, in the social sense of the word, are not parents within the meaning of the Act,

it appears that the basic position of s.61C is not open to them and the rights, duties and responsibilities of parenthood are at large.

THE CASE LAW

The debate has been opened up considerably since the High Court delivered judgment in the case of *Masson v Parsons* [2019] HCA 21. The case was widely reported in the media.

In that case, the appellant (whom the court termed "Robert Masson") was a gay man who had provided his semen to the first respondent (she was "Susan Parsons"), a lesbian with whom he had a close and longstanding friendship, so that she could artificially inseminate herself and have a child. He intended to support and care for the child as a father and his name was entered on the child's birth certificate. Susan subsequently started living with her female partner in a de facto relationship and they later had another child with a different sperm donor. Her partner was the second respondent in the case and there was no question that she was a legal parent of the second child, courtesy of s.60H.

Robert was actively involved in the lives of both children, although the High Court case was only about the elder child, who was his biological daughter. By the time the case reached the High Court, the child was around 13 years of age.

Robert paid child support for the elder daughter and spent five nights per fortnight with her. He shared half of her school holidays and special occasions with her. The trial judge determined that he had an extremely close and secure relationship with the child, one that had been fostered cooperatively by Robert, Susan and Susan's partner. Problems had only arisen when Susan and her partner decided to relocate to New Zealand and take the children with them. Robert opposed the relocation and the co-parenting relationship broke down.

The trial judge, Cleary J in the Family Court, found that Susan's partner was not an intended parent of the first child because Susan and her partner were not living in a de facto relationship at the time of conception. Her Honour also found that the Robert was not a parent under s.60H of the Act. Her Honour did, however, follow the reasoning of Cronin J in *Groth v Banks* (2013) 49 FamLR 510 and held that s.60H expands, rather than restricts, the

categories of people who can be parents. Accordingly, her Honour found that Robert was a parent of the child within the ordinary meaning of that word.

Consequentially, her Honour did not permit the relocation to New Zealand. Even so, her Honour did not order equal shared parental responsibility between Robert and the two mothers due to the high level of conflict between them, but the mothers were required to consult with him and keep him informed about decisions they made. Her Honour ordered that both children spend substantial and significant time with Robert.

The mothers successfully appealed to the Full Court of the Family Court. The Full Court found that the trial judge erred in finding that Robert was the parent of the elder child. There were several grounds of appeal, but essentially two arguments won the day. First, there was an irrebuttable presumption under state law, being the *Status of Children Act 1996* (NSW), that the biological father of a child conceived by a fertilisation procedure is not the child's father. Pursuant to s.79(1) of the *Judiciary Act 1903* (Cth), this provision in NSW was "picked up" and had to be applied by the Family Court. Section 79(1) says:

> *The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.*

The Full Court held that the Family Law Act had not "otherwise provided" that a donor of genetic material could be the parent of the child. Section 60H was consistent with the NSW provisions. As there was no inconsistency, the irrebuttable presumption under the NSW law must be applied.

Secondly, when considering the children's best interests, the Full Court said that the trial Judge had erroneously determined that Robert was the parent of the elder child and there was no provision in the Act to support that finding. Whilst the definition of a parent under s.60H was not exhaustive, the *Status of Children Act (NSW)* had to be applied pursuant to s.79(1) of the *Judiciary Act*. The Full Court canvassed the authorities up until that point and

held that the trial judge was in error in finding that s.60H expanded rather than limited the definition of “parent”.

The trial judge had found that the father, Robert Masson, was a legal parent within the ordinary meaning of that word. Thrackray J sitting in the Full Court said that the logical consequence of that would be that a child could have more than two parents, which would be “awkward” when applying provisions of the Act that clearly refer to “both” parents.

Robert Masson successfully appealed to the High Court. The court unanimously held that s.79(1) of the *Judiciary Act* did not apply in these circumstances. Section 79(1) did not apply because it was designed to pick up gaps in laws governing procedure and evidence when courts are applying federal laws, not to add to or subtract from laws that are determinative of rights and duties. The law in question was an irrebuttable presumption under a state Act that was not procedural in nature, but rather was determinative of a person’s rights and duties. Furthermore, the court held that s.79(1) did not apply because Commonwealth law had “otherwise provided.”

The plurality in the High Court held at [26] that s.60H is “not exhaustive of the persons who may qualify as a parent of a child born as a result of an artificial conception procedure”. The plurality was also cognisant that the Act contains “no definition of ‘parent’ as such”. Their Honours observed that “a court will not construe a provision in a way that departs from its natural and ordinary meaning unless it is plain that Parliament intended it to have some different meaning.” The majority judgment contains a survey of various provisions of the Act and comes to the conclusion that there was “no basis … to suppose that Parliament intended the word ‘parent’ to have a meaning other than its natural and ordinary meaning” in the text, structure or purpose of the legislation. The primary judge had been correct in finding that s.60H expands rather than restricts the categories of people who can be parents of children born by artificial conception procedure.

The High Court went on to say that whether or not a person qualifies as a parent is a question of fact and degree to be determined according to the ordinary, contemporary Australian understanding of “parent” and the relevant circumstances of the case at hand.

WHAT NOW?

If being a parent is a question of fact and degree, then where is the line drawn? Robert Masson was heavily involved in the child's parenting from the time of her birth, which was the intention of the parties at the time the child was conceived. That intention was given effect to over the first decade of the child's life. He had assumed financial responsibility for her and was more than an "alternate weekend dad". But what if the evidence had been equivocal about the extent of this involvement, for example if he had been involved in the child's life but had spent less time with her and could not afford to financially support her?

How would the High Court have ruled on an application for a declaration of legal parentage if Robert not been such a "hands on" father as he had been in that case? For its part, the High Court did not consider it necessary to rule on that issue as it was beyond the factual ambit of the matter before it, saying it was unnecessary to decide whether a man who relevantly does no more than provide his semen towards an artificial conception procedure may fall within the ordinary accepted meaning of "parent" (at [55]). However, from a first principles analysis, if his involvement had been less, his case would likely not have succeeded.

In *Masson v Parsons*, the father was one of only two legal parents, as the birth mother's de facto partner did not qualify as a parent of the elder child under s.60H of the Act. What if Susan Parsons had started living with her partner in a de facto relationship earlier than she did – could the child have had three legal parents within the ordinary meaning of that word? As the law stands, no.

What if Robert Masson had pressed for an order that he was the parent of the younger child, with whom he was also actively involved, but who was not his biological child? The answer to that question would seem to be a "no" as well, even though he was parenting both children in the same way and they were both spending five nights each fortnight with him. The younger child already had two legal parents according to s.60H, being her birth mother and her defacto partner.

We may ask, how different is the real-life situation of primary carers of children born from artificial conception procedures, including surrogacy from that of adoptive parents, who are recognised as legal parents under the Act? In a practical sense, no different at all.

The High Court told us in *Masson & Parsons* that the Act is to be the sole and exclusive source of law in Australia on issues of parentage. There is no scope for the operation of state legislation, except as expressly prescribed in the Act, as in s.60HB. However, we might ask whether the Family Law Act, as it currently stands, adequately deals with all of the issues that arise in modern Australian families. One of the reasons for this is that s.60H, on a plain reading of its wording, applies readily to lesbian couples, but not to gay couples in similar situations.

Bernieres & Dhopal (2017) 57 FamLR 149 makes it plain that s.60H uniquely applies to children born of artificial conception procedures. Do informal conceptions count as artificial conceptions within the scope of that statutory term? This query reflects the origin of the provision as one intended to deal with IVF and related procedures for infertile heterosexual couples. With successive legislative amendments, as well as changing social mores, the courts have proved flexible in their interpretation of the provision. *Masson & Parsons* stands as authority for the proposition that "artificial insemination conducted privately and informally", as occurred in that case, is a type of artificial insemination for the purposes of the Act. This aspect of the case was not challenged on appeal to the Full Court, nor before the High Court. The recent case of *McAuley & Salberg* [2020] FCCA 1538 is another example of s.60H being applied in this way.

The application of s.60H to lesbian couples is perhaps more a happy accident than legislative design, because of the genesis of the provision back in 1987 as applicable to married couples. It has been through some drafting changes since then, as recently as 2008, but still contains this core inconsistency that lesbian couples are covered but gay couples are not.

Let's assume that the mothers in *Masson v Parsons* were in a de facto relationship at the time of conception of the first child, as well as at the time of conception of the second child. The children would have had the same birth mother, the same other "intended parent", and different sperm donors. Both women consented to the carrying out of the procedures, and

so too did each of the men who donated their sperm. By operation of s.60H(1)(d), both of the children would have had the same legal parents, being the mothers. Robert Masson would not have gone to the High Court because s.60H would have shut him out completely from legal parenthood.

The plurality judgment in the High Court does not engage with the potential for a child to have two legal parents and a third person (for example, a sperm donor) involved in their life as a parent, in keeping with rights, duties and responsibilities of parenthood. Is this parenthood within the ordinary meaning of the word? Is it any different because there are two legal parents already?

In this paper, we have adopted the "ordinary meaning" test, as set out by the plurality in *Masson v Parsons* at [24], [27], [29], [44], [45], [51] and [53] of their reasons for judgment. However, at other paragraphs, although far fewer of them, the plurality also refer to "natural and ordinary" meaning (see eg at [26] and also picked up in the headnote). The word "natural" is an interesting choice on the part of the plurality, as it imparts connotations of genetic connection and male/female binaries in parenthood. But clearly s.60H moves beyond both of those concepts by legislative design. Arguably, as a legal test, "ordinary meaning" is sufficient without the gloss of "natural", and it may have been what the plurality intended, given the more frequent reference to "ordinary" sans "natural". We respectfully suggest that the test is properly confined to "ordinary", without more.

This lends itself to a bigger question of how many parents can a child have by definition? Biologically, only two, but the man who provides genetic material, "the sperm donor", is legislatively trumped by the husband or the de facto partner (of any sex) of the birth mother under s.60H. That would seem to be the case no matter how involved the sperm donor was in the child's life. If s.60H expands rather than restricts the categories of people who can be parents, then it remains to be seen how far the courts will go in expanding the definition of a parent.

It is clear that more than two people can have parental responsibility and seek parenting orders, but that does not make them legal parents. It might make administrative tasks easier

for the child's carers perhaps if they were legal parents, for example, when applying for a passport for the child, but in the absence of litigation about parental rights and responsibilities, it may not impact much on the child's day to day care and wellbeing. However, if there is litigation as a result of the breakdown in the co-parenting relationship, then the impact can be hard-hitting, as we saw in *Masson & Parsons*.

From a psychological perspective, we might also ask to what extent is it important to a child's sense of identity and sense of security to have one, two or more legal "parents" in keeping with the social and emotional bonds in their family unit? That would be an interesting question to put to a panel of child psychologists. In Ontario, Canada, it has been legally recognised since 1 January 2017 that a child can have up to four legal parents, subject to an agreement being signed by the child's parents before the pregnancy. Leading up to that legislative change, in the case of *A.A v B.B.* 2007 ONCA 2 (CanLII), the appeal court of Ontario held that a child could legally have three parents and relied on the *parens patriae* power of the court to bridge the gap left by legislative definition.

There are public policy considerations in this debate, quite apart from the legal issues. For example, some have argued that an expansion in the definition of parent may act as a disincentive to potential sperm donors, who may want some limited involvement in the child's life, but not to be exposed to all the responsibilities of parenthood, in particular the financial obligations that go with it. On the other hand, there is the bigger picture of social legitimacy. Same-sex couples can marry in Australia, so it stands to reason that children born of and into same-sex families ought be able to enjoy the social legitimacy that comes with legal parenthood.

The concept of parental responsibility may also be expanding to take into account other changes in our community. It seems possible now for a child to take on parental responsibility for themselves, at least in respect of health matters. There is a line of cases in the last decade where that was permitted, in the context of childhood gender dysphoria: see *Re Isaac* [2014] FamCA 1134 and *Re Shay* [2016] FamCA 998, both cases having been decided by Cronin J. The

children in those cases were in their late teens and were considered *Gillick* competent[2]. This is an English principle that has been adopted by Australian courts and is now well-established in our law. Children are deemed *Gillick* competent if, before they attain the age of 18 years, they have sufficient understanding and intelligence to consent to their own medical treatment without parental consent.

Cronin J went beyond finding that the children in those gender dysphoria cases were *Gillick competent* and gave them parental responsibility under the Act to make decisions for themselves about their medical treatment. It is a novel approach, and certainly has not been explored beyond the scope of gender identity dysphoria cases and has not been subjected to review by the Full Court.

It is an interesting concept that a child can assume partial parental responsibility for himself or herself, but some parents, in the ordinary meaning of that word, who have raised their children from birth, are still waiting for the right to call themselves parents at law. Arguably, this is an area of the law that needs to be reviewed to take into account our changing concepts of family.

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[2] *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] UKHL 7.