

De facto Relationships, Same-Sex and Surrogate Parents: Exploring the Scope and Effects of the 2008 Federal Relationship Reforms

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INTRODUCTION

In October 2008 a suite of major reforms concerning family relationships passed federal parliament.¹ Broadly speaking these reforms include same-sex couples within the category of 'de facto relationship' in all federal laws (previously limited to unmarried heterosexual couples), extend the definition of 'parent' and 'child' in much federal law to include lesbian parents who have a child through assisted reproductive means and, in more limited circumstances, to include parents who have children born through surrogacy arrangements. The reforms also bring de facto couples, both heterosexual and same-sex, from the territories and referring states (which to date do not include Western Australia and South Australia)² within the federal family law property division regime.

Australia differs from comparable jurisdictions such as the United Kingdom and United States in that it has consistently extended rights to unmarried couples over the past 25 years, and in the past decade has progressively included same-sex couples within this framework, such that the position of married and unmarried couples is now on par in every area of federal law, and virtually all state and territory law.³ The level of inclusion of informal relationships in Australian law is akin to Canada and

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¹ These comprised the following: *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth); *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* (Cth); *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth) and *Evidence Amendment Act 2008* (Cth).

² The referral legislation is: *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW); *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld); *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic); *Commonwealth Powers (De Facto Relationships) Act 2003* (NT); *Commonwealth Powers (De Facto Relationships) Act 2006* (Tas). The *Commonwealth Powers (De Facto Relationships) Act 2006* (WA) referred powers over division of superannuation only.

³ See Reg Graycar and Jenni Millbank, 'From Functional Family to Spinster Sisters: Australia's Distinctive Path to Relationship Recognition' (2007) 24 *Washington University Journal of Law and Policy* 121. Same-sex couples remain excluded from definitions of eligible de facto relationships in adoption law in all states except Western Australia, the ACT and (in limited circumstances) Tasmania: see Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption*, Report (2007); NSW Legislative Council, Standing Committee on Law and Justice, *Adoption by Same-Sex Couples: Final Report* (July 2009).

New Zealand (and, in a more piecemeal fashion, South Africa), with the distinction that those countries also subsequently extended a unitary mode of formal recognition to same-sex couples (being marriage in the case of Canada and South Africa and civil unions in New Zealand).⁴

This article is divided into two main parts, examining the reforms relating to de facto partners first and then exploring those concerning parental status. Changes to both partner and parent categories reflect, to greater and lesser degrees, reforms that have taken place in preceding years in state and territory laws across Australia.⁵ This article will outline the major provisions of the new laws, discuss where they draw upon or differ from earlier models and examine the extent to which the new approaches address 'mischief', such as statutory exclusions, ambiguities or unduly narrow judicial approaches, which have plagued previous definitions. The brief selection of case law available since the amendments will then be critiqued to assess whether the aims of the reforms are being, or are likely to be, met.

I. COUPLES

Prior to the 2008 reforms, there were at least six different definitions of 'spouse' operative in federal law, with an additional five definitions of 'partner' or 'couple', one of 'marital relationship' and four more variations of an 'interdependent' relationship category.⁶ While heterosexual de facto relationships fell within virtually all of the definitions⁷, same-sex relationships were covered only by the very limited 'interdependency' categories.⁸ The 2008 reforms mean that same-sex couples who meet the new de facto relationship definition are now treated as a couple in, among other things,

⁴ See Jenni Millbank, 'The Role of Functional Family in Same-Sex Family Recognition Trends' (2008) 20 *Child and Family Law Quarterly* 155.

⁵ For the background to these reforms see: Graycar and Millbank above note 3 and Millbank, 'Recognition of Lesbian and Gay Families in Australian Law - Part One: Couples' (2006) 34 *Federal Law Review* 1 and 'Recognition of Lesbian and Gay Families in Australian Law - Part Two: Children' (2006) 34 *Federal Law Review* 205.

⁶ See Jenni Millbank, 'Areas of Federal Law that Exclude Same-Sex Couples and their Children: Research Paper', HREOC (2006), Appendix II.

⁷ The only two areas of federal laws that *specifically excluded* heterosexual de facto partners were the *Family Law Act 1975* (Cth) property provisions and the *Members of Parliament (Life Gold Pass) Act 2002* (Cth) (which sets lifetime travel entitlements of federal parliamentarians and their spouses).

⁸ These definitions were operative for the purposes of superannuation death benefits, a limited number of migration visas and defence force employment benefits: above note 6. The *Criminal Code Act 1995* (Cth) was exceptional among federal legislation, as it was the only piece to expressly recognise same-sex partners (from 2004) in the definition of 'close family members': s 102.1(1).

federal superannuation schemes and Medicare benefits (from 1 January 2009); workplace entitlement guarantees (from 1 March 2009) and migration, social security and taxation laws (from 1 July 2009).

In addition to expanding the Family Court's jurisdiction to divide the property of unmarried couples and bringing same-sex couples within the broader federal approach to de facto relationships, the reforms introduce for the first time a uniform, central, federal definition of 'de facto relationship' with criteria for making a determination in cases of doubt. The central de facto definition is contained in s 22C of the *Acts Interpretation Act 1901* (Cth) ('AIA'). This provision (the 'central definition'), reflects out to federal law generally, and is essentially the same as that inserted into s 4AA of the *Family Law Act 1975* (Cth) ('the FLA definition') although there are minor differences, addressed below. While the AIA definition is intended to be of general application in federal law, for proceedings under the FLA it is the FLA definition that will apply.

1.1 Defining De facto Couples

The essence of the new federal definition of a de facto relationship is 'a couple living together on a genuine domestic basis' who are not legally married or related by family. This is almost identical to the definition in use in New South Wales (NSW) and many other states currently. However, unlike NSW, federal law does not include the requirement that there be 'two adult persons'⁹ so mature minors (or those who were minors at the outset of a relationship) are also included.

Federal law picks up from the NSW definition¹⁰ an inclusive list of criteria to be used in determining whether a relationship exists. These factors are:

- the duration of the relationship
- the nature and extent of common residence
- whether or not a sexual relationship exists
- the degree of financial dependence or interdependence, and any arrangements for financial support
- the ownership, use and acquisition of property
- the degree of mutual commitment to a shared life
- the care and support of children
- the reputation and public aspects of the relationship.¹¹

⁹ *Property (Relationships) Act 1984* (NSW) s 4(1).

¹⁰ In turn the NSW criteria, inserted in 1999 were drawn from earlier case law, see *D v McA* (1986) 11 Fam LR 214 at 227 per Powell J.

Like NSW, federal law specifically provides that no factor is *required*.¹² It is clear that case law from the states and territories will be very relevant in helping to determine the existence and duration of contested de facto relationships especially in the early days of the Family Court's jurisdiction.¹³ Note that there is no requirement regarding the duration of the relationship in the actual definition of de facto relationship itself, in either the *FLA* or *AIA*, although there are particular Acts or provisions within Acts which may impose time requirements for specific purposes, such as migration or in order to apply for property orders under the *FLA*.

Overlapping, Multiple or Concurrent Relationships

A major difference with the definition used in state legislation and the new federal definitions is that federal law expressly provides that a person can be in a de facto relationship, even if they are married or living in a de facto relationship with someone else.¹⁴

This provision caused great consternation among Christian groups and members of the Opposition, who characterised it as legalising polygamy and vigorously opposed it throughout the legislative and parliamentary inquiry processes.¹⁵ Such concern was ill-founded in the sense that the Family Court has always had jurisdiction to deal with the disputes of parties to void marriages,¹⁶ including polygamous marriages,¹⁷ without being taken to 'legalise' polygamy. Likewise, state laws have long provided for situations in which there is both a de jure and a de facto spouse, for instance in prioritising spousal categories of claim in intestacy.¹⁸ In property proceedings, in the absence of

¹¹ *Acts Interpretation Act 1901* (Cth) s 22(2); *Family Law Act 1975* (Cth) s 4AA(2).

¹² *Acts Interpretation Act 1901* (Cth) s 22C(3), *Family Law Act 1975* (Cth) s 4AA(3).

¹³ See eg *Robinson v Thompson* (2007) DFC 95-409 in which one party denied the existence of a 19 year same-sex de facto relationship through the duration of the trial.

¹⁴ *Acts Interpretation Act 1901* (Cth) s 22C(5); *Family Law Act 1975* (Cth) s 4AA(5)(b).

¹⁵ See eg Senate Standing Committee on Legal and Constitutional Affairs, *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008, Report* (October 2008) at [3.9]-[3.13]; Parliamentary Debates, *Senate Hansard* Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 in Committee, 16 October 2008, Senator Brandis at 6243.

¹⁶ See eg *Family Law Act 1975* (Cth) ss 4, 71, 112A.

¹⁷ *Family Law Act 1975* (Cth) s 6.

specific legislative provisions, state courts have also found that the category of de facto relationship can at times extend to those in concurrent or overlapping relationships.¹⁹

The Attorney-General's response to the Opposition was that the provision would be 'used most often' when 'a couple has been separated for some time but formal divorce of the original marriage has not been finalised' adding '*only to that extent, in those circumstances, does the legislation apply to concurrent relationships*'.²⁰ With respect to the Attorney, the wording of the legislation is plainly much broader than those circumstances and could, for example, encompass a situation where a person conducted two simultaneous de facto relationships over many years or a long-term affair while still married (well known to relationship lawyers as the 'travelling salesman' cases) if such relationships were also accompanied by a high degree of emotional and/or financial commitment – even if only in the mind of one of the parties. This breadth of approach reflects the developing interpretation of comparable state law and in my view rightly directs the focus of inquiry in any contested relationship upon the degree of commitment to a shared life (and in the case of family law, the extent of contribution to shared property and economic effects of separation) between the partners themselves, rather than on sexual exclusivity or infidelity.²¹

Registered Relationships

In addition to the standard list of criteria for determining a de facto relationship, the *FLA* includes 'whether the relationship is or was registered under a prescribed law of a state or territory'.²² The central federal definition separately provides that any reference to a de facto relationship includes a registered relationship under the prescribed law of a state or territory.²³ This slight difference in drafting means that while registered couples will be taken without further proof to qualify as de facto relationships in most federal law, for family law the registration is merely *one factor to be taken*

¹⁸ See eg *Probate and Administration Act 1898* (NSW) ss 61B, 61D.

¹⁹ See eg *Green & Ors v Green* (1989) DFC 95-075 (NSW CA); *Jones v Grech* (2001) DFC 95-234 (NSW CA).

²⁰ House of Representatives, *Parliamentary Hansard*, Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, 28 August 2008, Robert McClelland at 6542. Emphasis added.

²¹ See eg *Greenwood v Merkel* (2004) 31 Fam LR 571 (NSW SC); *Devonshire v Hyde* [2002] NSWSC 30; *Dridi v Fillmore* [2001] NSWSC 319.

²² *Family Law Act 1975* (Cth) s 4AA(2)(g).

²³ *Acts Interpretation Act 1901* (Cth) s 22A.

into account in determining the existence of the relationship, which could nonetheless be held not to qualify.

Relationship registration schemes currently exist in Tasmania, the Australian Capital Territory (ACT) and Victoria,²⁴ and these are all prescribed in federal law from 1 March 2009.²⁵ While all of the Australian registration and civil partnership schemes to date are open to both same-sex and heterosexual couples, they are likely to be primarily utilised by same-sex couples. Civil union and civil partnership schemes such as those in New Zealand (open to non-nationals and to same-sex and heterosexual couples) and the United Kingdom (limited to same-sex couples with at least one partner who is a British or dual-British national)²⁶ are at present *not* prescribed and so will have no effect.²⁷ Moreover the references to ‘State or territory’ in the legislation appears to indicate a deliberate exclusion of any overseas partnership registration scheme.

‘Living Together’ While not Cohabiting in a Common Residence

The central federal definition clarifies that a couple who are temporarily separated or who are separated by illness or infirmity should still be taken to be living together,²⁸ following the approach of case law from the states.²⁹ It remains to be seen how broadly or narrowly ‘temporarily’ is interpreted in this context, and whether federal courts limit themselves to the designated situations of illness and infirmity. In state case law couples who have maintained separate residences for several years due to work commitments have still been held to be in de facto relationships through

²⁴ See *Relationships Act 2003* (Tas) Part 2; *Civil Partnership Act 2008* (ACT); *Relationships Act 2008* (Vic).

²⁵ Family Law Regulations 1984 (Cth) Reg 12BC, 15AB, as amended by the Family Law Amendment Regulations 2009 (No 1) (Cth).

²⁶ See *Civil Union Act 2004* (NZ); *Civil Partnership Act 2004* (UK).

²⁷ Family Law Regulations 1984 (Cth) Reg 12BC, 15AB.

²⁸ *Acts Interpretation Act 1901* (Cth) s 22C(4).

²⁹ In *PY v CY* (2005) DFC 95-323 the couple had cohabited for nine years, then lived separately for a further three years when the female partner moved away to care for her parents. During those three years, the male partner visited every second week, and towards the end of that time they searched for another joint residence. The trial judge and all three judges of the Queensland Court of Appeal held that the relationship continued through that three year period.

that time,³⁰ as have couples involuntarily physically separated by, for example, gaol terms of several years' duration.³¹

It is unclear why the *FLA* definition does not also include the *AIA* clarification of 'living together'. However the Family Court is still at liberty to consider the state case law on point, which may in fact lead to a broader approach than the central federal definition. State courts have developed an increasingly liberal approach (although not uniformly so³²) to the question of 'living together' to encompass separate residences and voluntary physical separations within an understanding of couples being 'together' 'in the manner that suits them'.³³ So for example couples sharing a life together but maintaining separate residences for some years before cohabiting,³⁴ having adjoining interconnected residences,³⁵ or keeping separate residences for privacy, family disapproval, or other reasons of convenience,³⁶ have nonetheless been held to be 'living together'.

Separations

A major issue that has arisen under the state property division regimes is how to approach the question of when a de facto relationship ends, or how to determine the duration of a relationship in

³⁰ See eg *W v T* (2005) DFC 95-317 where the Queensland Supreme Court held that a de facto relationship existed over a 20 year period, notwithstanding there was a common residence for only the first four years. After that time, the male partner had a job managing a caravan park and stayed overnight at the park four nights a week, and stayed at the residence of the female partner on the other nights.

³¹ In *Howland v Ellis* [1999] NSWSC 1142 the NSW Supreme Court initially held that the de facto relationship ceased when the male partner was removed to gaol even though the couple continued to regard themselves as in a committed relationship, with the female partner visiting prison and awaiting her partner's release for over four years from the time of his incarceration. This was overturned by the NSW Court of Appeal which held unanimously that the involuntary nature of the separation meant that it did not end the relationship: (2001) 28 Fam LR 656.

³² See eg *KQ v HAE* [2007] 2 Qd R 32, 'It would be a wholly exceptional case in which one could conclude that a man and a woman, who have never lived together as husband and wife in a common residence, and who have never made provision for their mutual support, have been "living together as a couple on a genuine domestic basis": per McMurdo P, Keane and Holmes JJA at [20]. In that case the applicant was unrepresented. She had been fined by Centrelink because it determined that she was in a de facto relationship for the purpose of social security law, but she was still held not to qualify under the state property division regime.

³³ See eg *Greenwood v Merkel* (2004) 31 Fam LR 571 (NSW SC) at [15].

³⁴ *Robinson v Rouse* [2005] TASSC 48.

³⁵ *S v B (No 2)* (2004) 32 Fam LR 429 (Qld CA).

³⁶ *Houston v Butler* [2007] QSC 284.

which there have been separations and reconciliations. New South Wales in particular has taken a more formalistic, even literalistic, approach in finding that de facto relationships are ended by temporary separations. Especially in earlier cases, the NSW Supreme Court preferred to find that parties had been in a number of short de facto relationships with each other, rather than one long relationship interspersed with breaks or interrupted by temporary separations.³⁷ The approach taken to separations during a relationship has numerous consequences, including for determining applicability of the new jurisdiction (the *FLA* applies only to de facto relationships that end after 1 March 2009, unless the parties consent), the period over which contributions can be assessed, the length of the relationship in order to qualify for jurisdiction and whether time periods for filing since the end of a relationship have expired. The *FLA*, in common with most state and territory property division regimes,³⁸ requires that a couple have been in a de facto relationship for ‘at least two years’ in order to apply for property proceedings unless there is a child of the relationship or the applicant has made a substantial contribution such that serious injustice would result from a failure to make the order.³⁹ An application for de facto property proceedings under the *FLA* must also be filed within two years of the end of the relationship, although there are exceptions for hardship.⁴⁰

By way of example, in a recent NSW decision the court held that a couple had three short de facto relationships over an eight year period, rather than one relationship; thus it determined that one ‘relationship’ did not meet the required two year duration for jurisdiction to apply for property

³⁷ See eg: *Lipman v Lipman* (1989) 13 Fam LR 1 (parties in a 13 year relationship with a five month separation, the court held that there were two relationships); *Gazzard v Winders* (1998) 23 Fam LR 716 (parties had a 15 year relationship with a six week separation in the midst of it, Powell JA was determined to view it as two separate relationships, but Beazley JA disapproved. The question was not resolved on appeal.) In contrast see: *Jones v Grech* (2001) DFC 95-234 (parties in a relationship over a 32 year period and during several of the early years the male partner was also in a formal marriage. Through some of the years he regularly stayed in the female partner’s premises, and through two periods covering several years, the parties lived full-time in a joint residence. While Powell JA in dissent would have taken into account *only* those contributions made in the final four-year period of cohabitation, and ignored the preceding 28 years of the relationship, the majority judges, Davies and Ipp AJA considered the context of the relationship over the entire period). See also *Milevsky v Carson* (2005) DFC 95-314, where the parties had a relationship over a period of 22 years, with a four year break in the midst of it. In that case the court introduced an ‘aggregate’ approach, treating it as a long relationship comprised of all the years in which the couple were together. The NSW Court of Appeal has since returned to the short separate relationships approach in *Delany v Burgess* (2008) DFC 95-412.

³⁸ The exceptions are Tasmania and the ACT which do not have a required period of cohabitation at all for property division jurisdiction (and which will continue to apply in some circumstances to the property disputes of non-couples), and South Australia which requires three years: see discussion in Jenni Millbank, ‘The Recognition of Lesbian and Gay Families in Australian Law: Part 1 Couples’ (2006) 34 *Federal Law Review* 1.

³⁹ *Family Law Act 1975* (Cth) s 90SB; see also *Property (Relationships) Act 1984* (NSW) s 17, *Property Law Act 1974* (Qld) s 287.

⁴⁰ *Family Law Act 1975* (Cth) ss 44(5) and (6).

adjustment, while another was held to have ended more than two years earlier and thus the application was judged out of time, leaving only one period of the relationship to be assessed.⁴¹ By way of contrast in a 2006 case the Family Court of Western Australia considered the de facto relationship of a couple who had, in the midst of what was ultimately an eight year relationship, separated for one year. At the time of the separation the parties had considered the separation to be final. Thackray J remarked,

I suspect it would only be a lawyer (or Judge) who would be tempted to think Lisa and Peter had two different de facto relationships. Anyone else who knew them would simply have seen them getting back together and resuming their original relationship.

...

Those living in such ex-nuptial relationships, in my view, should be treated in the same way as their married neighbours – after a separation they simply resume their former ‘marital’ relationships – they don’t start another one.

...

Although the de facto marriage may appear to have ended when one party withdraws from the relationship, later events may demonstrate that the relationship was not, in fact, at an end.⁴²

Somewhat ironically, given that Western Australia appears set not to join in the referral of powers, the new *FLA* definition appears to adopt the ‘aggregate’ or ‘hindsight’ approach most strongly championed there. The *FLA* defines the two year period as ‘the period, or the total of the periods’ of the relationship.⁴³

In the case of a shorter relationship, jurisdiction may still be enlivened by the two standard exceptions: injustice or if the parties have a child. A child of the de facto relationship includes a child born to both parties, a child adopted by one party with the consent of the other, and a child born through assisted conception,⁴⁴ as well as a child born through surrogacy if parentage has been transferred through a prescribed state law⁴⁵ (these provisions will be discussed in more detail

⁴¹ *Delany v Burgess* (2008) DFC 95-412 (NSW SC). See also *Horton v Russell* (2006) DFC 95-334 (NSW SC) finding there were six separate de facto relationships between the same couple over a 25 year period.

⁴² *LeMay v Clark* (2006) DFC 95-327 at [29], [33], [35]. Although the court in that case did not distinguish the statutory language of other state jurisdictions in analysing their case law, it is perhaps worth noting that the legislation in Western Australia differs from other states in that it requires the court to consider ‘whether there was any break in the continuity of the relationship, and, if so, the length of the break and the extent of the breakdown in the relationship’: *Family Court Act 1997* (WA) s 205Z(2).

⁴³ *Family Law Act 1975* (Cth) s 90SB(a) (emphasis added).

⁴⁴ *Family Law Act 1975* (Cth) s 60HA.

⁴⁵ *Family Law Act 1975* (Cth) s 60HB.

below). The *FLA* additionally provides that the two year requirement does not apply if the relationship was registered under a prescribed law.⁴⁶

1.2 The New De Facto Property Jurisdiction

In order to have access to the federal family law jurisdiction, separated couples will need to demonstrate that they have a connection with one of the referring states. This requires that:

- one or both of the parties was ordinarily resident there when the application was made and that in addition both members of couple were resident there for a third of the relationship *or* that the applicant had made substantial contributions, or in the alternative,
- both parties were resident in the jurisdiction when the relationship broke down.⁴⁷

The actual property division factors are identical to those that apply to married couples; however, rather confusingly, they are placed in a new part of the Act and numbered in a way that does not reflect the numbering of the pre-existing provisions – so for example the s 79 factors appear for de facto couples under s 90SM, while 75(2) is replicated in 90SF(3).

Some commentators, most notably Patrick Parkinson, have argued that it is not appropriate to bring de facto couples within the same property regime as married couples. Parkinson has argued that sociological evidence demonstrates that the category of ‘de facto relationship’ covers a very wide range of relationships with varying levels of commitment (from those who are just ‘trying out’ a relationship to those who stay together for lengthy periods or who go on to marry) and that de facto couples are, on the whole, less likely than married couples to be financially interdependent, in particular if they do not have children.⁴⁸ Parkinson also argued before the Senate Committee that it is improper to subject unmarried couples to the potential obligation under federal family law to pay lump sum or periodic maintenance (which is not present in many state regimes) when they have the option to marry [if heterosexual] and have chosen not to do so.

⁴⁶ *Family Law Act 1975* (Cth) s 90SB(d).

⁴⁷ *Family Law Act 1975* (Cth) s 90K (1) and (1A).

⁴⁸ Patrick Parkinson, ‘Quantifying the Homemaker Contribution in Family Property Law’ (2003) 31 *Federal Law Review* 1; Parkinson, Submission, August 2008, Senate Legal and Constitutional Affairs Committee, Inquiry into the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008. Parkinson argues that property disputes between unmarried couples without children would be best dealt with using concepts of unjust enrichment and detrimental reliance.

Given that needs adjustments and maintenance orders are relatively uncommon even among married couples,⁴⁹ are based on a discretionary assessment of need, and additionally entail a threshold test of need as well as ability to pay for periodic maintenance, this may not in fact end up being a significant issue in practice for many unmarried couples.⁵⁰ However these arguments about financial interdependence and choice are still worth considering, especially in light of the fact that the property jurisdiction is discretionary and that some judges may hesitate to apply the 'partnership' approach⁵¹ to either the contribution or needs stage of the assessment process for unmarried couples.

While there is some evidence to suggest that married couples in general are more likely than unmarried couples to pool their incomes in a common account, this should not necessarily be taken to mean that unmarried couples are not financially interdependent or are necessarily less interdependent than married couples. Nor does this demonstrate that being unmarried always or often represents a 'choice' to reject the partnership approach to resources within the relationship. First, it is critical to note that general findings on pooling of income may not be sufficiently nuanced; indeed by addressing only marital status these inquiries may overlook other factors that are far more critical to economic interdependence. Recent Australian research by Edith Gray and Ann Evans found that the length of the relationship, the presence of children in the relationship and the purchase of property were more significant indicators of pooled income than marital status.⁵² That research also examined *degrees* of shared income rather than focusing only upon whether there was a total pooling of funds, and concluded that most de facto couples, like most married couples, combined some or all of their income.⁵³

⁴⁹ Belinda Fehlberg, 'Spousal Maintenance in Australia' (2004) 18 *International Journal of Law, Policy and the Family* 1.

⁵⁰ For those who wish to remain consciously financially independent in an unmarried relationship there is also the option of a binding financial agreement. The experience of the family law jurisdiction to date has been that it is often older people who have been previously married who undertake such agreements: see Belinda Fehlberg and Bruce Smyth, 'Binding Pre-Nuptial Agreements in Australia: The First Year' (2002) 16 *International Journal of Law, Policy and the Family* 127.

⁵¹ While there has been some disagreement about the partnership approach in high asset 'special skills' cases, it appears very widely applied in median asset cases: see Nareeda Lewers, Helen Rhoades and Shurlee Swain 'Judicial and couple approaches to contributions and property: The dominance and difficulties of a reciprocity model' (2007) 21 *Australian Journal of Family Law* 123; Helen Rhoades, 'Equality, Needs, and Bad Behaviour: The 'Other' Decision-Making Approaches in Australian Matrimonial Property Cases' (2005) 19 *International Journal of Law, Policy and the Family* 194.

⁵² Edith Gray and Ann Evans, 'Do Couples Share Income? Variation in the Organisation of Income in Dual-Earner Households' (2008) 43 *Australian Journal of Social Issues* 441.

⁵³ *Ibid* at 449-450.

In addition focusing upon shared bank accounts or pooled funds may be misleading when the real question in family law is ensuring a just and equitable response to the economic consequences of relationship breakdown, and involves broadly examining financial and non-financial factors. While heterosexual couples with children are most likely to engage in the enduring gendered division of paid and unpaid labour that disadvantages women (through consequent depressed income earning capacity and lower retirement savings at separation), this paradigm example of economic interdependence should not overshadow the fact that there may be many other forms. Some case examples drawn from state law illustrate vividly how parties may 'choose' to keep separate finances and yet, through the organisation of their labour and/or unequal contributions to expenses, operate by default as an economic unit which on separation results in unfair benefit to one partner at the expense of the other. In the well known NSW case of *Evans v Marmont*, the parties commenced a relationship while in their mid-40s and separated 15 years later.⁵⁴ For the duration of the relationship, the female partner paid for most of the daily outgoings and undertook all of the household labour while the male partner directed all of his available funds towards retirement investments. When the couple acquired property they did so in his name alone so as to preserve the female partner's pension entitlements. From the case report it does not appear that the couple pooled their incomes, yet they clearly divided their assets (him) and expenses (her) based on the understanding that they would be retiring together. Despite the fact that both parties had relatively even earnings through the relationship, at the end of the relationship their division of funds meant that she had assets worth \$50,000 while he had assets worth \$760,000 (perhaps a third of which he had brought into the relationship).⁵⁵ Both partners had retired by the time the case was heard. I would argue that *Evans v Marmont* represents a very good example of a case in which a partnership approach to contribution assessment and a needs adjustment would be merited. It is also a case in which the separate and detailed consideration of superannuation encouraged by the Full Family Court in *Coghlan*⁵⁶ would be critical to a just and equitable result.

In a more recent NSW case concerning a younger couple, *Hayes v Marquis*, the parties had a 10 year relationship which again did not involve pooled finances. The male partner stayed regularly at, and

⁵⁴ *Evans v Marmont* (1997) 42 NSWLR 70. The Court of Appeal sat as a bench of five and by majority rejected the consideration of 'reliance' or 'expectation' factors which could have brought the state jurisdiction closer to the federal family law approach of addressing both contribution and needs factors.

⁵⁵ The trial judge granted \$110,000 to the female partner, increased by the Court of Appeal to \$175,000, representing 27% of the asset pool.

⁵⁶ *Coghlan & Coghlan* (2005) FLC 93-220.

ran a business from, the female partner's rental house in the first six years, and they cohabited full time thereafter. The female partner paid all of the rent and most of the outgoings on the property, undertook all of the household labour and also contributed her unpaid labour to the male partner's business. At the conclusion of the relationship she had no assets, while he had assets of approximately \$520,000.⁵⁷ In this case it appears that the parties 'chose' not to marry for reasons that included the female partner's concern to preserve an entitlement to social security support for her child from another relationship (for whom she received no financial contribution from either the child's father or the male partner) and the male partner's reluctance to undertake an emotional or financial commitment. From one perspective this case could be seen as an example where the partnership approach to financial and non-financial contributions and the ability to take into account future needs should not be 'imposed' on a couple who had chosen not to marry and who so little reflected the ideal of economic partnership in marriage. Yet, conversely, I would argue that this case evinces such an unequal distribution of costs and benefits at the end of a relationship that it amply demonstrates the need for a broad discretionary property jurisdiction such as the *FLA* to be available to unmarried as well as married couples.

II. PARENTS

Since July 2006 a raft of *FLA* provisions further strengthen the importance of legal parentage through, among other things, a presumption that parental responsibility remains equally shared, the elevation to a 'primary factor' of the benefit of a meaningful relationship with both parents, and mandatory consideration of equal time or 'substantial and significant' time with both parents when parental responsibility is shared.⁵⁸ A wide range of other federal laws in areas such as migration, social security and taxation also impact upon parent-child relationships. Yet, as with the category of de facto relationship, federal law has until now proceeded without any form of coherent or comprehensive definition of 'parent' or 'child'.⁵⁹

⁵⁷ *Hayes v Marquis* (2008) DFC 95-415 (NSW CA). At the outset of the relationship the trial judge held that the female partner had assets of \$10,000 and the male partner \$40,000. The female partner was granted \$140,000, representing 28% of the asset pool (assessed as a 25% contribution to assets acquired during the relationship). On appeal the majority determined that the trial judge erred in not accounting for another \$140,000 of the male partner's initial assets and reduced the female partner's award to \$120,000. Einstein J would have reduced the award to \$85,000 using the same formula as the trial judge.

⁵⁸ See *Family Law Act 1975* (Cth) ss 60CC, 61DA, 65DAA, 65DAC, 65DAE.

⁵⁹ For detail, see Millbank above note 6.

In the absence of statutory provision, the second parent in lesbian families who have children through assisted reproductive technology (ART) using donor gametes and parents who have children through surrogacy arrangements were excluded from legal parentage. In lesbian-led families, such children had only one legal parent, the birth mother; while in surrogacy families the gestational mother and her male partner, not the commissioning parents, are accorded legal parentage regardless of the caregiving unit or genetic relatedness. While the 2008 reforms discussed below have added to the statutory categories of parents in the context of assisted conception and surrogacy, the opportunity to provide a coherent overarching definition of 'parent' in the *FLA* and elsewhere was not pursued.

2.1 The Law on Parentage before Amendment

The position of married heterosexual parents conceiving through ART with donor sperm was regularised in the late 1970s and early 1980s across the states and territories (later extended to heterosexual de facto couples and to donor eggs) so that the birth mother and her consenting⁶⁰ male partner are the legal parents of the child, regardless of genetic connection. This status operates from birth and occurs automatically.⁶¹

These state and territory laws differed in their wording,⁶² but reflected the decision in 1980 of the Standing Committee of Commonwealth and State Attorneys-General on uniform legislation on the status of children born as a result of 'artificial insemination'. The Standing Committee agreed that the legislation should provide that:

a husband who consents to his wife being artificially inseminated with donor sperm shall be deemed to be the father of any child born as a result of the insemination;

the sperm donor shall have no rights or liabilities in respect of the use of the semen;
and

⁶⁰ The consent of a partner to the conception is presumed, but such consent can be rebutted on the balance of probabilities by contrary evidence. See: *Marriage of P and P* [1997] FLC 92–790.

⁶¹ The current legislation is: *Status of Children Act 1996* (NSW) s 14(4); *Parentage Act 2004* (ACT) s 11(4); *Status of Children Act 1978* (Qld) s 17(3); *Status of Children Act 1974* (Vic) s 10C(3); *Artificial Conception Act 1985* (WA) s 6(1); *Status of Children Act 1978* (NT) s 5D(2); *Family Relationships Act 1975* (SA) s 10D(1).

⁶² For example in Western Australia the severing provisions originally only applied to married and heterosexual de facto couples and did not apply to single women: *Artificial Conception Act 1985* (WA) s 7. This was amended finally in 2002 to include unmarried women also (with retrospective effect).

any child born as a result of AID (artificial insemination by donor) shall have no rights or liabilities in respect of the sperm donor.⁶³

In 1983 the *FLA* was amended to ascribe parental status to the husband of a birth mother only if state and territory provisions already did so.⁶⁴ This provision was repealed and replaced in 1987 with a new section (originally numbered s60B, later 60H) which ascribed parental status to the husband or male de facto partner of a birth mother either on the basis of his consent or due to prescribed state and territory laws for children born through assisted reproduction.⁶⁵ However this section of the *FLA* did not completely mirror the state and territory Acts. Unlike the matrix of state and territory laws that both sever the link to donors and accord parental status to the birth mother and her partner, the *FLA* only included the *according* of status to the genetically unrelated parent and did not include provisions *severing* the relationship with the genetic parent. Although the section referred to state law it did not clearly pick up, through prescription in the Family Law Regulations 1984 (Cth), most of the relevant state provisions. This led to debate as to whether, for the purposes of the *FLA*, the court was limited to the s 60H definitions⁶⁶ when the child was conceived through ART or whether it could *also* recognise 'natural' or 'ordinary' male genetic parents/sperm donors as legal parents.

⁶³ Cited in *Re B and J* (1996) 21 Fam LR 186 at 192.

⁶⁴ *Family Law Amendment Act 1983* (Cth) s 4 inserting a new s 5A into the then *FLA*. For discussion of the background, see Senate Standing Committee on Constitutional and Legal Affairs, *IVF and the Status of Children*, Parliamentary Paper 493/1985 (1985).

⁶⁵ By virtue of the *Family Law Amendment Act 1987* (Cth) s 24.

⁶⁶ *Family Law Act 1975* (Cth) s 60H, 'Children born as a result of artificial conception procedures' prior to November 2008 read:

(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 a man; and

(b) either of the following paragraphs apply:

(i) the procedure was carried out with their consent;

(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 man;

then, whether or not the child is biologically a child of the woman and of the man, the child is their child for the purposes of this Act.

(2) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman;

then, whether or not the child is biologically a child of the woman, the child is her child for the purposes of this Act.

(3) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

For fifteen years there were varied and inconsistent judicial interpretations of s 60H. These arose in two contexts: cases concerning the parental status of known sperm donors/biological fathers in relation to children being raised by lesbian parents and cases where genetic fathers in surrogacy arrangements claimed parental status in relation to children being raised by themselves and the other intended parent. In short, judgments took two paths: on the one hand treating s 60H as exclusively defining the parents of ART children in the *FLA* and reading it consistently with state ART parentage provisions (the exclusive/consistent approach⁶⁷) and, on the other hand, those characterising s 60H as merely 'adding' to the categories of natural and adoptive parent under the *FLA* in a manner that was inconsistent with state parentage laws (the 'enlarging approach').⁶⁸ There

(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;

then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act.

(4) If a person lives with another person as the husband or wife of the first-mentioned person on a genuine domestic basis although not legally married to that person, subsection (1) applies in relation to them as if:

- (a) they were married to each other; and
- (b) neither person were married to any other person.

⁶⁷ In *W v G* (1996) 20 Fam LR 49, the NSW Supreme Court considered the provisions of the then operative *Artificial Conception Act 1984* (NSW) and held that they excluded a known sperm donor from legal parentage. The court considered the possibility that a sperm donor could still be liable as a 'parent' under provisions of the *FLA*. This option was precluded, in Hodgson J's reasoning, by the fact that s 7 of the *Child Support (Assessment) Act 1989* (Cth) (*CSA*) states that unless a contrary intention appears, the *CSA* and the *FLA* are to have the same respective meanings. Section 5 of the *CSA* does contain a definition of parent, one which references s 60H of the *FLA*. Taken together, and in conjunction with the exhaustive rather than inclusive wording of the definition of parent in s 5 ('means' rather than 'includes'), Hodgson J held that a sperm donor could not be a parent under the *CSA* unless caught by s 60H(1), ie a man married to the woman to whom he donated his sperm. Hodgson J also stated that he did not see an intention for the parental responsibility provisions of the *FLA* (which do not contain a definition of parent), to override the effects of the state parenting presumptions. *Re Patrick* (2002) 28 Fam LR 579 concerned a contact dispute between a known gay male sperm donor and lesbian parents. In deciding that the biological father was not a parent, Guest J expressly rejected the 'enlarging' approach of Fogarty J in *Re B and J* (discussed below) and concluded that, in the absence of prescription of the state Acts, the *FLA* should be read 'in light of' Australia-wide state and territory presumptions thereby excluding ovum and sperm donors from parental status.

⁶⁸ In *Re B and J* (1996) 21 Fam LR 186, a known sperm donor applied to the Family Court for a declaration that he was not liable as a parent under the *CSA*. In that case, Fogarty J held, as Hodgson had in *W v G*, that in the absence of prescription, the state Act operated to release the donor from liability, and further suggested that the absence of prescription of state law in the *FLA* was precisely *because* the state Acts covered the field. However Fogarty J departed from Hodgson J's analysis by suggesting in *obiter* that *other* provisions of the *FLA* might not be restricted by s 60H, such that a sperm donor who had no liability under the *CSA* could still be found to have a maintenance obligation under the *FLA*. In Fogarty J's view, s 60H 'enlarged' rather than reduced the range of people who could be considered by the court to be parents, leaving the court with considerable discretion to determine who a parent may be. In the surrogacy case of *Re Mark* (2004) 31 Fam LR 162 Brown J held that state parenting rules do not impact upon who is a 'parent' under the *FLA*. Brown J suggested that the *FLA* should be broadly read to give effect to the 'ordinary meaning' of parent to encompass commissioning parents who are biologically connected and 'intend to parent' a child born through assisted conception. However, Brown J in fact did not find that the biological father was a parent under the *FLA*, and

was a major temptation to follow the enlarging approach in surrogacy cases because this reflected the intention of the parties involved as to who the child's father was.⁶⁹ Yet this favouring of the 'natural' parent was inherently limited in that it could only ever be used to grant legal status to male genetic parents and never to similarly situated women; that is, to commissioning mothers whose eggs were gestated by another woman.⁷⁰ The 'enlarging' approach was also extremely troubling because although it was developed in response to the lacunae of legal status in surrogacy arrangements it was equally applicable to sperm donors in the context of lesbian-led families. In that context the 'enlarging' approach to parental status in family law could have resulted in parental responsibility automatically being accorded to a known (or even unknown but subsequently identifiable) donor, at the same time that co-mothers who were actually raising children had no parental status under state law and could only gain a limited form of parental responsibility through applying to the Family Court for consent orders.⁷¹

2.2 The Impact of Non-Recognition

The lack of legal recognition for the second female parent in lesbian-led families in both state and federal law had profound effects, which have been detailed elsewhere.⁷² In the context of family law, although the Family Court was able to hear applications from and grant orders to 'non-parents',

instead heard his application as a person concerned with the child's care, welfare and development under s 65C. For criticisms of the 'enlarging' approach see eg: Danny Sandor, 'Children Born from Sperm Donation: Financial Support and Other Responsibilities in the Context of Discrimination' (1997) 4 *Australian Journal of Human Rights* 175; Dorothy Kovacs, 'The AID Child and the Alternative Family: Who Pays? (or Mater Semper Certa Est — That's Easy for You to Say!)' (1997) 11 *Australian Journal of Family Law* 141; Adiva Sifris, 'Dismantling Discriminatory Barriers: Access to Assisted Reproductive Services for Single Women and Lesbian Couples' (2004) 30 *Monash University Law Review* 229; Aleardo Zanghellini, 'Who Is Entitled to Parental Responsibility? Biology, Caregiving, Intention and the *Family Law Act*: A Jurisprudential Feminist Analysis' 35(1) (2009) *Monash University Law Review* (forthcoming).

⁶⁹ Justice Brown's *obiter* was very influential on later Family Court decisions concerning surrogacy arrangements which have since declared or simply *assumed* male genetic parents to be legal parents in the face of state law to the contrary: see eg *Hutchens & Franz* [2009] FamCA 414 (10 May 2009); *King & Tamsin* [2008] FamCA 309; *Raines and Anor & Curtin* [2007] FamCA 1295; *Cadet & Scribe and Anor* [2007] FamCA 1498. It also began a trend in lesbian parent cases to treat known and unknown donors as entitled to participate in proceedings: see eg *Re J and M* (2004) 32 Fam LR 668, 670.

⁷⁰ See eg *King & Tamsin* [2008] FamCA 309; see also *Rusken & Jenner* [2009] FamCA 282.

⁷¹ See eg *Mathers & Mathers* [2008] FamCA 856; *Re J & M* (2004) 32 Fam LR 668 and discussion of the difficulties of the process and limitations of such orders in Human Rights and Equal Opportunity Commission, *Same-Sex: Same-Entitlements Report* (2007) at 102-104.

⁷² See eg, Victorian Law Reform Commission, above note 3; Human Rights and Equal Opportunity Commission, *ibid*; Liz Short "It makes the world of difference": Benefits for Children of Lesbian Parents of Having their Parents Legally Recognised as their Parents' (2007) 3(1) *Gay & Lesbian Issues and Psychology Review* 5.

it appears that the lack of parental status for co-mothers nonetheless disadvantaged them when they appeared in child-related disputes with the birth mother. It is also very clear that such lack of status placed co-mothers at a very considerable disadvantage in negotiating contact prior to any litigation.⁷³ So, for example, in the case of *H & J* in 2006⁷⁴ the women had separated when the child was 12 months old and the birth mother then refused any contact for the five months prior to the interim hearing, at which she argued:

whatever significance lay in the relationship between [the child] and the [co-mother] (she asserts it was at best slight), now, given [the child's] age and level of intellectual and cognitive development, *that relationship no longer exists*.⁷⁵

Although the co-mother was a legal parent under the relevant Northern Territory provisions, the birth mother argued that she was neither a legal parent nor a person 'concerned with the care, welfare and development' of the child under s 65C of the *FLA*. The Federal Magistrates Court decided that legal parentage under territory law had no bearing on the *FLA*. In deciding whether the applicant was entitled to have her application for contact heard under s 65C the Magistrate dismissed the relevance of the women's joint endeavour in conceiving the child, stating that the:

applicant cannot claim to be significant to [the child] merely because the applicant and the mother were involved in a significant relationship, at the time of [the child's] conception and afterwards.⁷⁶

While the co-mother in *H & J* referred to herself as the 'non-biological co-parent', the court noted that she 'provided no genetic material, personal to her, to assist in the conception' and so decided that for the sake of 'neutrality' it would refer to her as 'the applicant'.⁷⁷ The Federal Magistrate evinced a clear preference for genetic parents, even if unknown, over resident caregivers who are genetically unrelated:

Obviously, a biological parent can be significant to a child, in the sense of being important to that child, notwithstanding he or she has *no involvement at all* in the care of that particular child. In that case, the importance arises as a result of the particular child having a shared genetic inheritance with the parent. The applicant in this case cannot claim such a genetic

⁷³ See also *S & B* [2008] FMCAfam 763 where the co-mother who had been the primary caregiver of a 10 year old child through much of her early life was unable to prevent relocation by the birth mother and was unsuccessful in a subsequent claim for residence.

⁷⁴ *H & J & Anor* [2006] FMCAfam 514.

⁷⁵ *H & J & Anor* [2006] FMCAfam 514 at [12] (emphasis added).

⁷⁶ *H & J & Anor* [2006] FMCAfam 514 at [62].

⁷⁷ *H & J & Anor* [2006] FMCAfam 514 at [5]. In contrast, the birth mother and the completely uninvolved sperm donor were labelled 'the mother' and 'the father' in the judgment.

significance to [the child]. In my view, her claim to be of significance to [the child] can only be based on [what has been described] as '*past performance*'.⁷⁸

While the court held that the co-mother did have standing under s 65C to bring a claim and so the matter could proceed to a determination of the substantive issues, there is no final decision available.

In *Verner & Vine* the birth mother actually denied that she had been in a lesbian relationship with the applicant at all, although there was uncontested evidence that the women had bought a house together, presented to a fertility clinic as a couple and been counselled and treated together, and the applicant had co-signed all of the relevant documentation for fertility treatment as the partner of the birth mother.⁷⁹ In that case Lawrie J was, if anything, even more dismissive of the relevance of the joint process of planning, conceiving and then caring for the child, finding that,

The language of the Act in speaking of the group of people with whom children have a right of contact, other than their parents, does not refer to people who may once have played a role in their life, but looks to the present and future...

...

I am satisfied that the significance of the applicant in the child's life is now a matter of history, namely the participation in the IVF process and the occasional assistance she offered as the mother's friend when the child was younger.⁸⁰

The application for contact was denied, and an appeal to the Full Family Court was dismissed.⁸¹

While lesbian-led families had to struggle with the fact that only one parent in the couple had legal status, and moreover with on-going uncertainty as to the status of sperm donors in child-related disputes, families in surrogacy arrangements have faced the reverse dilemma. In surrogacy families, the legal status of the family was quite clear but flew in the face of both the parties' intentions and

⁷⁸ *H & J & Anor* [2006] FMCAfam 514 at [61].

⁷⁹ *Verner & Vine* [2005] FamCA 763. Note that the applicant was self-represented and this appears to have impeded her ability to put her claim, with the birth mother's evidence preferred on most points. However in not making a clear finding regarding the existence of the lesbian relationship, the judge does appear to experience some doubt regarding the birth mother's implausible claim that she chose to misrepresent her 'best friend' as her lesbian partner to the fertility clinic.

⁸⁰ *Verner & Vine* [2005] FamCA 763 at [17], [41].

⁸¹ *Verner & Vine* [2007] FamCA 354. The appellant was again self-represented.

the care-giving unit in which the child was being raised, by granting legal status to the gestational mother and her partner rather than to the intended/commissioning parents.⁸²

The ability to transfer legal status between parents through adoption is extremely limited, as Australian law largely proscribes 'direct' or 'private' adoptions.⁸³ In NSW for example there are two very limited exceptions to the general approach that a child relinquished for adoption must be placed by the relevant government department with a family chosen by it, not by the relinquishing parent. First, a 'relative' of the child may apply for a 'direct' adoption (thus if the birth mother is a sister or mother of the intended mother, which is not uncommon, then adoption is possible through this means because one intended parent is legally an Aunt or half-sister of the child), second an otherwise non-compliant placement for adoption may be directly authorised by the Director-General.⁸⁴

2.3 State Reforms and on-going Federal Inconsistency

Lesbian co-parents in state law

Since the early 2000s there has been a gradual move across Australia to extend existing ART parentage rules to lesbian-led families so that a consenting female partner of a child conceived with donor sperm is granted parental status in the same fashion as a male partner.⁸⁵ Western Australia in

⁸² Neither of the intended parents are legal parents under state law, although genetic fathers commonly pass themselves off as legal parents by listing themselves as father on the birth register and, as discussed above (see note 70), some Family Court judges have (in my view, erroneously) considered the genetic father to be a legal parent under the FLA.

⁸³ See Millbank, 'Part Two: Children' above note 5.

⁸⁴ *Adoption Act 2000* (NSW) s 87. Note that by treating the genetic father as a legal parent proceedings could also be brought under FLA for leave to proceed to a step-parent adoption (although a disfavoured mode of adoption in the modern era): see *Hutchens & Franz* [2009] FamCA 414. I argue below that the decision was incorrect, a view confirmed in *Re Michael: Surrogacy Arrangements* [2009] FamCA 691.

⁸⁵ In New Zealand equivalent measures were introduced through legislative reform in 2004, see: *Status of Children Act 1969* (NZ) s 18. See also in the UK *Human Fertilisation and Embryology Act 2008* ss 42-44, which require that the conception be undertaken at a licensed UK clinic for parentage to be accorded unless the women are in a civil partnership, in which case conception may take place elsewhere. Legal recognition from birth for co-mothers is in place in South Africa and various Canadian provinces as a consequence of Constitutional equality litigation (see eg *J v Director-General, Department of Home Affairs* (2003) 5 BCLR 463 and *Rutherford v Ontario* (2006) 270 DLR (4th) 90). In the US states of California and New Jersey this status has been extended as a matter of statutory interpretation: see *Elisa B v Emily B*, 37 Cal 4th 108 (2005) and *In re Kimberly Robinson* 890 A2d 1036 (2005), respectively. Washington DC is the first US jurisdiction to introduce this model of parental recognition through a legislative pathway, with the Domestic Partnership Judicial Determination of Parentage Act of 2009 (DC) coming into effect in July 2009, and New Mexico to follow in January 2010, see: 'Law Extends Parental Rights for Gays' *Washington Post* 23 July 2009.

2002,⁸⁶ the Northern Territory in 2003⁸⁷ and the ACT in 2004⁸⁸ all included such provisions as part of comprehensive same-sex relationship reforms. In NSW similar provisions were passed in 2008⁸⁹ as part of a belated package supplementing earlier de facto relationship reforms.⁹⁰ In Victoria such provisions were passed as part of a package of legislative reforms to ART regulation in 2008.⁹¹ In Tasmania a stand-alone Bill to accord co-mothers parental status using the same approach passed the lower house in August 2009 and at the time of writing is currently before the upper house.⁹² The Queensland government recommended similar reforms in August 2009 in order to achieve consistency and certainty,⁹³ leaving South Australia as the only state to have not yet indicated it intends to follow this path.

The new state and territory provisions on parental status operate whether the child was born before or after the commencement of the amending Act, reflecting the structure and intent of the substantive Acts which aimed to regularise the legal status of existing families by operating retrospectively. So, for example, for babies born after the commencement of the amendments in NSW (October 2008), the NSW Registry of Births, Deaths and Marriages registers both women as

⁸⁶ *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA) s 26 introduced section 6A into the *Artificial Conception Act 1985* (WA). This section came into force on 21 September 2002.

⁸⁷ *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2004* (NT) s 41 inserted s 5DA into the *Status of Children Act 1978* (NT). This section commenced on 17 March 2004.

⁸⁸ *Parentage Act 2004* (ACT) repealed the *Birth (Equality of Status) Act 1988* (ACT) and came into effect on 22 March 2004.

⁸⁹ *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW) inserted s 14(1A) into the *Status of Children Act 1996* (NSW). This section commenced on 22 September 2008.

⁹⁰ The Act was said to implement recommendations from a NSW LRC inquiry into areas of law which had not been covered by the 1999 reforms, particularly those concerning parental status. The Commission did not complete its report until 2006 and the report was not released by the Government until 2008. See NSW LRC, *Relationships*, Report 113 (2006).

⁹¹ *Assisted Reproductive Treatment Act 2008* (Vic) inserted s 13 and s 14 into the *Status of Children Act 1974* (Vic). This section will commence on 1 January 2010 unless proclaimed earlier. These reforms closely implemented the recommendations of the Law Reform Commission of Victoria ART and Adoption Inquiry, which reported in 2007: see above note 3.

⁹² The Relationships (Miscellaneous Amendment) Bill 2009 (Tas) passed the House of Assembly on 20 August 2009, and was read for a second time in the Legislative Council on 2 October.

⁹³ See Department of Justice and Attorney-General Queensland, 'Review of the Legal Status of Children Being Cared for by Same-Sex Parents' (August 2009) at 6-7.

parents in the birth registry and lists them on the birth certificate.⁹⁴ For children born before the commencement of the amendments, if only the birth mother is listed on the registry the consent of both mothers is required, accompanied by a statutory declaration of the circumstances of conception, for amendment to the birth register through an administrative process.⁹⁵ If the sperm donor is named as a 'father' on the birth certificate, his name can be removed with his consent through the same process.⁹⁶ If any of the relevant parties cannot agree, an order can be sought from the District Court to amend the register to include the co-mother and/or remove the donor.⁹⁷

Consequential amendments to gendered language, and to the definition of 'parent' in *Interpretation Acts* ensured that the amendments flow through to all areas of law within each jurisdiction, so that children born to lesbian couples through assisted conception have a second legal parent in Western Australia, the Northern Territory, the ACT, NSW and (from 1 January 2010) Victoria. Such children do not have to have been conceived through clinic processes; the presumptions also apply to informal or home insemination.⁹⁸ Yet whether this parental status flowed through to federal law generally was uncertain⁹⁹ and, as noted above, when lesbian co-mothers from 'recognition states' appeared before the Family Court in parenting matters and argued that they were legal parents, these claims were rejected on the basis that s 60H was gender specific.¹⁰⁰ This mis-match between state and federal law was clearly unsatisfactory, and in recent years co-ordained recognition measures based on the ART parentage model for children in lesbian-led families were proposed by the NSW and

⁹⁴ The birth mother can choose to be identified as 'birth mother', 'mother' or 'parent' on the birth certificate, while the co-mother can choose to be described as a 'mother' or 'parent'.

⁹⁵ *Births, Deaths and Marriages Registration Act 1997* (NSW) Sch 3, cl 17(4)(a).

⁹⁶ *Births, Deaths and Marriages Registration Act 1997* (NSW) Sch 3, cl 17(4)(b).

⁹⁷ *Births, Deaths and Marriages Registration Act 1997* (NSW) s 19.

⁹⁸ Note that the ACT was especially clear in its wording to this effect: see *Parentage Act 2004* (ACT) s 11(9) which defines 'procedure' as:

- (a) artificial insemination; or
- (b) the procedure of transferring into the uterus of a woman an embryo derived from an ovum fertilised outside her body; or
- (c) any other way (whether medically assisted or not) by which a woman can become pregnant other than by having sexual intercourse with a man.

⁹⁹ See discussion in Millbank, 'Part Two' above note 5 at 254-256.

¹⁰⁰ See *H & J & Anor* [2006] FMCA fam 514; *Kemble & Ebner* (2008) 39 Fam LR 582.

Victorian law reform commissions as well as the Human Rights and Equal Opportunity Commission.¹⁰¹

Surrogacy parentage in state law

In a parallel trend, states and territories began considering and introducing specific mechanisms for the transfer of parentage in surrogacy families. While both lesbian families and surrogacy families are formed through ART and involve a mix of genetic and non-genetic parents with third party contributions to the reproductive endeavour, the issues facing surrogacy families are more complex. Unlike the according of second-parent recognition in lesbian led families, for surrogacy families any form of legal recognition also involves severing the legal relationship of the gestational mother. The arrangement involves a child born into one family with the intention that it be raised in another, necessarily implicating the rare although serious prospect of the gestational mother refusing to relinquish the child following birth. It is generally acknowledged that surrogacy is unique because the involvement of the gestational mother is far more intense and enduring than the involvement of a known sperm (or egg) donor in other forms of ART families. In my view these unique circumstances justify maintaining the current legal position that the gestational mother is accorded legal parentage in the absence of any transfer process (even if she is not a genetic parent). This ensures that the gestational mother's needs and interests are centred and that she is empowered to change her mind at any point in a process up until, and after, birth. A number of recent Australian inquiries into surrogacy have contributed to a growing consensus that any parentage transfer process must be based on the informed consent of the parties in the period following rather than preceding birth.¹⁰²

In the ACT since 2004 commissioning parents can apply to the Supreme Court for a substitute parenting order for a child between six weeks and six months old.¹⁰³ Orders are only available if the

¹⁰¹ See NSW LRC above note 90, Recommendation 23; VLRC above note 3, Recommendation 78; Human Rights and Equal Opportunity Commission above note 71, Recommendation 5.5.2 (2) at 107. See also the Senate Standing Committee on Legal and Constitutional Affairs, *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, Report* (August 2008), Recommendation 1. Parkinson is therefore quite wrong to claim that the amendments to s 60H 'were not based upon any recommendation by a law reform body or Committee of inquiry' and that they occurred 'without public debate': Patrick Parkinson, *Australian Family Law in Context*, 4th ed (2009) at 655.

¹⁰² See VLRC above note 3; WA Legislative Council, *Standing Committee on Legislation in Relation to the Surrogacy Bill 2007, Report 12* (2008); Legislative Council of Tasmania, *Select Committee Report on Surrogacy* (2008); Queensland Parliament, *Investigation into Altruistic Surrogacy, Report* (2008), NSW Legislative Council, Standing Committee on Law and Justice, *Legislation on Altruistic Surrogacy in NSW* (May 2009).

¹⁰³ *Parentage Act 2004* (ACT) ss 24, 25. Note the earlier *Substitute Parent Agreement Act 1994* (ACT) was much more limited in effect.

gestational mother is *not* genetically related to the child (and neither is her partner, who may be male or female) and at least one of the commissioning parents is genetically related, the conception took place in the ACT and the commissioning parents reside in the ACT.¹⁰⁴ The Court may make an order substituting the commissioning parents in place of the mother and her partner if it is satisfied that there has been no payment beyond reasonable expenses, an order is in the best interests of the child and the relinquishing parents consent and fully understand what is involved.¹⁰⁵ Parentage transfer has the same effect as an adoption order.¹⁰⁶

In Western Australia since 1 March 2009, commissioning parents can apply to the Family Court of Western Australia for a transfer of parentage for a child between four weeks and six months of age.¹⁰⁷ Like the ACT, conception and residence within the jurisdiction is required, as is the absence of payment and the court must determine that it is in the child's best interests.¹⁰⁸ The Western Australian regime is in some ways more restrictive than the ACT in that at least one of the commissioning parents must be over 25, the couple must be heterosexual and the woman unable to gestate a child for medical reasons¹⁰⁹ as well as containing more prescriptive requirements for counselling.¹¹⁰ Conversely, the Western Australian regime is more expansive than the ACT in that it does permit transfer when the gestational mother is a genetic parent. The effect of a parentage order is that the relationship of commissioning parents and child is 'treated as being that of child and parent'.¹¹¹

Unlike elsewhere in Australia and other comparable jurisdictions such as the UK¹¹² where transfer processes are entirely consent based, the Western Australian regime explicitly countenances a transfer which overrides the gestational mother's *refusal* of consent in some circumstances. Non-

¹⁰⁴ *Parentage Act 2004* (ACT) s 24.

¹⁰⁵ *Parentage Act 2004* (ACT) s 26.

¹⁰⁶ *Parentage Act 2004* (ACT) s 29.

¹⁰⁷ *Surrogacy Act 2008* (WA) s 20.

¹⁰⁸ *Surrogacy Act 2008* (WA) s 21.

¹⁰⁹ *Surrogacy Act 2008* (WA) s 19.

¹¹⁰ *Surrogacy Act 2008* (WA) s 21. See also *Surrogacy Regulations 2009* (WA).

¹¹¹ *Surrogacy Act 2008* (WA) s 26.

¹¹² See *Human Fertilisation and Embryology Act 2008* (UK) s 54; replacing the earlier provisions under the *Human Fertilisation and Embryology Act 1990* (UK) s 30.

consensual transfer of parentage is permitted in instances in which the gestational mother is not a genetic parent and one of the commissioning parents is genetically related to the child.¹¹³ This abandonment of the consent based approach to transfer, based simply on a preference for genetic connection over gestational connection, is, in my view, highly problematic.

In Victoria from 1 January 2010, commissioning parents may apply to the Supreme or County Court for a transfer of parentage when a child is between four weeks and six months old (or at another time with leave).¹¹⁴ As with the other jurisdictions to date, Victoria requires residence of the commissioning parents and conception within Victoria, with a similar inquiry process to ensure the absence of payment, a child's best interests assessment and informed consent. Like Western Australia, additional eligibility restrictions apply both directly and indirectly through ART regulation.¹¹⁵ The effect of a transfer is the same as an adoption order.¹¹⁶

New South Wales, Tasmania and Queensland have all recently held parliamentary inquiries which recommended the introduction of post-birth parentage transfer regimes for surrogacy based upon the central elements of a best interests inquiry, absence of for-profit payment and the requirement of informed consent.¹¹⁷ (However it appears that variation in approach as to the necessity or desirability of other eligibility criteria such as age, genetic connection and jurisdictional residence continues to flourish). In January 2009 the Standing Committee of Attorneys-General issued a discussion paper on surrogacy encouraging a harmonious approach, in particular, to parentage transfer.¹¹⁸ Although developments in surrogacy parentage reforms to date are clearly less uniform than those concerning lesbian-led families formed through ART, they do nonetheless demonstrate a clear trend towards according parental status in surrogacy families through state-based post-birth court sanctioned transfer processes.

¹¹³ *Surrogacy Act 2008* (WA) s 21(4).

¹¹⁴ *Status of Children Act 1974* (Vic) s 20

¹¹⁵ The gestational mother must be over 25 and have received extensive counselling if she did not undergo ART treatment at a licensed Victorian clinic: *Status of Children Act 1974* (Vic) s 23. To be eligible for ART treatment for surrogacy in Victoria the gestational mother must, additionally, not be genetically connected to the child and have a living child already: *Assisted Reproductive Treatment Act* (Vic) s 40(1).

¹¹⁶ *Status of Children Act 1974* (Vic) s 26.

¹¹⁷ See above note 102.

¹¹⁸ Standing Committee of Attorneys-General Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy*, January 2009.

While parentage transfer orders from state and territory courts should be accorded status by the Family Court as binding declarations of parentage from a state court,¹¹⁹ their impact upon other federal law prior to the 2008 reforms was less clear.

2.4 The Original Federal Reform Bills

In their original versions, the 2008 reform Bills proposed an informal mode of parentage recognition for federal law which was intended to cover both lesbian-led families formed through ART and surrogacy families where at least one partner had a genetic link to the child. The proposed category was of a child who was the ‘product of a relationship’. The definition provided that,

someone is the child of a person if he or she is the product of a relationship the person has or had as a couple with another person (whether of the same sex or a different sex). For this purpose, someone cannot be the product of a relationship unless he or she is the biological child of at least one of the persons in the relationship or was born to a woman in the relationship.¹²⁰

There were numerous problems with this approach, which attempted to solve two very different legal problems with one overarching, unclear, and frankly ungainly category. Most importantly, the category did not offer any consistency of approach with pre-existing state or federal laws on parentage.¹²¹ Unlike state laws on parentage the Bill did not require consent to the conception of the child, nor specify the point at which consent must be given in order to trigger parental status. Nor did the federal Bills purport to sever the parental status of otherwise eligible legal parents (thus a literal reading of the definition would, for example, generate the result that a child born through surrogacy with the commissioning father’s sperm was the ‘product’ of *both* the gestational mother’s relationship, and the commissioning father’s relationship).

¹¹⁹ Triggering a conclusive presumption of parentage under s 69S of the *FLA*.

¹²⁰ See Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 cl 4.

¹²¹ Including, inter alia, an explicit intention to include children who were conceived through intercourse as well as those conceived through ART processes: see *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill, Explanatory Memorandum* (2008) at [21]. So, for example if a lesbian couple agreed to conceive through sex with a man, the genetic father would have been a parent under both state law and the *FLA* (see *ND & BM* (2003) 31 Fam LR 22), also potentially under other federal law as nothing in the Bills operated to sever parental status, while the women would have been parents for all federal law *except* the *FLA*.

Additionally, the 'product of a relationship' category was contained in the general reforms but excluded from the *FLA* itself, and so did *not* bring with it parental responsibility, child support liability and entitlement, or any of the *FLA* provisions for child-related disputes. The Bill amending the *FLA* was anomalous, and frankly inexplicable, in that it included a provision that children born to same-sex parents through ART would be considered as children under s 60H *only* for the de facto property division sections of the *FLA* and not for any of the child-related provisions.¹²²

The 'product of a relationship' approach was widely criticised during the Senate Committee Inquiries into the reforms, and the Committee recommended that it be dropped and replaced with a centralised and consistent federal definition of child, drawn from a new s 60H of the *FLA*, amended to include a mother's female partner.¹²³ In response to the Senate Committee recommendations, as well as pressure from Attorneys-General from those states that had already passed similar recognition measures for co-parents in lesbian families,¹²⁴ the federal government moved amendments to its own Bills in the Senate.¹²⁵

¹²² Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) s 90RB.

¹²³ See Senate Standing Committee on Legal and Constitutional Affairs, *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, Report* (August 2008) Recommendation 1, discussed at [3.99]-[3.123]; also Senate Standing Committee on Legal and Constitutional Affairs, *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008, Report* (October 2008) at [3.40]-[3.65]; Senate Standing Committee on Legal and Constitutional Affairs, *Same-Sex Relationships (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008, Report* (October 2008), Recommendation 2, discussed at [3.40]-[3.69].

¹²⁴ See Parliamentary Library, *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, Bills Digest No 9, 2008-09* at 12.

¹²⁵ Notably, the Senate Committee recommendations were bipartisan, and the Opposition generally supported amending s 60H to provide a consistent and inclusive definition of 'parent'. However the Opposition moved its own amendments to s 60H with the intention that they would have had exactly the same legal effect as the government provisions but draw a distinction in terminology. The Opposition proposal was that for married parents the legislation would say that the child 'is the child of the woman and her husband', whereas for unmarried parents it would say that 'the child is the child of the woman, and is *deemed to be the child* of the other person in the relationship'. The Opposition amendments failed on an exactly equal vote and the government amendments were then agreed to with only one dissent recorded: Parliamentary Debates, *Senate Hansard Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 in Committee*, 16 October 2008, 6237-6268.

2.5 The New section 60H and its Effects

There are four elements to the new *FLA* provisions:

- the extension of parental status to the consenting female de facto partner of a woman who conceives through ART (s 60H(1));
- clarification that the consenting gamete donor is not a parent of the resulting child for the purposes of the *FLA* (s 60H(1)(d));
- the extension of parental status to a person whose de facto partner has adopted a child with their consent (s 60HA); and
- clarification that transfer of parentage by state and territory courts for surrogacy families alters parentage under the *FLA* (s 60HB).

The new ss 60H, HA and HB commenced from the date of Royal Assent to the legislation, 21 November 2008, and, like comparable state provisions, cover children born before as well as after the amendments. The new s 60H definitions are adopted in various other federal Acts, for example, the *Child Support (Assessment) Act 1989* (Cth) and social security legislation, and thus have broad effect in federal law (although these provisions took effect in 2009 depending on when amendments to the substantive Act commenced rather than when the *FLA* amendments commenced).¹²⁶ Notably, provisions on the parentage of children which mirror out from the *FLA* also apply federal recognition to children born in and living in states which have *not* referred their powers to the federal family law regime in the recent reforms.¹²⁷

¹²⁶ For eg amendments to the Child Support Scheme operate from 1 July 2009.

¹²⁷ Note that the referrals leading to the 2008 *FLA* reforms were all limited to 'financial matters'. The source of power for the s 60H provisions is actually the 1980s state referrals of power over children from unmarried relationships. See eg *Commonwealth Powers (Family Law – Children) Act 1986* (NSW) s 3(1) which includes in addition to 'maintenance' and 'custody and guardianship' in subsections (a) and (b) respectively, subsection (c) 'the determination of a child's parentage for the purposes of the law of the Commonwealth, whether or not the determination of the child's parentage is incidental to the determination of any other matter within the legislative powers of the Commonwealth'. The referrals from Victoria and Tasmania are in identical terms: see *Commonwealth Powers (Family Law-Children) Act 1986* (Vic) s 3(1)(c); *Commonwealth Powers (Family Law) Act 1987* (Tas) s 3(1)(c). However the referrals from South Australia and Queensland originally omitted subsection (c): see *Commonwealth Powers (Family Law) Act 1986* (SA) s 3(1); *Commonwealth Powers (Family Law-*

Children Adopted by One Partner

While much of s 60HA, which refers only to the children of de facto partners, simply replicates provisions under s 60H and s 60HB, the new s 60HA(1)(b) extends parentage to the de facto partner of a parent who has adopted a child with their consent.

In all states and territories in Australia, except Queensland,¹²⁸ heterosexual de facto couples are eligible to jointly apply to adopt a child (although in the context of international adoption some sending countries will still not allow children to be placed with a couple if they are unmarried). Same-sex couples remain ineligible to apply to jointly adopt a child in NSW,¹²⁹ Victoria,¹³⁰ South Australia, Queensland, the Northern Territory and, in most circumstances, Tasmania (where only partners who have a registered relationship for three or more years can adopt a child who is related to one of them).¹³¹ Thus in those jurisdictions lesbians and gay men must, if successful in an adoption process, adopt as individuals.

The new s 60HA(1)(b) was clearly intended to cover the situation of same-sex de facto couples in many Australian states, and possibly heterosexual de facto couples in Queensland, who are excluded from eligibility to apply to adopt as couples but who can nonetheless go through an adoption process while members of a couple in which only one partner became the adoptive parent.

Children) Act 1990 (Qld) s 3(1) – this was remedied in Queensland by amendments in 2001 which duplicated subsection (c), see *Commonwealth Powers (Family Law-Children) Act 2001* (Qld) s 3. It seems likely that the grant of rights or obligations under federal laws according parentage of children from unmarried relationships, including children conceived through ART and surrogacy from South Australia (and also Western Australia) must therefore rest on whatever the substantive source of Commonwealth power is in each case.

¹²⁸ See *Adoption of Children Act 1964* (Qld) s 67A.

¹²⁹ Despite recommendations to the contrary: see eg NSW LRC, *Review of the Adoption of Children Act 1965 (NSW)*, Report 81 (1997); NSW Legislative Council, Standing Committee on Law and Justice, *Adoption by Same-Sex Couples: Final Report* (July 2009).

¹³⁰ While the Victoria government implemented many of the reforms recommended in the Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption*, Report (2007), it is presently unclear whether those on adoption will be pursued.

¹³¹ *Adoption Act 1988* (Tas) s 20.

Female Co-Parents

The new section 60H(1) is rendered gender-neutral and provides that 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^[132]; 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.

It is clear from this provision that the *FLA* now accords parental status to both female parents in lesbian-led families formed through ART. As noted earlier, child support legislation and a number of other federal laws adopt the s 60H definition of parent, so that it also mirrors out to numerous other areas. It is important to stress that the new definitions of parent apply across Australia and cover children who are born in places where state law does not yet accord parental status to the second female parent (currently South Australia, Tasmania and Queensland). This will present some difficulties for lesbian families in those states when they try to access federal rights and benefits but cannot use the usual method of proof – a birth certificate – to demonstrate legal parentage.¹³³ The

¹³² This is defined in the *Family Law Act 1975* (Cth) s 4(1) as including '(a) artificial insemination; and (b) the implantation of an embryo in the body of a woman'.

¹³³ For example lesbian parents from Queensland were recently denied a passport for their child as they could not produce a birth certificate: email communication with the author, July 2009.

Family Court has the power to make a conclusive declaration of parentage for the purposes of federal law under s 69VA. It may be that streamlining a simple consent process to make orders under s 69VA offers the best method of dealing with this problem until such time as the remaining states reform their laws.

There will also no doubt be cases appearing before the Family Court where parentage is contested in lesbian families. This is likely to include families from those states which do not now recognise both female parents given that the ability to amend birth certificates is still very recent. Moreover, for children who were born in the pre-recognition era, it is quite possible that while some families will have taken all possible steps to gain even partial legal recognition of the co-mother (such as parental responsibility orders by consent), others will have assumed that the non-birth mother would never have legal status - and may have negotiated different understandings of their parental roles as a consequence of this.

The first case under the new s 60H, *Keaton & Aldridge*, highlights the difficulties inherent in this shifting legal landscape.¹³⁴ The case concerned a claim by Ms Keaton for parental responsibility and time with a child born in early 2006 to her former partner, Ms Aldridge. Various interim applications and orders had already been made on the basis that Ms Keaton was a person concerned with the care, welfare and development of the child under s 65C. The final hearing was set down in the Federal Magistrates Court for 25 and 26 November 2008, and as the definitions came into effect immediately upon proclamation on 21 November 2008 Ms Keaton at hearing argued that she was a parent under the new s 60H. Ms Aldridge resisted all contact and disputed the claim to parentage.

It was uncontested that the parties had been a couple from 2001 onwards, that both parties had attended initial intake and counselling at the relevant fertility program as a couple in August 2004,

¹³⁴ *Keaton & Aldridge* [2009] FMCAfam 92.

that Ms Keaton had signed the consent forms for treatment as the birth mother's partner, was present at the birth and stayed in the hospital with her for three nights. The date at which the relationship between the parties ended was in dispute, as were the dates and duration of periods of cohabitation between them in earlier years. Ms Aldridge claimed that the relationship had ended by mid 2004 and they were simply close friends at the time of both conception and birth. However the Magistrate accepted Ms Keaton's submission that, given the women had attended relationship counselling for over a year from mid 2005 to mid 2006, they were in fact a couple for a period of around five years until November 2006. It was uncontested that:

- the women were not living together in a common residence at the time of conception,
- the women moved in together on a permanent basis in January 2006 in preparation for the arrival of the child the following month, and
- cohabitation ceased in November of that same year.

The case essentially turned upon whether the women were in a de facto relationship. If they were, section 60H accorded parental status to Ms Keaton but if they were not de facto partners within the meaning of the *FLA*, then her participation in the conception and birth process, even though she provided written consent to the conception *as a partner*, did *not* trigger s 60H.

Because the women were living together at the time of birth but not conception, and s 60H is structured in such a way that the reference to the de facto partner and to their consent appear in separate sub-sections, initial argument centred upon whether the de facto relationship had to exist at the time of conception or at birth. The court determined, in line with cases under comparable state legislation,¹³⁵ and correctly in my view, that the relationship in which the consent is given must exist at the time of the conception procedure, stating:

¹³⁵ Although the court incorrectly distinguished the finding of the NSW Supreme Court in *Ganter v Whalland* (2001) 54 NSWLR 122 which it says required the marriage be on foot at the time of the 'pregnancy' under NSW law. *Ganter* actually determined that the marriage had to be on foot at the time of the relevant 'fertilisation procedure': which is at the time of insemination in the case of assisted insemination (as occurred in *Keaton*) or at the time of *embryo transfer* in the case of IVF (as was the situation in *Ganter*). That is, the 'procedure' leading to conception is understood in relation to the birth mother's body, rather than in relation to fertilisation of the embryo.

It appears sensible that for the consent to be effective in ascribing parental responsibility, the de facto relationship should be in existence at the time consent is given. This would flow on from the nature of the consent as a decision made by would-be-parents who together make a joint decision to have a child. That decision to have the child together must be made before the child is conceived so that the responsibility (and the acceptance of responsibility) for that child is set well before the baby is born.¹³⁶

It appears that because the couple did not live together for a large part of the relationship and were financially independent of each other, a great deal of attention was placed on the question of the 'degree of mutual commitment to a shared life'. Much of this analysis in turn addressed the intention to share parenting, thus a degree of circularity ensued: Ms Keaton was a parent if in a de facto relationship and was in a de facto relationship if she was a co-parent.¹³⁷ The factual basis of the women's relationship to each other and to parenting a child together was not straightforward, and it should be recalled that they were involved in a prolonged period of couples' counselling which commenced shortly after entering the fertility program. It appears that the birth mother was keen for Keaton to be a co-parent with her, and that it was Keaton herself who was initially ambivalent about doing so.¹³⁸ Ms Keaton was older, had already raised adult children of her own and the evidence of both parties suggests that they always saw the child as 'more' the child of the birth mother:

It is agreed by both parties that the respondent [birth mother] was to decide the role the applicant was to play in the child's life. In her affidavit the applicant states that in the period 2002 to 2003 the parties had conversations relating to the possibility of the respondent having a child. The applicant asserts that she said to the respondent:

"I don't want to push you into a [sic] being a mother, and I'm not suggesting that I want to have anymore children. Having children has to be your decision for yourself and for your life...I will be as much or as little in your child's life as you want".

The respondent stated that in making the decision to have a child one of the factors was her ability to decide how much or little involvement the applicant would have in the child's life.

¹³⁶ *Keaton & Aldridge* [2009] FMCAfam 92 at [35].

¹³⁷ 'The majority of the evidence before me related to their commitment to parenting. As this featured predominantly in their relationship I am of the opinion that the degree of mutual commitment to a shared life turns on a finding in this respect': *Keaton & Aldridge* [2009] FMCAfam 92 at [88] (emphasis added).

¹³⁸ *Keaton & Aldridge* [2009] FMCAfam 92 at [95e].

This evidence demonstrates a high degree of doubt as to the couple's mutual commitment to raising a child together and, to a lesser extent, to each other. The applicant clearly places the responsibility for any decision to have a child on the respondent alone and also envisages the possibility having a very limited role in the child's life – or in fact no role at all.¹³⁹

What is particularly disturbing about the judgment is that it interprets evidence of a shifting and negotiated understanding of shared parenthood between the women¹⁴⁰ as meaning that there was 'no understanding between them as to the applicant's role' as there was no 'meeting of the minds'.¹⁴¹ This 'ambiguity'¹⁴² meant that Ms Keaton was not a co-parent (and so not a de facto partner and so not a legal parent). There is apparently no appreciation here that a lesbian couple (and in particular a lesbian couple within the context of a long-standing absence of any form of legal recognition of the non-birth mother) could jointly conceive and parent a child based on an evolving understanding of each other's roles that developed over time, or alternately that they could do so based upon a fixed understanding that the birth mother would have a greater say in parenting while the other partner would still *be* a parent.¹⁴³

¹³⁹ *Keaton & Aldridge* [2009] FMCAfam 92 at [91b]-[92].

¹⁴⁰ For example notes from the counsellor at the fertility clinic indicate that at the initial intake interview the parties envisaged that if the birth mother died the child would be cared for by her own brother (who had young children) rather than by Keaton: at [95b]. Yet a letter from both parties to the sperm donor shortly after birth refers to 'our' daughter and is signed by them as 'parents': *Keaton & Aldridge* [2009] FMCAfam 92 at [95h].

¹⁴¹ *Keaton & Aldridge* [2009] FMCAfam 92 at [95f].

¹⁴² *Keaton & Aldridge* [2009] FMCAfam 92 at [93], [96]. See also 'Certainly the applicant played a large role in the events surrounding conception of the child and supported the respondent in her endeavour. However, the lack of certainty and the ability of the respondent to determine the role the applicant would play – which I find had not been fixed at the time of conception and which could have been determined to be nil – undermines the notion of any strong mutual commitment to a shared life merely because of their involvement in the program as a couple': at [100].

¹⁴³ See for example, Kathryn Almack's findings that birth mothers had greater control over events such as child naming and conception planning: Almack, 'What's in a name? The significance of the choice of surnames given to children born within lesbian-parent families' (2005) 8 *Sexualities* 239; 'Seeking Sperm: Accounts of Lesbian Couples' Reproductive Decision-making and Understanding of the Needs of the Child' (2006) 20 *International Journal of Law, Policy and the Family* 1.

While 'the care and support of children' is a listed circumstance that can be used to determine if people have a relationship as a de facto couple, there was curiously little attention given to this factor as a separate part of the inquiry. Although the 'care and support' of children occurs *after* birth and the relevant time for the existence of the de facto relationship was at conception, the Magistrate did accept that what happened after the birth was relevant as a 'reflection of the parties' mutual commitment to each other at the time of conception'.¹⁴⁴ Nonetheless, Pascoe FM determined in the space of a few sentences that because the applicant's role was 'unclear' and 'seemed to change from time to time'¹⁴⁵ the shared early care of the child did *not* demonstrate co-parenting or a de facto relationship. This reflected earlier findings that Ms Keaton's involvement such as 'attendance at various prenatal activities, her involvement on the day of the birth, and sharing the care of the child at her residence' including reducing her work hours to care for the child were all 'support' given to the birth mother rather than 'co-parenting'.¹⁴⁶ It is very problematic that the Magistrate appears in drawing this distinction between 'support' and 'co-parenting' to understand 'co' parenting as 'equal' parenting.¹⁴⁷ Yet there are very many families in which, although parenting is a joint endeavour, it is *not* one in which the labour of child-raising (or even necessarily, the responsibility for child-raising) is shared equally. In short, there are a great many fathers past and present who do a lot less 'co' parenting than the evidence reveals Ms Keaton did for those first 10 months of the child's life.

Extraordinarily, the Magistrate dismissed the fact that Ms Keaton's surname was given by the birth mother as one of the child's middle names as merely 'reflect[ing] the applicant's role in encouraging

¹⁴⁴ *Keaton & Aldridge* [2009] FMCAfam 92 at [104].

¹⁴⁵ *Keaton & Aldridge* [2009] FMCAfam 92 at [106].

¹⁴⁶ *Keaton & Aldridge* [2009] FMCAfam 92 at [97].

¹⁴⁷ This reflects a trend in many other pre-reform cases in Australia and elsewhere in which the degree of caregiving required of co-mothers to qualify as 'functional' or 'de facto' parents is very high: see discussion in Jenni Millbank 'The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family' (2008) 22 *International Journal of Law, Policy and the Family* 149.

the respondent to have a child'.¹⁴⁸ It is generally known that social customs concerning naming of children entail the symbolic identification of the familial unit through a shared surname. These customs have modernised in recent decades such that unmarried and other women who have kept their own surnames commonly place either their name or the other parent's surname as the child's middle name. With respect, the facts of *Keaton & Aldridge* appear much more akin to the widespread custom of shared naming of a child to be raised by two parents than to the utterly novel conclusion that a lesbian parent has named her child in recognition of a former (but never really committed or involved) partner who 'encouraged' the conception. It is also disturbing that the Magistrate countered the evidence of naming with the fact that the birth mother did not list the applicant on the child's birth certificate¹⁴⁹ – a step that was not possible prior to October 2008 when NSW law changed.¹⁵⁰

This was evidently a difficult case, especially as it was the first such case under the new provisions (moreover entailing a very short period in which arguments and evidence could be tailored to the new law).¹⁵¹ Yet it must be recalled that many, probably most, lesbian parents in Australia have

¹⁴⁸ *Keaton & Aldridge* [2009] FMCAfam 92 at [107].

¹⁴⁹ *Keaton & Aldridge* [2009] FMCAfam 92 at [107] and [95].

¹⁵⁰ In my view it is also problematic that the Court considered factor 2(g) (whether the relationship was registered under a prescribed state or territory law) by reference to the City of Sydney relationship declaration program. This program has no legal effect whatsoever and only 138 NSW couples have registered since it opened in 2005. This program was also not prescribed under the *FLA*. I repeat here the concern that 'opt-in' recognition systems, while offering important symbolic recognition to those who enter into them, may disadvantage the many more same-sex couples who do not register if courts and other decision-makers interpret absence of registration as evidence of *lack* of commitment: see Jenni Millbank and Kathy Sant, 'A Bride In Her Every-Day Clothes: Same Sex Relationship Recognition in NSW' (2000) 22 *Sydney Law Review* 181.

¹⁵¹ The Magistrate granted Ms Keaton time with the child under s 65C, but denied the application for parental responsibility. The time orders began with daytime only contact to re-establish the relationship, increasing to one weekend (including 1 night) per month. This decision was appealed by the birth mother, who also sought (and was denied) a stay of the orders pending appeal, see: *Aldridge & Keaton (Stay Appeal)* [2009] FamCAFC 106. Perhaps in recognition of the importance of determining these new issues with some early clarity, the stay and substantive appeals were heard by the Full Court sitting as a bench of three rather than one. However Ms Keaton, apparently satisfied with the time accorded her, did not raise the issue of parenthood on appeal. Most unfortunately an Independent Children's Lawyer was not appointed, nor did any intervener such as the Human Rights Commission apply to argue the child's interest in having two legal parents, therefore the Full Court decision (not released at the time of writing) will be unable to address this key issue.

conceived their children with donor sperm at home or other informal setting, outside of the clinic system.¹⁵² In these circumstances there will almost certainly be no written record of the partner's consent to the conception attempt. The legislation presumes a partner's consent unless it is rebutted on the balance of probabilities.¹⁵³ It is worrying that situations such *Verner & Vine* and *Keaton & Aldridge*, while they are hard cases, represent what is likely to be a high water mark in terms of the availability of formal proof of the co-parent's consent to conception, yet both failed. Although the latter case was decided after the reforms and the former before the *FLA* amendments, both decisions pay scant regard to the fact that the woman arguing that she was a co-parent did, in fact, participate in the conception process and give a formal, witnessed, written consent to the conception attempt (and, equally, that the woman arguing that this 'former friend' is not now, nor was she ever, a parent, had in fact sought and accepted her consent to this event). In this light, I suggest that there will be equally difficult, indeed more difficult, cases to come. These cases require the court to be aware of the fact that the social and legal context in which lesbian family planning and parenting has taken place in Australia differs from the experience of heterosexual families.

Donors are Not Parents

The amended s 60H(1)(d) clarifies that if a person other than the birth mother's partner provided genetic material and consented to its use in a conception procedure, the child is not a child of that person. This severing provision for gamete donors is similar to that in comparable state legislation, and should finally lay to rest the 'enlarging' approach to sperm donors/male genetic parents under section 60H.

¹⁵² Studies and surveys of lesbian-led families in Australia are small-scale, but those that have examined circumstances of conception have found that informal conception is more likely than clinic-based conception: see sources discussed in Millbank, 'From Here to Maternity: A Review of the Research on Lesbian and Gay Families' (2003) 38 *Australian Journal of Social Issues* 541. In jurisdictions such as Victoria where lesbians were until recently legislatively excluded from access to fertility services, the proportion of informal conceptions is of course higher.

¹⁵³ See eg *Family Law Act 1975* (Cth) s 60H(1)(5).

While the legislative intention seems clear, the provision may nonetheless be limited by the fact that it appears only in the first sub-section of s 60H, relating to women who are in a marriage or de facto relationship. This is because the pre-existing structure of the section was not altered: it comprises three subsections, the first of which accords parental status to the partner of a birth mother in a couple who is not a genetic parent, the second to a birth mother who is not a genetic parent and the third to a man who is not a genetic parent but is a legal parent under a prescribed state or territory law. As the severing provision does *not* appear in these latter two subsections it is therefore possible that a single mother who conceived with the assistance of a known donor could still have to contend with the argument that the donor is a parent under the *FLA*.

Disturbingly, in two cases decided since the amendments, decision-makers and lawyers appeared unaware of this new provision, and continued to rely upon earlier cases using the ‘enlarging’ approach. In the case of *Keaton & Aldridge* discussed above, the Magistrate considered the question of serving notice of proceedings upon the sperm donor by reference to the earlier cases of *J & M* and *Re Mark*.¹⁵⁴ After noting that the issue was not pressed, the Magistrate simply distinguished *J & M* on the basis that there was no contradictor in that case.¹⁵⁵ Requiring notice to a donor to participate in proceedings obviously relies upon the notion that he is a parent under the *FLA*, as such notice is not given to others interested in the care, welfare and development of a child. If Ms Keaton and Ms Aldridge had in fact been determined to be a de facto couple, s 60H(1)(d) would have applied to conclusively determine that the donor was not a legal parent under the *FLA* – yet there was no reference to the section, nor any suggestion that the position expressed in obiter in *Re Mark* had since been legislatively overruled.

¹⁵⁴ *Re J & M* (2004) 32 Fam LR 668; *Re Mark* (2004) 31 Fam LR 162.

¹⁵⁵ *Keaton & Aldridge* [2009] FMCAfam 92 at [8].

More troublingly, in *Hutchens & Franz*¹⁵⁶ the Family Court considered an application for leave to commence proceedings for the adoption of a child under s 60G(1) of the *FLA*. This provision essentially covers step-parent adoptions by providing that the Court may give leave for adoption proceedings by a prescribed adopting parent, defined as the parent of a child and/or their spouse or de facto partner.¹⁵⁷ The case concerned a child born through a surrogacy arrangement, and implicitly throughout treated the genetic father as a legal parent, with no reference to the new s 60H(1), despite the fact that the birth mother was in fact married at the time of conception and so the provision clearly applied.

Mr and Mrs Hutchens were the commissioning parents in the surrogacy arrangement, Mr Hutchens' sperm was used, while Ms Franz carried the child and (it appears) also contributed the egg. The child was born in 2002, and consent orders were made shortly afterwards for the Hutchens to have parental responsibility and residence with the child. Ms Franz was married at the time of conception, thus her husband was also a legal parent under state law, under the old s 60H(1)(a) and under the new s 60H(1)(a). Yet in both the earlier parental responsibility case and in the 2009 adoption leave case, only Ms Franz, and not her husband, was named as a respondent. Critically, the jurisdiction of the Family Court under s 60G(1) is only possible if one of the people adopting the child is *already* a legal parent: the case proceeded on the basis that Mr Hutchens, the genetic father, is that parent. Yet Mr Hutchens was never a legal parent under state law and the new s 60H(1)(d) provides in very clear terms that he is not a parent under the *FLA*.¹⁵⁸ Further, as the 2008 amendments also introduced s 60HB, a specific legislative provision regarding the parentage of children born through surrogacy, it is suggested that the legislative intention was clear that parentage in surrogacy should be dealt with through this new avenue.

¹⁵⁶ *Hutchens & Franz* [2009] FamCA 414.

¹⁵⁷ *Family Law Act 1975* (Cth) s 4(1).

¹⁵⁸ The earlier case is not available. If the Court had determined that Mr Hutchens was a 'natural' or 'ordinary' parent under the 'enlarging' approach to the *FLA* prior to the 2008 reforms, it should be noted that the child would actually have had two fathers under the *FLA*, as the old s 60H(1) also designated Mr Franz a father.

The more recent judgment by Watts J in the surrogacy case of *Re Michael* should finally put this question to rest.¹⁵⁹ Like *Hutchens* the commissioning parents in *Re Michael* applied to the Family Court under s 60G for leave to commence adoption proceedings for the child. After concisely outlining the debate on the ‘enlarging’ approach, Watts J held that ‘the debate...has been legislatively decided’ with ss 60H(1) and 60HB providing an exhaustive definition of parentage in the case of surrogacy.¹⁶⁰

It is my view that it was the legislative intention of s 60HB FLA to 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 the provisions of a prescribed State law. In circumstances where State law did not allow an order to be made recognising the providers of genetic material as parents, it was Parliament’s intention that they not be recognised as parents. Consequently the provisions of s 60H(1)(d) FLA then apply and a child is not to be considered a child of those who have provided genetic material.¹⁶¹

As neither of the intended parents was a legal parent, the application to proceed with a step-parent adoption was denied.¹⁶²

Surrogacy Families

The new 60HB is headed ‘Children born under surrogacy arrangements’ and provides that if a court has made an order under a prescribed state or territory law as to the parentage of a child, then for the purposes of the FLA the child is a child of the person or persons.

Section 60HB reflects the view of the Senate Committee in rejecting the ‘product of a relationship’ approach because it would have altered the parentage of children born through surrogacy via ad hoc

¹⁵⁹ *Re Michael: Surrogacy Arrangements* [2009] FamCA 691.

¹⁶⁰ *Re Michael: Surrogacy Arrangements* [2009] FamCA 691 at [25].

¹⁶¹ *Re Michael: Surrogacy Arrangements* [2009] FamCA 691 at [34].

¹⁶² See note 165 below.

processes at federal level that were not in accord with state law on parentage.¹⁶³ Deferring to state-based transfer processes ensures consistency of state and federal law on parentage. Moreover reliance upon the formal court-based transfer processes ensures a child's best interests inquiry and an inquiry into informed consent by the gestational mother.

To date the prescribed laws are those of Western Australia and the ACT (the Victorian Act takes effect from 1 January 2010).¹⁶⁴ In the case of *Re Michael*, discussed above, the parties were from NSW and so could not avail themselves of s 60HB because NSW had not yet introduced a parentage transfer process at the time of the hearing (although a parliamentary committee has recently recommended doing so).¹⁶⁵ For the new provision to work effectively, the remaining states and territories will need to introduce such schemes as quickly as possible.

A notable omission in s 60HB is that it only refers to state and territory laws. Thus parentage transfers in surrogacy arrangements granted by courts overseas (even those that meet the same standards as those in operation in Australia) are *not* recognised. This leaves the parentage of children born through overseas surrogacy arrangements in a continuing vacuum. A child born abroad through surrogacy is not entitled to Australian citizenship by descent, nor is a birth certificate issued overseas or a foreign court order of parentage binding on an Australian court.¹⁶⁶ Furthermore if parentage has

¹⁶³ See eg Senate Standing Committee on Legal and Constitutional Affairs, *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008, Report* (October 2008) at [2.22], [3.44].

¹⁶⁴ Family Law Regulations 1984 (Cth) reg 12CAA.

¹⁶⁵ See above note 102. The parties in the case would nevertheless be able to apply to adopt the child as 'relatives' under NSW adoption law because the birth mother in this case was actually the mother of the commissioning mother. The birth mother and her male de facto partner are the legal parents of the child (although the social grandparents) and the child is therefore legally a half-brother to the commissioning mother. The Court notes that the process for 'relative' adoptions has recently been streamlined in NSW: *Re Michael: Surrogacy Arrangements* [2009] FamCA 691 at [55]. While a beneficial solution for the parties in this case, many surrogacy families are not be able to access this very limited avenue.

¹⁶⁶ See *Australian Citizenship Act 2007* (Cth) ss 12, 16 and *Re Mark* (2004) 31 Fam LR 162.

been transferred to the intended parents while overseas, a denial of Australian citizenship would effectively render the child stateless.¹⁶⁷

CONCLUSION

This overview, and very preliminary critique of the 2008 amendments indicates that while they have been sweeping in scope they build upon 20 years of state based case law interpreting de facto relationships and are also largely consistent with a decade of reforms in state and territory law concerning same-sex relationships, as well as with developing, and increasingly harmonious, state approaches to parentage in assisted conception and surrogacy. This general confluence of approach augers well for the development of a more cohesive body of family and relationship law in Australia, which has been plagued by inequality and fragmentation in the past.

Yet there still remain some gaps in the federal reforms, such as the recognition of Australian but not foreign civil unions and registered partnerships. In general the new parentage provisions will enhance access to justice for children born into non-traditional families, and the models used represent a marked improvement on the ‘product of a relationship’ approach posed in the original Bills. It is worth recalling that the new parentage provisions were hastily drafted in response to brief and intense Senate Committee inquiries and so it is perhaps unsurprising that the parentage reforms also evince some omissions and inconsistencies. Most notable among these is the absence of a provision conclusively severing parental status under the *FLA* for gamete donors to single women and the absence of any provision to address the parentage of children born through surrogacy arrangements overseas. No doubt more concerns and criticism will appear with the passage of time as families continue to pose unexpected and complex fact scenarios that test the new provisions.

¹⁶⁷ This scenario recently occurred in the UK: *X & Y (Foreign Surrogacy)* [2008] EWCH 3030.