Page Provan
family and fertility lawyers

Sperm Donation Issues

Miller du Toit Cloete Virtual Conference 2021

It is an honour to present again at this conference. I last presented at this conference in March last year just as the pandemic was taking off. Sadly, I can't be in Cape Town in person currently, but I am delighted to appear via Zoom. I am going to cover six topics in today's presentation:

1. Anonymity is dead and buried.
2. Caps on the number of children born.
3. Who is a parent?
4. Throuples.
5. A recent case involving a transman who gave birth.
6. Pandemic challenges.

1. ANONYMITY IS DEAD AND BURIED

In 2018 when I spoke at your conference, another speaker was from the South African Law Reform Commission who called for there to be openness for gamete donors, along the lines of the Australian model so that when the child turns 18, they have the ability if they so choose, to find out who is the donor.

Australia's current settings of transparency have been in place since 2014. Prior to then anonymity was the norm.

Victoria has taken it a step further. Victoria is the only jurisdiction in the world that has changed its laws retrospectively (in 2017) so that previously anonymous donors (principally sperm donors) are anonymous no longer. When Victorian authorities wrote to adult recipients along the lines of: "Guess what? You were conceived from a sperm donor!", many of them had not been told by their parents that they had been conceived through donation. For some reason, Victorian authorities did not notify the parents first, so they could be given a heads up before the letter went to their children.

There have been suggestions that similar laws should be enacted interstate, but these moves have not occurred.

It should be accepted by any donor that sooner or later they will be found if the recipient wishes to find them. It is only a question of time. Whether it is wise to undertake DNA tests is another matter entirely. Recently, I have seen an anonymous egg donor agreement from the United States by which the egg donor remains anonymous – but then the agreement warns that with the rise of databases such as www.ancestry.com and www.23andme.com that true anonymity is at an end – but it may not be a wise idea to undertake such a search.

Anyone contemplating being a sperm or egg donor or seeking to become a parent with the benefit of a sperm or egg donor must contemplate that the data held in these databases should not be considered as to the current data held in the database but how much data might be held in 18, 20, 30 or 40 years' time from now – in which case one must consider that the amount of data held is likely to be considerably greater.

EXAMPLE 1: FIONA DARROCH

Fiona is a psychologist practising in Newcastle. She regularly writes family reports for the Family Court of Australia and the Federal Circuit Court of Australia. However, Fiona does not do so in cases involving ART.

She was born in 1961 in South Africa. She and her family migrated to Australia. It was only after her father's death that Fiona discovered that he was not in fact her genetic father. This was both a shock and a surprise to her- that her parents had lied to her about where she had come from- a lie as she discovered was initiated by the treating doctor.

Fiona then tried to locate her genetic father. Her efforts were initially blocked by the requirement for donor anonymity.

However, going to databases such as ancestry.com and 23andme.com quickly yielded results. Fiona discovered that her genetic father:

- ✔ Was the doctor who had helped her parents conceive.
- ✔ Had committed suicide.
- ✔ Had fathered at last count about 200 children.

Fiona has relatives around the world. Some of them are as keen as she is to find out their genetic origin. Some are indifferent. Some are hostile to knowing.

Recipient advocates often make the point that everyone has the right to know their genetic origins- and that everyone wants to know. Fiona's example is clear- that some may not find out their genetic origins until much later in life (than the ability to achieve that outcome at 18), and may never want to find out.

EXAMPLE 2: THE MEDICAL STUDENT

In 2000 a medical student, after some nudging from lecturers, agreed to be a sperm donor. This was a common scenario back then. In his telling, he became a sperm donor voluntarily, but the clear expectation was that he would be a sperm donor- to help society and help medicine. At the time he donated, his donation was anonymous.

In 2004 the licensing conditions of clinics changed in Australia so that true anonymity was removed, and the child could, after reaching the age of 18, find out the identity of the donor. As the sperm donor was not in Victoria, this change was not retrospective.

In 2020 the former medical student (now a doctor) was alarmed to find an unsolicited message on Facebook from a lesbian couple which started: "This is your son" with a picture of teenage boy.

The doctor concluded that the IVF clinic had leaked information and that that is how the couple found out his identity.

He had his own family, and he was concerned about the impact on them of the existence of this other child.

I suggested that there were three possibilities about how the women had found him:

1. That there had been a leak by the IVF clinic, as he suggested, but that I considered this most unlikely. My experience with that clinic was that it had never leaked, even inadvertently.

2. That there had been a social connection that the women had cottoned onto.
   In a social group in a regional town, two sets of parents discovered a likeness of their children one to the other. It was soon discovered between them that they had gone to the same clinic and most likely used the same sperm donor. That case illustrates about what it means in practice to have a cap on the number of donations- a cap in a large metropolitan area might be quite different to the same cap where the only IVF clinic is operating in a small country town.
   In a case which had appeared in the media in Australia some years ago, a woman had donated an embryo through her IVF clinic. The clinic was required to report to the Government as to whether a child had been born or not. The clinic reported to the Government that a child had not been born, because the recipient had advised the clinic that a child had not been born. Subsequently, the donor saw on Facebook pictures of another child about the same age as her child who looked remarkably similar to her child. On the hunt, she then put two and two together that the other child was in fact the child who had been born from the embryo donation, the recipient having lied for some reason that a child had not been born.
   That case led to changes in statute law in New South Wales as a result to try and minimise the chances of a repeat.

3. That someone had been on a database such as ancestry.com or 23andme.com and then tracked him down.

My client was firmly of the view it was the first. In any event, I referred him to a fertility counsellor to discuss as to the implications of the discovery. He found this counselling very helpful.

The answer as it turns out was No. 3. My client's mother had done a DNA test with ancestry.com. The current data meant that he was able to be tracked down very easily.

The anecdotal reports I have received is that the database is heavily weighted towards Caucasians, as opposed to other ethnic groups, such as Asians. Despite the phenomenal growth in the volume of the data stored by these databanks (where to get a test done you consent to the release of your information), those betting on anonymity now are betting that the state of data will be the same in 18, 20, 30 or 40 years' time. This would seem a losing bet.

2. CAPS ON THE NUMBER OF CHILDREN BORN

Australia is a federation. There are no consistent rules on the number of children who can be born through sperm donation[1]. Each State sets rules as to the number of women or families to whom donations can be made. In most States this is seen as a reasonable number of families (which is commonly viewed as 10). Victoria has a limit of 10 women. This has been criticised by a recent review as counting each woman in a lesbian relationship separately. Thus while a couple might each want to carry and give birth to a child, and to ensure that the children are genetically a sibling, problems might (and have) arise when the first woman is under the cap, but the second woman is over it. The cap in New South Wales is 5 women (although if the woman is in a same sex relationship, her partner in included in the cap). Western Australia has a limit of 5 recipient families, anywhere in the world.

1 Or egg or embryo donation- the rules are the same for any of these, but my topic is about sperm donation.

A side effect of removing anonymity all those years ago has been a marked reluctance of men to be sperm donors. It is also possible that many men who might otherwise have been sperm donors through clinics but identify as either gay or men who have sex with men may be reluctant to be sperm donors, when it is widely publicised that they cannot be blood donors in Australia due to perceived risks as to the spread of HIV. There has thus been an increase in reliance on overseas sperm donors, especially from the United States.

The low cap in each of New South Wales and Western Australia has, I am told from those in the industry, diminished the amount of imported sperm available in those States, as it may not be commercially viable for US sperm banks to export to those States, unless a higher price is paid by the recipient clinics (and therefore the intended parents) to guarantee exclusivity.

An added complication in Western Australia is that in any surrogacy journey there the sperm or egg donor must be a party to the surrogacy arrangement, and must as a consequence have had counselling and independent legal advice. Such a donor must therefore be a known donor.

With the rise of the internet has been the rise of sites by which intended parents can connect with prospective egg and sperm donors. These sites are not regulated[2]. On one of these sites some men opt to be parents "the natural way" probably without much consideration about the implications to being a parent such as child support and inheritance, let alone transmission of disease[3].

In the last couple of years there have been media stories of men donating the sperm through connecting on these sites:

- "**Joe Donor**".[4] He is an American man who goes by this pseudonym. At last count, he had "**fathered**" 100 children. Before the pandemic he would fly into Australia with his expenses being met by the intended parents. He had **annual** health checks.
- The Brisbane man, Alan Phan[5], who told the Daily Mail in November 2020 that he had reached the cap as a sperm donor through various IVF clinics, but enjoyed the experience so much he kept going, using the internet to meet intended parents. He described his sperm donation "**as a hobby**". The report said that he had "**fathered**" 23 children **in one year**. He had two by his wife. The report was unclear as to whether the grand total at that stage was his two children plus 21 other children or his two children plus 23 other children. He said he was going to complete sperm donation by the end of December 2020. When the story broke, several sperm samples of the man stored at IVF clinics and embryos created from his sperm were discarded by IVF clinics.
- Australia's oldest sperm donor, John Lindsay Mayger, aged 72[6], who has been banned by IVF clinics as being too old and has reportedly "fathered" up to 50 children, is still going, now supplying to lesbian couples. In his words: "**Some people fish some golf … I masturbate**." By comparison, one of the sites operated by an IVF clinic has an upper limit on the age of sperm donors at 45[7].

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2 https://www.abc.net.au/news/2017-11-08/i-used-facebook-to-find-a-sperm-donor/9107812 viewed 10 May 2021.

3 This is an American story, and one wonders whether it refers also to Joe Donor, but it covers the point: https://abcnews.go.com/Lifestyle/meet-men-sex-strangers-babies/story?id=26870643 viewed 10 May 2021.

4 https://www.youtube.com/watch?v=NGhbcTGZmkI . I was interviewed, and was quite critical of Joe Donor.

5 https://www.dailymail.co.uk/news/article-8989065/Married-freelance-sperm-donor-Alan-Phan-investigation-fathering-23-children-year.html viewed 10 May 2021 and by way of disclosure I was interviewed for the story.

6 https://www.dailymail.co.uk/news/article-9087093/Meet-Australias-oldest-sperm-donor-fathered-50-kids.html viewed 10 May, 2021.

7 https://www.spermdonorsaustralia.com.au/who-can-donate/are-you-eligible/ viewed 10 May 2021.

The operator of one of the websites, Adam Hooper[8], who in turn is the father of 17 children, two by his wife and 15 as a donor, has called for transparency between the websites and IVF clinics and that he "felt the investigation into Mr Phan would create a dishonest system with donors using aliases and recipients avoiding registering their donors."[9]

In part, possibly due to the decision of the High Court of Australia in **Masson v Parsons** [2019] HCA 21 and in part due to pandemic challenges, in 2020 there was a marked increase in the number of known sperm donor arrangements through my practice. We will see if this marked increase is temporary or more permanent. Intended parents have reported that at some clinics there is now a shortage of sperm donors. This shortage is also occurring in the United States, the source of much sperm used in Australian IVF clinics, with the rise of unregulated internet sites there too, as reported by the New York Times[10].

3. WHO IS A PARENT?

There is no consistent definition across Commonwealth legislation of who is a parent. In 2013 a statutory body, the Family Law Council, recommended that there be a federal **Status of Children Act**. No such Act has been enacted.

Each of the six States and two Territories have enacted status of children legislation, broadly similar in scope. In addition, most of our family law when it comes to parenting (including

some parenting presumptions) is under the **Family Law Act 1975** (Cth), which is Commonwealth legislation. An issue that has concerned the courts is what legislation applies to decide who is and is not a parent.

In the last 20 years, two different approaches have been taken by Family Court judges:

- ✔ That the parentage presumptions under the **Family Law Act 1975** (Cth) and the respective State and Territory **Status of Children Acts** act as one unitary scheme. One goes first to the federal legislation, the **Family Law Act**, to determine if someone is a parent and if the answer is not present there, then one goes to the respective State or Territory **Status of Children Act**.
- ✔ That there is no unitary scheme. Where the Federal legislation is inconsistent with the respective State or Territory legislation then, consistent with the provisions of the Constitution, the former prevails over the latter.

The differing approaches were highlighted in **Masson v Parsons** [2019] HCA 21.

8 https://www.afr.com/policy/health-and-education/meet-the-father-of-17-who-leads-australia-s-private-sperm-donor-group-20210127-p56x8l viewed 10 May 2021.

9 See the link at footnote 5.

10 https://www.nytimes.com/2021/01/08/business/sperm-donors-facebook-groups.html viewed 10 May 2021.

MASSON V PARSONS [2019] HCA 21[11].

The Facts

Mr Masson was a gay man who contributed a quantity of sperm to his friend Ms Parsons (the first Ms Parsons). Her girlfriend (the second Ms Parsons) helped her become pregnant.

A girl was conceived and born. With his consent, Mr Masson was named on the birth certificate as the father. For 10 years the girl called him Daddy. The two women had a second daughter, conceived through a clinic-recruited sperm donor. She also called Mr Masson Daddy.

The two women at one stage commenced living together. They then married.

They announced to Mr Masson that they intended to move with the children to New Zealand. He sought an injunction to stop the children moving. The issue at trial focused on whether Mr Masson was a parent of the first child.

The two Ms Parsons claimed that at the time of the conception of the first child they were living together in a de facto relationship. If this had been true, then under a Commonwealth State scheme of legislation, they would have been the only parents and Mr Masson would not have been a parent. The trial judge rejected that evidence and found that they were not living in a de facto relationship at that time. The issue at trial was therefore whether the child had one parent (the first Ms Parsons) or two (Ms Parsons and Mr Masson).

The two Ms Parsons argued that the appropriate course was to take that of the unitary scheme and that on that basis Mr Masson was not identified under the **Family Law Act** as a parent. Under the **Status of Children Act 1996** (NSW) Mr Masson was not a parent. He was therefore in their submission not a parent, and the only parent therefore was the first Ms Parsons.

The trial judge rejected that approach. She found, consistent with a line of single judge decisions, that as a matter of fact, Mr Masson was a parent because:

1. He was genetically the parent.
2. He intended to be a parent.
3. Following the birth of the child, he had parented.

The two Ms Parsons appealed.

11 http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2019/21.html for the benefit of South African eyes.

FULL COURT

The Full Court of the Family Court of Australia rejected the approach of the trial judge. The court found that there was a unitary scheme between the Federal and State laws. As a result, Mr Masson was not a parent. It was irrelevant that:

1. He was genetically the parent.
2. He had intended to parent.
3. That he had "**parented**".

Mr Masson applied for special leave of the High Court of Australia to appeal. This was granted.

HIGH COURT OF AUSTRALIA

Mr Masson's appeal was wholly successful. Six judges of the High Court delivered a joint judgment. The seventh agreed with the outcome but dealt with a discrete constitutional issue. The High Court found:

1. The issue of who is a parent, the word not being defined under the **Family Law Act**, was a question of fact unique to each case. Parent was a word that took on its contemporary meaning in Australian society in the English language. A parent was someone seen in the contemporary Australian view of who is a parent.
2. Without citing any authority for that proposition, the High Court came to the same conclusion that the Full Court of the Federal Court of Australia had taken as to who was a parent for the purposes of Australian citizenship[12]. The High Court approached the matter based on statutory interpretation.
3. The High Court made plain that where there was a conflict between the **Family Law Act** and any State or Territory Status of Children Act, the former prevailed. There is no unitary scheme.
4. The High Court left open the question that there might be more than two parents under the Family Law Act.

Ms Parsons and the State of Victoria argued that Mr Masson as a sperm donor did not fall within the ordinary definition of who was a parent. What was clear to the High Court was that the key issue in that case was that of intention. Mr Masson had supplied his sperm "on the express or implied understanding" that he wanted to become a parent. He had placed his name on the birth certificate because he intended to parent. He had then engaged in parenting. Accordingly, he was a parent.

The High Court did not give a hard and fast rule about sperm donors.

In a single judge decision of Groth & Banks[13], the trial judge found that a sperm donor who did not want to have an ongoing relationship with the child was not a parent. Again, it was a question of intention.

Media reports have said that each of Mr Masson and the two Ms Parsons had spent by the conclusion of the High Court case (which was not the end of the matter, it being sent back to the Family Court for further decision) in the order of A$2m in legal fees[14].

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12 H v Minister for Immigration & Citizenship [2010] FCAFC 119, viewable at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2010/119.html, which makes plain that there does not need to be a genetic connection between parent and child.

13 [2013] FamCA 430, viewable at www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FamCA/2013/430.html .

14 For example: https://www.abc.net.au/news/2019-08-28/sperm-donor-legal-father-high-court-decision-impact-on-family/11450364?nw=0 viewed 10 May 2021, in which I was interviewed.

The High Court has clarified the issue of intention so that, by way of a general rule, if someone is the genetic parent through ART of some kind and makes plain that he or she wants to be a parent, then he or she is a parent, whereas if he or she makes plain that he or she does not want to be a parent, then the expectation is he or she won't be. Accordingly, there has been a significant rise in the number of sperm donor agreements entered into with known sperm donors to make plain that they are not parents. What status these agreements have in Australia is unclear. The clear statement by the High Court that Mr Masson's understanding was "express or implied" makes plain that the agreement in that case was oral. If it had been a properly drafted agreement there would have been no doubt his express intention to become a parent.

Because the Commonwealth under the Family Law Act has specifically recognised State and Territory regulatory regimes as to domestic surrogacy, then when it comes to those surrogacy arrangements, State and Territory parentage presumptions continue to apply[15] in consideration of the making of a State or Territory parentage order. What remains unclear is what happens if the parentage order is not made, then what presumptions apply.

4. THROUPLES

Until the High Court in Masson came along and said that there was the possibility of greater than two parents, the general view in Australia was that the number of parents was limited to two. Of course, with a child conceived naturally this was easy. Once sperm donation became a feature, the sperm donor was not recognised as a parent.

Matters became more complicated with modern family formation, especially for LGBTIQ+ people. This was seen with the recognition of lesbian couples as parents. Prior to that legislative change, men who had supplied sperm to their lesbian couple friends that resulted in the birth of children had been named on the birth certificate as the father. Following that legislative change in which the two women were recognised as the parents, there were then a series of cases in which the women successfully stripped the men back from being a parent, to have the non-birth mother recognised as a parent.

In AA v Registrar of Births Deaths and Marriages and BB [2011] NSWDC 100 the lesbian couple had split up. The non-biological mother wanted to be named on the birth certificate as a parent. In order for her to be so named, the man who had provided his sperm resulting in the conception of the child (and was named as the father) had to be removed. The father had not initially been named on the birth certificate. This had occurred after he had commenced Family Court proceedings in order to spend time with the child. Six years after the man was named on the birth certificate as the father, the law changed in New South Wales to say that both women were the parents. The legislation was retrospective. The relationship between the couple had ended two years before the change of the law. The court held that the parents who should be registered on the births' register should be the two women. The man's name was then removed.

He later went public telling of the trauma to him of being removed from the birth certificate and campaigning to allow for three parents to be registered. His efforts have fallen on deaf ears.

In Dent v Reece [2012] FMCAfam 1303 the child was born before the change of law in New South Wales. The non-biological mother was added to the birth register as a parent.

15 In RBK v MMJ [2019] QChC 42 viewable at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QChC/2019/42.html , in which I acted for the intended parents.

In LU v Registrar of Births Deaths and Marriages (No. 2) [2013] NSWDC 123 the father was removed as a parent from the birth register on the same basis.

The same was seen in Queensland in A & B v C [2014] QSC 111. The same outcome ensued. The proceedings in Queensland were brought after the father had commenced proceedings in the Federal Circuit Court to spend time with the children.

But what if all three (or four) people creating a child agree that they should all be recognised as a parent? Throuples although not common are seemingly on the rise. If only two people are to be recognised as parents, what happens to the third?

Recent Example of a Throuple

Husband and wife had tried for many years to have a child, without success. They had formed recently a relationship with their long-time neighbour, a woman, whom I will for the sake of convenience call "the partner", so that now there was a three-way relationship. The three of them lived together as an item and shared the same bed.

They intended to have a child through ART. The genetic mother of the child would be the partner, who would also be the birth mother. The husband was infertile, so a clinic-recruited sperm donor was to be used.

Who were the parents? I had no doubt that the birth mother would be a parent. It is likely under the Masson test that all three of them might be parents. All three of them intended to bring about the existence of the child and to parent it. Whether all three would be recognised under the Masson test remains unclear. Under Queensland law, only two parents could be registered. This might be the birth mother and the wife, the birth mother and the husband or the husband and wife.

After having discussed the matter at length, there was agreement between the three parties that the two people to be registered on the birth were to be the birth mother and the wife.

I could not be certain that the wife would be a parent under Queensland law (as opposed to the Family Law Act). Nor could I be certain that the husband would be a parent under Queensland law. Whilst a test case was very interesting, it could be emotionally and financially draining. The preference of the three parties was to comply with Queensland law to have only two named on the birth certificate.

Even if not named on the birth certificate, the other party or parties could have all the responsibilities of parenthood, including an obligation to pay child support. In 1996 a non-biological lesbian mother (a time when they were not recognised as a parent) was held liable to pay damages to her former partner for issue estoppel as they had both undertaken the plan to have children together but the non-biological mother, realising that she was not a parent under the law, then washed her hands of the liability to maintain the children[16]. In other parts of the world it is possible to have three parents or more registered. The leading example is Ontario where, by agreement, four parents may be registered.

16 W v G [1996] NSWSC 43.

5. THE CASE OF THE QUEENSLAND TRANSMAN WHO GAVE BIRTH

As an example of complexity about who is named as a parent, Queensland law requires that the woman who gives birth is named as the mother. This is consistent with the historical view: the mother is always certain (mater semper certa est). In Coonan v Registrar of Births, Deaths and Marriages [2020] QCAT 434, Leigh Anthony Coonan gave birth. He was a transman, i.e. genetically female but identified as male. He wanted to be registered on the birth register as the father, not the mother. Mr Coonan sought a review of the decision of the Registrar of Births, Deaths and Marriages to name him as the mother.

The Registrar argued:

1. By recording Mr Coonan as the child's mother, the Registrar did not make a decision in the requisite sense, but merely recorded the biological role of the applicant in the birth of the child as required under the **Births, Deaths and Marriages Registration Act**. There was no reviewable "**decision**" because it was not a matter that the Registrar was capable of deciding or otherwise had control over. The terms '**mother**' and '**father**' are objective and "**self-executing**" definitions and the provisions in which those definitions appear merely direct what information must be recorded on the birth register. If the tribunal determined that there was no decision, then the application for a review is misconceived and ought to be dismissed.
2. Alternatively, if there were a decision, the Registrar sought an order confirming the decision on the basis that the Registrar had made the correct and preferable decision. The Registrar argued that Mr Coonan's role in the birth of the child precluded the Registrar from forming a reasonable belief that he was the "**father**" of the child for the purposes of the register. The relevant Act used "**mother**" to refer to the person who gave birth to the child and that the term in the Act is not concerned with the legal status of the person's registered sex, but with the ordinary biological status attributed to a sex. The biological classification of terms is also why: the child's parent or one of the child's parents must be registered as the '**mother**' or '**father**'; not more than one person may be registered as the child's '**mother**' or '**father**'; not more than two people in total may be registered as the child's parents and there is provision for a change of parentage pursuant to a parentage order in order to ensure the most accurate details are reflected in the register.

The Tribunal did not accept that there was no decision being made by the Registrar. The Registrar from receipt of the application was engaged in a process of fact finding to determine whether the information provided is corrected and whether, relevantly, for the purposes of the **Births, Deaths and Marriages Registration Act** a person has been properly identified in the application of the child's mother or father. That process led to a decision whether to accept the application of the registration of the child's birth in the terms proposed in the application or not. The Tribunal stated it was clear from the definition of birth that a mother under the Act is a person who gave birth and as a matter of statutory interpretation, the relevant Act does not provide for a person being, at the same time, a child's mother and father:

"**As the applicant gave birth to the child, the applicant must be the child's mother for the purposes of the registration of that child's birth. No one else gave birth to the child. Because the applicant is the mother and must be registered as the mother, the applicant cannot be registered as the father.**"

Further:

"**The Births, Deaths and Marriages Registration Act does not concern itself with the role a parent wishes to take in raising the child. It uses as its reference point the biological aspects of childbirth and the role a person takes in that process. It is not concerned with the role a person wishes to play in the upbringing of that child. I note that being registered as the 'mother' or, as the person who gave birth to a child, does not prevent that person from being the father figure in that child's life**."

6. PANDEMIC CHALLENGES

The pandemic has made life interesting. For those pursuing surrogacy overseas, there have been great difficulties going over and coming back. Australia, alone of all the democracies, has made it a criminal offence to leave Australia as an Australian citizen or resident without permission of the Australian Government. After a period of chaos following the imposition of this requirement on 25 March 2020, that approval now can be obtained in a reasonably ordered and timely manner for those wishing to attend at the birth of their child via surrogacy overseas. In media reports of the last few days, that travel ban is likely to remain in place until some time next year.

There have been a number of Australians who have reported that they cannot travel overseas for IVF treatment, such as through egg donation or sperm donation. I have had a number of reports to me that the Australian Government has allowed Australians to travel overseas, for example to the United States, for this purpose.

Nevertheless, there has been a definite increase in Australians seeking to have sperm, eggs or embryos imported into Australia. The first that must be said is that each State has different rules. In broad terms, there must be compliance with:

1. Consent, including the ability to be located after the child turns 18.
2. The relevant cap on donations.
3. The donation not being commercial, as defined under Australian law.
4. Adequate counselling, as seen through Australian eyes, has been undertaken.

In two Australian States, the specific approval of the State regulator is required when it is intended to import either donor gametes or embryos created from donor gametes:

In Victoria, the Victorian Assisted Reproductive Treatment Authority (VARTA).

In Western Australia, the Reproductive Technology Council (RTC).

I am aware that there has been one case of embryos being created in South Africa being able to be approved by VARTA to be imported into Victoria. These embryos were created from the Australian man's sperm and egg from a South African egg donor.

I am aware that a number of Australian couples have sought unsuccessfully to import embryos from the United States created from the Australian man's sperm and egg from an American egg donor.

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