

## AND BABY MAKES FOUR: DEALING WITH THROUPLES

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### INTRODUCTION

An emerging trend in those who want to become parents are those who seek to be parents where there are more than two intended parents. This issue has been recognised internationally. In Ontario, for example, up to six parents can be, with consent, named on the birth certificate. Australian law has stuck at two parents. The High Court in *Masson v Parsons* [2019] HCA 21<sup>2</sup> left open the possibility that more than two parents could be recognised under the *Family Law Act*.

The evident difficulty is that if the law only recognises two people as the parents, but the child's reality is that there are three, then what?

I set out below a case example which shows the difficulty where more than two people seek to have a child about how they will be recognised or not as the child's parents. Cases of multiple parents typically occur in the LGBTIQ+ community.

### EXAMPLE – BOB AND CAROL AND ALICE

Bob and Carol are a married couple. Despite their best efforts, they have never been able to conceive. Their neighbour of many years, Alice, has always been their best friend. She has had no difficulties with fertility, having had several children. The relationship between Bob and Carol, and Alice respectively changes when Alice becomes a member of the household. Rather than being a two partner relationship, the relationship is now three, namely Bob and Carol and Alice. They are a throuple.

Carol is desperate to have a child. Alice wants to support Bob and Carol's intention to have a child – which the three of them will raise together as their child.

The first issue for an IVF clinic is whether, if it feels uncomfortable about this arrangement, it can decide not to provide treatment. The simple answer is it can't.

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<sup>2</sup> At [26].

## NHMRC ETHICAL GUIDELINES

The National Health and Medical Research Council *Ethical Guidelines*<sup>3</sup> sets out guiding principles. These include:

1. ART activities must be conducted in a way that shows respect to all involved.
2. The interests and wellbeing of the person who may be born as a result of an ART activity must be an important consideration all decisions about the activity.
3. ART activities must be undertaken in a manner that minimises harm and maximises the benefit to each individual or couple involved in the ART activity, any persons who may be born as a result of the activity, and any other child within the family unit who may be affected by that birth.
4. Decision-making in the clinical practice of ART must recognise and take into account the biological connections and social relationships that exist or may be formed as a result of the ART activity.
5. Decision-making in the clinical practice of ART must recognise and respect the autonomy of all relevant parties, promoting and supporting the notion of valid consent as a fundamental condition of the use of ART.
6. Decision-making in the clinical practice of ART must recognise that social relationships and social context may affect an individual's or a couple's decision-making and be sensitive to cultural and spiritual differences.
7. Processes and policies for determining an individual's or a couple's eligibility to access ART services must be just, equitable, transparent and respectful of human dignity and the natural human rights of all persons, including the right to not be unlawfully or unreasonably discriminated against.
8. The provision of ART must be underpinned by policies that support effective and efficient practices that minimise interventions not supported by evidence of successful clinical outcomes.
9. The provision of ART must be transparent and open to scrutiny, while ensuring the protection of the privacy of all individuals or couples involved in ART and persons born, to the degree that is protected by law.

The *Ethical Guidelines* say in respect of discrimination:

*"In determining an individual's or a couple's eligibility to access ART services, there must be no unlawful or unreasonable discrimination, for example, on the basis of:*

- *Race, religion, sex, sexual orientation, relationship status, gender identity or intersex status, social status, disability or age*

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<sup>3</sup> National Health and Medical Research Council, *Ethical Guidelines on the use of assisted reproductive technology in clinical practice and research*, 2017

- *The reason(s) for seeking assisted conception*
- *Refusal to participate in research.*

*The right of an individual or a couple to accept or reject specific procedures or treatments should be respected. However, where the choice of an individual or a couple is in conflict with current clinical evidence and practice, it is likely to have an adverse effect on the person who would be born, or has demonstrable adverse social impacts (e.g. the transfer of multiple embryos at the one time), then it is appropriate that these factors are taken into account in decision-making regarding the procedure. There are circumstances where it is reasonable for a clinician to delay treatment or decline to treat an individual or couple."*

The *Ethical Guidelines* then allow for conscientious objection "so long as the objection does not contravene relevant antidiscrimination laws and does not compromise the clinical care of the patient (e.g. the patient is referred to someone without a conscientious objection and is willing to accept their care)." The *Ethical Guidelines* refer to the *Age Discrimination Act 2004 (Cth)*; *Disability Discrimination Act 1992 (Cth)*; *Sex Discrimination Act 1994 (Cth)*; *Australian Human Rights Commission Act 1996 (Cth)* and similar State and Territory legislation.

The *Ethical Guidelines* are not law. There are imported into the licence conditions of every IVF clinic in Australia via the *RTAC Code of Practice*. It is therefore mandatory for IVF clinics to comply with the *Ethical Guidelines*, save where there is a contrary law.

Section 22 of the *Sex Discrimination Act 1984 (Cth)* provides:

*"It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:*

- a. by refusing to provide the other person with those goods or services or to make those facilities available to the other person;*
- b. in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or*
- c. in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person."*

Quite simply, to discriminate against a patient based on their sexual orientation or marital or relationship status, which I highlighted, for example, is unlawful as section 22 makes plain.

Previous attempts by States to limit ART to married women or those in de facto relationships were unsuccessful, when the courts upheld the validity of section 22, thereby overriding those State restrictions<sup>4</sup>. There is no reason to believe that s.22 remains valid concerning

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<sup>4</sup> *Pearce v South Australian Health Commission & Ors* [1996] SASC 6233; *McBain v Victoria* [2000] FCA 1009.

sexuality, marital or relationship status. The *Sex Discrimination Act* was enacted in part relying on the Commonwealth Parliament's external affairs power. The current recognition of LGBTIQ+ issues in section 22 came about following pointed criticism of Australia at the United Nations Human Rights Committee as to the failure by Australia to protect LGBTIQ+ individuals.

In my view, just because the *Ethical Guidelines* refer to couple or an individual is irrelevant. Given that they are not law, in my view, they are no barrier to preventing treatment to a throuple.

## CONTRARY STATE AND TERRITORY LAWS

### Northern Territory

Section 41 of the *Anti-discrimination Act 1992* (NT) provides that a person shall not discriminate against other by failing or refusing to supply goods, services or facilities.

The attributes for which there cannot be discrimination are:

- a. Race.
- b. Sex.
- c. Sexuality.
- d. Age.
- e. Marital status.
- f. Pregnancy.
- g. Parenthood.
- h. Breastfeeding.
- i. Impairment.
- j. Trade union or employer association activity.
- k. Religious belief or activity.
- l. Political opinion, affiliation or activity.
- m. Irrelevant medical record.
- n. irrelevant criminal record.
  - na. A person's details being published under section 66M of the Fines and Penalties (Recovery) Act 2001
- o. Association with a person who has, or is believed to have, an attribute referred to in this section.

The critical ones are sexuality and marital status. However, currently there is an exemption under section 4(8) of the Act for which it would appear that any discrimination might be possible in the Northern Territory:

*"A reference in this Act to the provision of a service does not include the carrying out of an artificial fertilisation procedure."*

It is likely that s.4(8) is not operative, because s.22 of the *Sex Discrimination Act 1984*, being Commonwealth law, prevails.

In any event, the Northern Territory Parliament has enacted the *Surrogacy Act 2022* (NT). That Act is to commence on a date to be fixed, but likely to be later this year. That Act repeals section 4(8) of the *Anti-discrimination Act*.

## Western Australia

Western Australia continues to discriminate against single men or male couples undertaking surrogacy. Under section 33 of the *Human Reproductive Technology Act 1991* (WA) a licensee (i.e., a WA IVF clinic) must comply with the directions. Consent under clause 3.1 must be given by the recipient and the recipient spouse or de facto partner. No consideration has been given to there being more than two people in the relationship.

It is likely that the provisions of the *Human Reproductive Technology Act* and *Directions*, being contrary to the *Sex Discrimination Act*, are not valid, as the latter, being Commonwealth law, prevails.

## Victoria

Although treatment can be provided in Victoria, there is no recognition of a third person. Section 10(1) of the *Assisted Reproductive Treatment Act 2008* (Vic) provides:

1. A woman may undergo a treatment procedure only if –
  - a. the woman and her partner, if any, have consented, in the prescribed form, to the carrying out of procedure of that kind; and
  - b. either –
    - i. the criteria in subsection (2) apply to the woman [i.e. need for treatment]; or
    - ii. the Patient Review Panel has decided that there is no barrier to the woman undergoing a treatment procedure of that kind."

Where there is any conflict between the Victorian law and section 22 of the *Sex Discrimination Act*, the latter, being Commonwealth law, in my view prevails. Section 109 of the *Commonwealth Constitution* provides:

*"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."*

## WHO IS A PARENT?

After having established that treatment can occur and subject to the usual requirements of counselling and consent, the issue that then arises is as to who is a parent. The universal position of State and Territory laws is that there are only two parents. This is said in all States and the Northern Territory. Only the ACT does not specify the maximum number of parents:

## LIMIT ON THE NUMBER OF PARENTS

Jurisdiction	Limit of number of parents	Law
ACT	Not stated	Section 14 <i>Births Deaths and Marriages Registration Act 1997</i>
New South Wales	Both parents	Section 18 <i>Births Deaths and Marriages Registration Act 1996</i>
Northern Territory	Both parents	Section 15 <i>Births Deaths and Marriages Registration Act 1996</i>
Queensland	Two parents	Section 10A <i>Births Deaths and Marriages Registration Act 2003</i>
South Australia	The biological parents i.e. two	Section 17 <i>Births Deaths and Marriages Registration Act 1996</i>
Tasmania	Both parents	Section 14 <i>Births Deaths and Marriages Registration Act 1999</i>
Victoria	Both parents	Section 15 <i>Births Deaths and Marriages Registration Act 1996</i>
Western Australia	Both parents	Section 15 <i>Births Deaths and Marriages Registration Act 1998</i>

Whether parentage is limited to two parents is unclear. The High Court in *Masson v Parsons* [2019] HCA 21 made plain that when there was a conflict between the federal law, namely, the *Family Law Act 1975* (Cth) and the relevant state law concerning who was a parent, the *Family Law Act* prevailed. Who is a parent under the *Family Law Act* is a question of fact dependent on the particular case as seen in the wider view of Australian society as someone being a parent. The High Court has left open the possibility that there can be more than two parents. Chief Justice Kiefel, and Justices Bell, Gageler, Keane, Nettle and Gordon stated<sup>5</sup>:

*“Section 60B(1) perhaps suggests that a child cannot have more than two parents within the meaning of the Family Law Act. But whether or not that is so, section 60B(1) is not inconsistent with the conception of parent which, in the absence of contrary statutory provision, accords to ordinary acceptance: hence, as it appears, the need for the express provision in section 60H(1)(d) that, where a child is born to a woman as a result of an artificial conception procedure while the woman is married to or a de facto partner of an ‘other intended parent’, a person other than the woman and intended partner who provides genetic material for the purposes of the procedure is not the parent of the child.”*

<sup>5</sup> At [26]

In the case of Bob and Carol and Alice, Carol and Alice decided that they wanted to be on the birth certificate as the parents. Alice was to be the birth mother. It could be said with certainty that Alice was a parent. What could not be said with certainty was whether Carol would be a parent. The issue under the *Family Law Act* about being in a de facto relationship between Carol and Alice and the similar provisions under the Queensland *Status of Children Act 1978* were whether that de facto relationship needs to be exclusive between them or whether there could be another person in the relationship.

Under s.60H(1) of the Family Law Act, if a woman has given birth after having had an artificial conception procedure while she was married to or a de facto partner of another person and either the woman and the other intended parent consented to the procedure, and any other person who provided the genetic material used in the procedure consented to the use of the material in an artificial conception procedure, or under a prescribed State or Territory law, the child is the child of the woman and of the other intended parent, then the child is the child of the woman and of the other intended parent, but not the child of the person who provided the genetic material.

Under relevant matching State and Territory legislation, there is a recognition only of a couple relationship. For example, in Queensland, the Status of Children Act determines who is a parent first by the general parentage presumptions (usually as to paternity, for example arising from marriage or a de facto relationship), then a series of different categories:

- Fertilisation procedures – married women with husband’s consent
- Fertilisation procedures– women with female partner’s consent
- Fertilisation procedures– other married women and unmarried women

If Alice were to become pregnant via an artificial conception procedure with Bob’s sperm, is Bob:

- A person in the de facto relationship with Alice? – in which case he will be a parent.
- The provider of genetic material, because Carol and Alice are in a de facto relationship, in which case he is not a parent?

And what is the status of Carol? Her status also is unclear. She may or may not be a parent, depending on whether her relationship is considered a de facto relationship with Alice.

If Bob’s sperm were used, and it was considered that he was the genetic provider of material (and that Carol and Alice were in a de facto relationship) then he would not be a parent, because of the effect of s.60H *Family Law Act* and related State and Territory provisions.

Paradoxically, if sperm from a sperm donor were used, it is possible that Bob may be a parent, if, consistent with Masson, he was someone seen in the wider view of Australian society to be a parent.

Under s.60H(2) of the *Family Law Act*, Alice, by giving birth to the child, is a parent.

If Carol and Alice are the parents named on the birth certificate, this does not mean that they are the parents. A birth certificate under Australian law is only considered to be evidence of parentage, not proof of parentage.

Therefore, it can be said with some clarity:

- The birth mother, Alice, would be a parent.
- The other intended mother, in this case Carol, whose name would appear on the birth certificate, may or may not be a parent.
- The other intended parent, in this case Bob, whose name would not be on the birth certificate, may or may not be a parent.

Therefore, the outcome might be one, two or three parents.

## FINANCIAL LIABILITY

If someone is a parent recognised under the Family Law Act and therefore under the *Child Support (Assessment) Act 1989* (Cth), then a liability for child support may arise.

What if someone is not recognised as a parent? Does that person nevertheless have an ongoing financial obligation concerning the children?

The simple answer to that is that they may do. This was seen in a New South Wales case decided before lesbian couples were recognised as parents of their children under s.60H of the *Family Law Act* and matching State and Territory legislation.

### **W v G [1996] NSWSC 43**

Two women were in a de facto relationship between 1986 and 1994. In 1989 a son was born to one of the women as a result of an at home artificial insemination. In 1992 a daughter was born to that same woman as a result of a similar procedure. In the words of the court:

*"After the plaintiff returned to live with the defendant ... there was discussion between them about the plaintiff having a child. In late 1988, arrangements were made with a man, who had previously given sperm to an acquaintance, to provide sperm for the plaintiff. He agreed to do this, on the basis that he had no involvement with or responsibility for the child.*

*In January and February 1989, this man attended at the ... house on about five to seven occasions in each month, and he provided semen which was injected into the plaintiff's vagina. According to the plaintiff, it was the defendant who performed these injections. The defendant denies this, but she admits to participating, at least to the extent of bringing the sterilised container with the semen to the plaintiff, keeping it warm under her arm."*

Following the birth of the child, the plaintiff told the Department of Social Security that the father had been away on holidays from New Zealand. This was false.

Of course at that stage, the relationship between the women was not recognised by Centrelink, as same sex relationships were not recognised by Centrelink.

In late 1990 and early 1991 there were discussions about the plaintiff having another child. In March and April 1991, the plaintiff went to an acquaintance's house in Sydney. The man who had previously provided semen came to the house a number of days in each month, and again provided semen. According to the plaintiff, the defendant came with her in March, but not in April. The defendant denied coming to the house on either occasion. It appears that the plaintiff became pregnant as a result of the artificial conception procedures.

Following the birth of the daughter, the plaintiff applied for social security benefits, telling the Department that the child was a result of sexual intercourse without her consent. This was false.

In 1992 the defendant made a Will. She gave the whole of her estate to the plaintiff and if the plaintiff died within 14 days of her death, then to the two children.

In 1993 the parties briefly separated. The plaintiff left, taking the children with them. The implication from the judgment is that the defendant had been violent and abusive to the plaintiff.

In 1993 the defendant consulted a GP. The defendant was feeling depressed and suicidal. It was noted there was a lesbian relationship with the plaintiff and two children ended two months previously and there were further notes that she wanted reassurance that they might reconcile. The parties separated in 1994. Following separation, the defendant made another Will, leaving her whole estate to her new partner except there was a gift of \$10,000 each to each of the children.

The plaintiff said that the defendant owed damages to the plaintiff concerning child support:

*"By virtue of her statements and her conduct by way of support for the plaintiff and her participation in the actions leading to the impregnation of the plaintiff and by her silence as to any contrary view, the defendant created or encouraged on the plaintiff a belief or assumption, or otherwise could be said to have promises to the plaintiff, that she, the defendant, would accept the role of parent to each of the children, and would in so doing accept responsibility for the material and general welfare of both children, and would support the plaintiff in providing for the needs of both children and of the plaintiff as their mother. In reliance on that promise or assumption, the plaintiff acted to her detriment by going about the actions which led to her conceiving each child and carrying each child to term. The defendant knew or intended the plaintiff would act in reliance on the assumption; and the plaintiff's action in so relying will occasion detriment if the assumption or expectation is not fulfilled, in that the plaintiff will be left to bear the costs of providing for the material welfare of both children until they reach adulthood, and otherwise the plaintiff will suffer detriment in the form of income and opportunities foregone by virtue of her pregnancies, and also by virtue of the obligation she bears towards both children in terms of parenting and the provision of care. The defendant had failed to act to avoid that detriment, her action was unconscionable, and it was appropriate for the court to give effect to the resulting estoppel by ordering payment of an appropriate lump sum by the defendant to the plaintiff in respect of child support." (emphasis added)*

The defendant said that the primary liability for payment for the children was that of the sperm donor as the biological parent, as well as public policy and lack of clean hands.

The court accepted that there was a close and loving relationship between the parties, including that during the currency of the relationship, the defendant made a Will leaving everything to the plaintiff or the children. Although the relationship was in some respects a dysfunctional one involving at times frequent severe arguments, some physical violence and periods of separation, this was largely due to the defendant's drinking and psychological problems and that on a number of occasions there were reconciliations when the defendant promised to change her conduct. The defendant said words to the effect that the first child at least would be "our baby" and that the plaintiff and the defendant and the child would be "a family".

The defendant did participate in the artificial conception procedure, at least to the extent of using her body to keep the sperm warm while being taken to the plaintiff. The court was not able to conclude whether the defendant went to Sydney in connection with the conception of the second child but was satisfied the defendant agreed to the plaintiff having a second child in circumstances such as to indicate that the relationship of the child would be the same as with the first. Although the initiative came from the plaintiff, the defendant did by her words and actions convey to the plaintiff that the defendant would act with the plaintiff as a parent of the children, and would assist and contribute to the raising of the children, so long as this was necessary.

The court found that the biological father was not a parent. The court said:

*"There is no definition [in the then Artificial Conception Act 1984 (NSW)] of 'artificial insemination', but there seems no doubt, and it seems to be common ground, that the procedure adopted in this case does amount to artificial insemination. The plaintiff's evidence that the donor semen was inserted in her vagina by means of a syringe is corroborated by the defendant in relation to the first child; and, even though I have reservations about the plaintiff's credibility and there is no corroboration in relation to the second child, I find on the balance of probabilities that this procedure was adopted also for the second child."*

The court held:

*"I do not believe it is contrary to public policy for a court to find that a person who is living in a lesbian relationship with the mother of a child, conceived by artificial insemination, and who also participates in the act of conception and acts as a parent to the child or children and thereby conceived, is liable to provide material support for the child."*

An order was made for the defendant to provide just over \$150,000 towards the costs of raising the children.

Therefore, it is quite possible for someone not to be recognised as a parent of a child but still be liable to pay for the upkeep of the child.