LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Preliminary Paper 54

NEW ISSUES IN LEGAL PARENTHOOD

A discussion paper

The Law Commission welcomes your comments on this paper
and seeks your response to the questions raised
Submissions should be forwarded to the Law Commission
PO Box 2590, DX SP23534, Wellington
com@lawcom.govt.nz
by 24 May 2004

This discussion paper is also available on the Internet at the Commission's website:
http://www.lawcom.govt.nz

March 2004
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

The office of the Law Commission is at 89 The Terrace, Wellington
Postal address: PO Box 2590, Wellington 6001, New Zealand
Document Exchange Number: SP 23534
Telephone: (04) 473–3453, Facsimile: (04) 471–0959
Email: com@lawcom.govt.nz
Internet: www.lawcom.govt.nz

National Library of New Zealand Cataloguing-in-Publication Data

Preliminary paper 54 : new issues in legal parenthood.
Includes bibliographical references and index.
ISBN 1–877316–00–8
1. Parenthood. I. New Zealand. Law Commission. II. Title.
306.87—dc 22

Preliminary Paper/Law Commission, Wellington 2004
ISSN 0113–2245 ISBN 1–877316–00–8
This preliminary paper may be cited as: NZLC PP54

This discussion paper is also available on the Internet at the Commission's website: http://www.lawcom.govt.nz

Contents

Terms of Reference

To review the rules relating to the parental status of children and, in particular, to inquire into and report on:

1 How parental status should be determined in law, specifically what value should be ascribed to a person's biological relationship with a child; a person's social or care giving relationship with a child and a person's gestational relationship with a child;

2 Whether the assumption underlying the current law, that a child should have no more than two parents, be amended to allow a child to have more than two parents identified in law;

3 Whether the law should permit a child to have only one parent recognised in law;

4 Whether the current statutory presumptions as to parenthood based on relationships with the child's birth mother be amended, and if so, how;

5 What should be the processes and evidence by which an adult can prove or disprove parenthood;

6 What value should the law attach to agreements between adults as to parenthood and what should be the effect of disproving a biological relationship with the child;

7 What legal effect should surrogacy agreements have in determining the parental status of the adults who are party to the agreements and what should be the consequences if one party to an agreement reneges on it;

8 Whether a commissioning couple, before entering into a surrogacy agreement, be required to gain approval as parents as adoptive parents are required to; and

9 To consider and comment upon any other legal issues relating to status of parenthood that arise in the course of this review.

Preface

The Minister Responsible for the Law Commission has asked the Law Commission to review the legal rules that determine parenthood. In particular, we have been requested to examine the assumptions that underlie the current law, including issues relating to fatherhood; what values to attach to genetic, caregiving and gestational parenthood; how many parents a child can have in law; how to determine parenthood in surrogacy arrangements. We also consider the value to be attached to parenthood agreements between adults, and the processes for proving and disproving parenthood.

This review is necessary because of the number and diversity of family forms now existing in New Zealand. At least a third of our children live outside the nuclear family model comprised of a genetic mother and father raising their children together in a separate household.

Our parental status laws have evolved from this nuclear family model. It is therefore timely to review whether the law is providing the necessary legal structures for families outside this model and the individuals within them. Our laws must respond to the needs of all the country's families. They each require a legal framework that will provide certainty and clarify the responsibilities and rights of the adults within them. In that way children are supported. Children's needs and interests are the overarching principle underlying the review.

The paper proceeds by identifying the legal principles that underpin our law, identifying the problem areas, and suggesting possible options. Many of the matters discussed are complex and require an understanding not only of current legal provisions but also of proposed changes foreshadowed in the Care of Children Bill and the Human Assisted Reproductive Technology Bill. We have provided brief chapter summaries to assist readers to navigate around the document.

We seek a response from all sectors of society – many citizens have an interest in family laws. We are also particularly interested in hearing from families affected by the issues discussed here and those for whom the current laws do not give adequate protection and support. Following analysis of those responses we will report to the Minister on the current laws with recommendations for any areas that may need alterations.

Although the discussion paper includes many questions, respondents should feel free to deal with only those matters most relevant to them. Should groups so

request, Law Commission personnel will meet with them , as available, to hear views expressed orally and/or to provide clarification on matters raised in the paper.

In preparing this discussion paper we undertook a preliminary round of consultations with a small number of key organisations and individuals. We record our thanks for the help we have received from them and also from our peer reviewers who have commented on drafts. Their names appear below.

The Commissioner in charge of preparing this discussion paper was Frances Joychild. She was assisted by legal researchers Robert Ludbrook, Claire Phillips and Helen Colebrook.

Submissions or comments on this discussion paper should be sent by 24 May 2004 to Claire Phillips, Law Commission, PO Box 2590, DX SP23534, Wellington, or by email to parenthood@lawcom.govt.nz.

Any inquiries or informal comments can be directed to Claire Phillips (phone (04) 914 4826) or Susan Hall (phone (04) 914 4819).

This discussion paper is also available on the internet at the Commission's website: http://www.lawcom.govt.nz.

Acknowledgements

Peer reviewers
Professor Mark Henaghan, Dean of Law School, University of Otago, Dunedin
Catriona MacLennan, Barrister, Auckland
also
Helen Colebrook (on leave from the Commission) and
Dayle Takitimu (specific sections)

Professionals and academics
Associate Professor Ken Daniels, Department of Social Work, University of Canterbury, Christchurch
Dr Liz Harding, Auckland

Organisations
National Ethics Committee on Assisted Human Reproduction
Fertility Associates, Auckland and Wellington
Fertility Association of New Zealand
Fertility Plus, Auckland
Christchurch Fertility Centre
Interchurch Bioethics Council, Wellington
Nathaniel Centre, Wellington
Otago University Bioethics Centre
Otago Fertility Services
Women's Health Action Group

Government agencies
Births, Deaths and Marriages (Department of Internal Affairs)
Ministry of Health
Ministry of Justice

Individuals
Peter and Toni Allpress
Maewa Kaihau
Mandy Wells, Wendy Wells and Phyllis Lash

Common terms

Parenthood, guardianship and parental responsibilities

Access
A person who obtains an access order from the Family Court has the right to contact with the child. In most cases only a parent or step-parent may apply for an access order.

Custody
A person who obtains a custody order from the Family Court has the right to have a child live with them and has the responsibility to attend to the child's day-to-day care. Where parents who have separated cannot agree where the child will live they can ask the Family Court to make a custody order. Non-parents can ask the Court to grant them custody of a child but the Court must first give them leave to apply.

Genetic parents
Those persons whose eggs or sperm have been used to create a child.

Gestational mother
The woman who gives birth to the child and who may or may not be the child's genetic mother.

Guardian
Most parents are automatically guardians of their children. People who are not parents can be appointed a guardian by the Family Court where such appointment is in the child's best interests.

Guardian's responsibilities and rights
A guardian is responsible for the child's upbringing and has a right and duty (jointly with the child's other guardian or guardians) to make decisions on important matters affecting the child, for example, the child's names, manner of education and choice of school, medical treatment and religion. A guardian is entitled to have the child in her or his personal care unless there is a court order giving sole custody to someone else.

Paramountcy principle
This principle (sometimes called the "child's best interests" or the "welfare principle") is the overarching principle by which the Family Court decides matters

to do with children. The Guardianship Act 1968 states that the Court, in making decisions about children, must regard the welfare of the child as the first and paramount consideration.

Parenthood
In law, the child's mother is the woman who gives birth to the child, and the child's father is the man with whose sperm the child was conceived. They are the child's legal parents. Parenthood alone does not give parental responsibilities and rights for a child. That is given by guardianship.

Legal parenthood can also be acquired by people with no genetic connection to the child by means of an adoption order or by statutory deeming provision (in the case of children conceived with donated gametes).

There is a legal presumption that a woman's husband is the father of a child born within marriage or within 10 months of the marriage being dissolved. The presumption may be rebutted in cases where there is evidence that another man is the child's genetic father.

Social parent(s)
Those persons who have taken on the responsibility for the upbringing of the child, who may or may not be child's genetic parents or the woman who gave birth to the child.

Māori

Atawhai
An orphan or adopted child, sometimes used interchangeably with "whāngai".

Hapū
A larger village community, sub-tribe.

Karakia
A prayer or chant, often used to open or close a meeting.

Iwi
A regionally based kin group, which claims descent from a single distant ancestor, tribe.

Mātauranga
Information, knowledge, education.

Matua whāngai
A member of a child's family who takes on the responsibility of caring for a whāngai.

Tapu
Sacred, forbidden, taboo.

Whakapapa
A person's genealogy, cultural identity, family tree. It is also said to be the glue that holds the Māori world together.

Whānau
The extended family, which has been the basic social unit of Māori society. It usually included grandparents or great grandparents and their direct descendants.

Whanaungatanga
The centrality of family relationships to the Māori way of life.

Whāngai (tamaiti whāngai)
A child given by the parents to family members to raise, where the child remains aware who his or her birth parents are and what his or her whakapapa is.

Assisted human reproduction

Assisted human reproduction (AHR)
A range of procedures designed to assist a couple or an individual to conceive a child with medical assistance. Procedures may involve the use of donated sperm, eggs or a donated embryo to bring about conception.

Donor
A person who gives an egg or sperm to assist another or others to conceive a child.

Donor-conceived child (donor offspring)
A person conceived and born as a result of donated egg, sperm or embryo.

Donor eggs
Eggs (oocytes or ovum) that have been given by one woman to another for use in human conception.

Donor embryo
An embryo that is given by the persons whose gametes created it, for use by another in human conception. The procedure of embryo donation is not yet carried out in New Zealand.

Donor gamete conception
Conception achieved using donor sperm or a donor egg without sexual intercourse, either:

- with medical assistance or the assistance of a fertility clinic; or
- through self-insemination.

Donor sperm
Sperm, contained within semen, that has been donated by a male to a person who is not his wife or partner for use in human conception.

Embryo
A term used to refer to a fertilised egg (or "zygote") until approximately the end of the eighth week of gestation.

Gametes
Human cells necessary for sexual reproduction, that is, eggs in women and sperm on men.

Intracytoplasmic sperm injection (ICSI)
A single sperm is retrieved directly from the testes with a fine needle, or from ejaculated semen, and injected directly into an egg. The fertilised egg is then transferred to the uterus.

In vitro fertilisation (IVF)
Fertilisation occurring outside the human body where eggs, collected from a woman, are fertilised with sperm in a laboratory – usually in a dish or test tube.

Self-insemination
A procedure by which semen is inserted by a woman into her vagina without medical assistance (typically by using a needle-less syringe).

Semen
Fluid containing sperm that is released from the male genital tract.

Sperm
Male reproductive cells necessary for the fertilisation of an egg.

Surrogacy

Commissioning parent(s)
The person or persons in a surrogacy arrangement who arrange for the surrogate mother to gestate and give birth to a child for them to raise from birth. The commissioning parents are always the *social parents* of the child. One or both of them may also be the child's *genetic parent(s)* if their gametes were used in conception.

Full surrogacy (IVF)
Refers to arrangements in which the gametes of commissioning parents and/or a donor or donors are used in conception.

Surrogacy
An arrangement in which a woman agrees to carry and give birth to a child for another person or persons to raise. Surrogacy agreements may be altruistic (unpaid) or for financial reward.

Surrogate mother
A woman who agrees to gestate and give birth to a child for another person or persons (the commissioning parents) to raise from birth. A surrogate mother is always the *gestational* mother of the child, and may also be the child's *genetic* mother if her egg is used in conception.

Traditional or partial surrogacy
Refers to arrangements in which the surrogate mother's own eggs are used to achieve conception, either with the assistance of a fertility clinic or through self-insemination with the semen of the commissioning father or of a donor.

Chapter summaries

CHAPTER 1: INTRODUCTION

Aim

The Introduction sets out key background information for readers to have when considering the issues raised in this discussion paper. Specifically it:

- Summarises legal concepts of parenthood in New Zealand law, explaining that our laws are based on a two genetic parent cohabitation model.
- Discusses the changes to family structures that have occurred in New Zealand in recent decades and also the developments in donor gamete conception. The result of the above is that in many situations children are being raised from birth by people who are not their genetic parents.
- Raises issues relative to information recorded on birth certificates and notes that birth certificates do not always contain a full or accurate record of a child's genetic lineage.
- Records that New Zealand's parental status laws have never reflected customary laws and practices of Māori, particularly in relation to whāngai.
- Summaries the Terms of Reference that underpin this discussion paper.
- Indicates that the overarching principle adopted in the preparation of this paper is the needs and interests of children.
- Explains that the focus in this review is on the people and children for whom the current rules provide inadequate support or protection.
- Explains that issues involving contested custody and access, step and foster parenting and the status of whāngai are not part of the review.

CHAPTER 2: PARENTHOOD, GUARDIANSHIP AND PATERNITY

Aim

To set out what the current parenthood and guardianship laws are and to review laws relating to fatherhood.

Issues

The current law presumes a man to be the father of any child born to his wife during their marriage or within 10 months of the marriage being dissolved. If

the mother and father of a child are not married, but are living together, there is no presumption that he is the father of her child born during their relationship. They must each sign the birth registration form that he is the father. Where contested, fatherhood can be proved to an extremely high degree of reliability by DNA testing.

Is the presumption of paternity still a useful and appropriate way to determine fatherhood? If retained, should the presumption of paternity be extended so that it applies to men who are living with the mother of the child at or about the time of conception?

What might be done

Presumption of paternity

- Keep the presumption that a married man is the father of a child born to his wife during their marriage.
- Alter the presumption so that it only applies to married men who are living with the mother at or about the time of conception.
- Remove the presumption.
- Extend the presumption to de facto partners the child's mother.
- Extend the presumption to men in de facto relationships but apply various other conditions that require, for example, the couple to be living together at or about the time of conception or to have cohabited at any time between 44 and 20 weeks before birth.

CHAPTER 3: DONOR GAMETE CONCEPTION

Aim

To review the laws that allocate parenthood when children are conceived by donor gametes. In these situations the children's social parents (caregivers) are usually genetic/non-genetic parent combinations.

To consider how the law might recognise children's relationships with their social parents, genetic parents and their gestational mother.

To examine assumptions about how many parents a child should have in law.

Current situation

- The Status of Children Amendment Act 1987 transfers full parental status from the sperm donor to the mother's spouse or male partner automatically. Sperm and egg donors lose status as parents and all parental rights and responsibilities.
- Where a single woman or a woman in a lesbian relationship conceives using donor sperm the law does not extinguish the parenthood of the donor but removes the donor's parental rights and liabilities towards the child. It does not transfer parental status to a same-sex partner of the mother, as it does to opposite-sex partners, but will do so under proposals in the Care of Children

Bill. The Bill will also extinguish the parenthood of the sperm donor in these situations, as it does in heterosexual-couple donor conceptions.

- If a woman conceives a child using a donated egg or embryo she is deemed to be the child's full legal parent. The parenthood of the donor is extinguished along with all her parental rights and responsibilities.

Issues

- These laws have benefits in that they provide the social parent who is not genetically related to the child with legal parental status in a simple and straightforward manner. However, they create a legal fiction and, what some term "deceit", in that the mother's husband or partner is held out in law to be the child's genetic parent.
- The current rules also create problems when it is intended that the donor will play a parental role in the child's life. Such agreements often exist where a same-sex couple is involved. The donor's rights and liabilities as a parent are extinguished.
- The assumption underlying the current rules is that the child will have two opposite-sex parents. When a child is raised by three or four adults who share parental responsibilities, or by two same-sex parents, the law does not recognise the reality of the parenting arrangements. A child born to a single woman or to a woman in a same-sex relationship where conception has been achieved with donor sperm has only one legal parent, but retains a nominal genetic father who has no rights and liabilities towards the child. Under proposals in the Care of Children Bill, the child's genetic father would have no legally recognised parental status at all, not even as the genetic father.

What might be done (options set out in chapters 5 and 7)

- Create a register held by the Registrar-General of Births, Deaths and Marriages to record full details of the genetic parents of all donor-conceived children. (*The Human Assisted Reproductive Technology Bill makes provision for a full record of such details to be held at the clinic and passed onto the Registrar-General after 50 years or on closure of the clinic, with only brief details being held by the Registrar-General.)*
- Require that the birth certificate of every donor-conceived child be annotated to indicate in some way that the child was conceived with donated gametes.
- Provide that donor-conceived children shall have two birth certificates – a private one that records genetic parenthood and a public one that records social parenthood. Where egg donation was involved, it might list two mothers: the genetic mother and the gestational mother. In this way, donor-conceived children would have an accurate record of their genetic, gestational and social parents and no child would have only one recorded parent.
- Require fertility clinics to provide counselling for parents as part of donor gamete treatment as to the benefits of telling their child the circumstances of their conception.
- Place a legal duty on parents to tell their children of the true circumstances of their conception.

- Make changes to the law so that a child might have two legal parents of the same sex, and more than two legal parents, and that the names of all such parents be shown on the child's public birth certificate.
- Continue to reallocate full parenthood by deeming the mother's spouse or partner (whether male or female) to be the child's joint parent and extinguishing the parental status of any gamete donor. (The current law with the addition of a same-sex partner as in the Care of Children Bill.)
- Continue to reallocate parenthood via statutory deeming provision, but amend the law so the donor's genetic parenthood is recognised but the rights and responsibilities of parenthood are transferred.
- Enable a partner, spouse, donor, donor's partner or other person to obtain a court order giving them joint parental status and joint responsibility for the care and upbringing of the child with the parent. This might be termed a parental status order and a fast-track process might be established so that the order was made before birth to come into effect upon birth.
- Reallocate parenthood by granting non-genetic parents automatic guardianship on the birth of the child. A new status of "enduring guardianship" might be created to take effect from birth and to continue for the lifetime of guardian and child.
- Require both parents to apply to the Family Court for a guardianship order, which would make the genetic parent a parent for all purposes and the non-genetic parent a guardian.
- Require the non-genetic parent to apply to the Family Court for an adoption order, while the genetic parent sought guardianship.

CHAPTER 4: SURROGACY

Aim

To ensure the child conceived in a surrogacy arrangement is gestated and cared for after birth by adults who are emotionally stable and secure in their relationships with the child.

To ensure the child will have knowledge of both his or her genetic parents and the gestational mother, where these adults are not raising the child.

To ensure the gestational mother of a child born to a surrogacy arrangement has legal protections before conception, during pregnancy and after birth to prevent the mother being forced or pressured to hand over the child to others.

To ensure that the commissioning parents of children born into surrogacy arrangements are supported by a legal parent–child framework that enables them to take on the responsibilities and exercise the rights of legal parents.

Current situation

There is a mismatch between the agreement entered into by parties to a surrogacy arrangement and their legal status in relation to the child. Under current law, the surrogate mother is the child's legal mother and she and her partner or husband have parental rights and responsibilities, even though it is planned that

the child will be raised by the commissioning parents. The commissioning parents have no recognised legal relationship with the child, even where they are the genetic parents and have been the child's primary caregivers from birth.

Commissioning parents can only acquire legal parenthood by adoption. There are serious obstacles. The Adoption Act 1955 makes it unlawful for anyone to have a child in their home with a view to adoption without prior approval of the Department of Child, Youth and Family Services. The Act forbids advertising and payments for a child and creates a legal fiction that the adoptive parents are the child's genetic and gestational parents, whether or not they are. The Act creates uncertainty for the child as well as the adults until the adoption order is made.

What might be done (options as set out in chapters 5 and 7)

Parental status order

- Commissioning parents could apply to the Court prior to birth of the child for a parental status order. This could be granted on condition that it would take effect after a specified period after birth, during which time the surrogate mother could seek to have the order set aside. However, the child could be cared for from birth by the commissioning parents.
- There may be conditions that have to be met before an order could be made: for example, a requirement that one of the commissioning couple is the genetic parent; that the commissioning couple and surrogate mother have independent legal advice and independent and joint counselling.
- If the surrogate mother made application to set the parental status order aside, the Court would determine the issue on the basis of the child's welfare and best interests. There might be a rebuttable presumption that if the child was the full genetic child of the commissioning parents they would be awarded custody.
- The effect of a parental status order would be to bestow on the commissioning parents all the rights and responsibilities of parenthood, but not genetic parenthood unless they are genetic parents. It would extinguish the parental rights and responsibilities of the surrogate mother and her partner, unless the parties wished otherwise.

Guardianship

- The commissioning parents could apply to the Family Court to be appointed joint guardians of the child. If a guardianship order was granted it would give them the parental rights and responsibilities of a natural parent. There might be provision for an "enduring guardianship" order, which would create a legal relationship with succession rights beyond 18 years.

Adoption

- Changes might be made to the Adoption Act 1955 so that adoption orders could be made before birth to take effect after birth. The surrogate mother would have a specified period in which to apply to have the orders set aside.

- When such an order was made the child could be cared for from birth in the home of the commissioning parents.
- Conditions might be set on who could adopt in this way and requirements for joint counselling, independent legal advice and approval of the commissioning parents by the Department of Child, Youth and Family Services might be established.
- Where the child was the genetic child of one of the adopting parents some pre-conditions might be waived, such as the need for Department of Child, Youth and Family Services approval.
- The law might be changed so that, in a surrogacy situation, the man and/or woman whose gametes were used to achieve conception would be deemed to be the child's legal parents from birth.

CHAPTER 5: CHILDREN AND IDENTITY

Aim

To ensure all children have an accurate record, available to them, of their birth and genetic origins.

Issues

- Official statistics indicate that a significant number of children do not have their father's name listed on their birth certificate.
- Other children have mothers and fathers listed on the birth certificate who are not their genetic parents. These people may have been presumed or deemed by law to be legal parents (by way of the presumption of parenthood, adoption and donor gamete conceptions in opposite-sex relationships) or they may have been wrongly or mistakenly registered as parents when the birth was notified.
- There is a growing body of research and information that indicates that many children need to know their genetic background to complete their sense of identity and to be able to adjust and function fully. The law needs to find ways to ensure that children have access to this information, while at the same time strengthening and supporting the critical role played by a child's social parents.

What might be done

Fathers whose names and details are not recorded in a child's birth information

- A state agency might be given the responsibility of identifying and registering parents who are not named on the child's birth certificate.

Children born by donor gamete conception and surrogacy (where a child is usually raised by a genetic/non-genetic parent combination)

- Clinics might be required to educate parents as to the importance of telling their children of their true genetic and birth origins, or there may be a duty placed on parents to tell their children.

- The names and details of the genetic and gestational parents of all donor-conceived children or children born to a surrogate mother, whether in a clinic or through private arrangements, might be recorded in a register held by a state agency. The information could be accessed by the child or, in the case of young children, by guardians on the child's behalf.
- The child's birth certificate might be annotated so as to indicate that parenthood is not genetic, for example, by adding the words "by donor"; or "by section 4 Status of Children Amendment Act 1987".
- A system of dual birth certificates might be implemented. The publicly accessible certificate would record the child's social parents. A second certificate would contain the child's full genetic and birth history and could be accessed only by the child and those persons recorded on it.

CHAPTER 6: AGREEMENTS

Aim

To make greater use of agreements in situations where there are more than two adults involved in the conception, birth and raising of a child to ensure legal certainty and clarity as to the individual parental responsibilities and rights of the adults towards the child and the responsibilities they have towards each other.

Issues

Many children have more than two adults involved in their conception, birth and day-to-day care. Typically, these children will be conceived via donor gametes; born into surrogacy arrangements or born into gay and lesbian-led families.

The law is a blunt instrument in the allocation of parental responsibilities in these cases, and works on a paradigm of two parents of opposite sex. It would be almost impossible for the law to anticipate and cover the variety of parental arrangements chosen by the adults involved.

Agreements are a means by which the intentions and undertakings of the parties could be recorded from the outset so that the legal status of those involved will be tailor-made to the circumstances of the individual families.

What might be done

- Adults involved in the conception, birth and raising of children might be given the power to register agreements in the Family Court that they have made as to the parental rights, responsibilities and intended parental status of all parties.
- Once registered, the terms of the agreements could be enforced subject to the best interest of the child as the overriding factor.
- Before registration, the adults could be required to have had independent legal advice and separate and joint counselling.

- Registered agreements could be declared to be evidence to be given weight by the Court when considering applications for adoption, guardianship, or parental status orders.

CHAPTER 7: OPTIONS

Aim

To provide a number of possible options for a legal framework that would reallocate parenthood in situations where children are not raised by both of their genetic parents or their gestational mother. Typically, these children will be conceived via donor gametes; born into surrogacy arrangements or born into gay and lesbian-led families.

Issues

The current legal framework often creates a mismatch between the legal responsibilities and rights of parenthood and the intentions and practical arrangements of those adults involved in the child's conception, birth and care. Where it does not create a mismatch, it nevertheless creates a legal fiction by hiding the fact that the child's genetic parents are not the social parents. It denies the child the opportunity to find this out in the future.

It is proposed that the following guiding principles be applied when weighing up options. These are:

- The best interests of the child should be paramount.
- Children have a right to know the circumstances of their conception and birth.
- Persons raising children from birth as "parents" should have the legal responsibilities and rights necessary to nurture and rear the child.
- All families, where children are being raised, need legal rules relating to parenthood that address the contributions and intentions of the adults in them.
- A child can have a number of committed and co-operative adults involved in his or her upbringing, provided that these people always have clear lines of responsibility and mechanisms for dealing with conflict.
- Children should be given the opportunity to express their views on matters that affect them, and have their views taken into account.

What might be done (set out also in chapter summary 4 and 5)

Legal responsibilities and rights might be reallocated in a number of different ways. These are:

- By retaining the status quo but making adjustments to address current difficulties.
- Reallocating parenthood by means of a "parental status order".

- Reallocating parenthood by means of an adoption order but amending adoption law to resolve current difficulties.
- Reallocating parenthood by way of an "enduring guardianship" order.

CHAPTER 8: PROVING AND DISPROVING PARENTHOOD

Aim

To provide clear and just processes for determining the genetic parenthood of children.

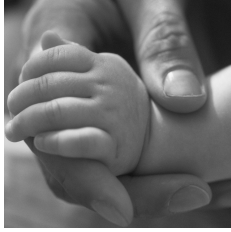
Issues

If a child is born within marriage, the child is presumed to be a child of the birth mother and her husband, unless there is evidence to the contrary. If a child is born outside marriage no presumption is made as to who the father is. Hence, scientific testing to prove and disprove paternity is critical in some cases. Children can now be born to a woman with whom they have no genetic connection, although she is their legal mother. There may be occasions where the genetic mother or the child wants legal recognition as a genetic parent. Should she also be able to seek a declaration of maternity?

Particular issues arise in relation to the way in which DNA parentage testing is used to establish legal parenthood. Questions arise as to how tests are carried out and by whom; the invasive nature of DNA blood sampling; the consents necessary for tests to be carried out; the Court's inability to enforce compliance with its recommendations for testing; and the use of babies' stored blood samples ("Guthrie tests") for DNA parentage testing.

What might be done

- Establish a legal process for establishing the genetic motherhood of a child. Should she be able to seek a declaration of maternity, even though she did not give birth to the child?
- Impose controls on DNA parentage testing by regulating service providers through a system of accreditation; by introducing a Code of Practice for providers, similar to that in the United Kingdom; or by requiring that tests be conducted only pursuant to a court order.
- Allow DNA parentage testing to be carried out on bodily samples other than blood samples, for example, buccal (mouth) swabs or hair follicles.
- Impose sanctions for a failure to comply with a court order for testing.
- Give the Court power to grant or refuse consent for a child to be tested in cases where the child's guardians cannot agree.
- Require that the consent of children be obtained for DNA parentage testing where they have the required knowledge, competence and maturity to give a free and informed consent.
- Regulate third party access to babies' Guthrie tests for the purposes of DNA parentage testing where the child's guardian refuses consent.



1

Introduction

1.1 New Zealand law has rules for determining who is and is not a legal parent of a child. This discussion paper reviews these laws (for adequacy) in light of continuing and significant changes in family structures in New Zealand and the impact of new reproductive technologies.

Two-parent cohabitation model

1.2 The laws in New Zealand on parental status are underpinned by the premise that a child's genetic mother and father will raise the child together.

1.3 In the instances where the reality has been different, the law has generally made adjustments to fit the non-conforming situation into the standard model. For example, where children could not be looked after by their genetic parents and others assumed lifetime responsibility for the child's care, the law developed the concept of "adoption", which "deemed" the substitute parents to be the child's legal parents in nearly all respects. Birth parents lose their legal status as genetic parents in adoption and are relieved of all responsibility for the child's care and upbringing. The child's birth certificate is altered by removing any reference to the genetic parents and showing the adopting parents as the child's genetic and legal parents.

1.4 A similar deeming mechanism has been used to reallocate parenthood in donor gamete conception[1] where couples experiencing infertility use donor sperm, eggs or embryos to conceive a child. The non-genetic male partner is deemed to be the child's parent in all respects. The birth mother, if she has conceived using someone else's eggs, is deemed to be the mother in all respects. At the same time, the law extinguishes the natural parenthood of the genetic parents without trace. They are deemed not to be parents of the child. The non-genetic partner's name appears on the birth certificate as a legal parent. Unlike adoption, where the genetic parents are initially named but then removed, genetic parents are never named on the birth certificate in donor gamete conception situations.

1.5 These deeming provisions, by which substitute parents replace the child's genetic parents, maintain the traditional mother/father model and operate to ensure

[1] See Common terms.

the child's family reflects a model of two opposite-sex parents.[2] This family model, which is based on the English origins of our legal system, has generally worked well for traditional nuclear families where the children are being cared for by their cohabiting genetic parents.

Changes to family structures: donor gamete conception and social change

1.6 Over the past two-to-three decades, there have been vast changes to our social structure and, in that same period, new birth technologies have become available.[3] These factors raise important questions about the continuing feasibility and appropriateness of constructing parental rights and responsibilities in all situations within this framework. There are many families now who do not fit easily within the traditional model.

1.7 A number of children in New Zealand are now conceived using donor eggs, sperm or embryos. Children are being born into surrogacy arrangements that have been entered into between a gestational mother and commissioning parents (either or both of whom may be genetic parents to the child). Others are born into gay and lesbian families. These social and technological changes mean that some children are now cared for by two parents, one or both of whom are not their genetic parents, and who may be of the same sex. Other children have three or more adults as parents sharing responsibility for their care and upbringing.

1.8 In these situations, parenting of children from birth may involve genetic/non-genetic parent combinations. In some combinations the law currently affords no legal status to the social (caregiving) parents. A common element in all the situations considered in this paper is the juxtaposition of genetic and social

---

[2] Note that when a child conceived from donor sperm is born to a single woman, the law does not extinguish the genetic parentage of the male donor as it does in the case of married women. He retains his status as a natural father so as to maintain the two-parent model (although all his responsibilities and rights as a father are removed). However, note the exception in adoption laws that allows a single man or woman to adopt a child – curiously, the child is deemed to have been born to that person in lawful wedlock: s 16(2) Adoption Act 1955.

[3] Until 1969, children born outside marriage were deemed "illegitimate" and suffered social stigma and legal disadvantages. Marriage was the only acceptable form of cohabitation and having a family. Between 1981 and 1991 there was an 84 per cent increase in adults aged between 20 and 39 years living in a de facto relationship. By 1996, the proportion of all New Zealand children born from a de facto union was 13.5 per cent. Many children are living in blended families where a step-parent has a role in their care. This is as a result of the breakdown of their parent's relationship and repartnering by their caregiving parent. In 1996, 36.5 per cent of all marriages were remarriages for at least one partner, compared with 18.7 per cent in 1952.

Families in which the parents are of the same sex have become more visible and their numbers have increased 100 per cent between the last two census dates. The number of same-sex couples with children in 1996 was 684 while in 2001 it was 1356. Over 4000 grandparents had assumed the role of primary parent to their grandchildren in 2001.

One-parent families are now a major family model. In 2001, just under one-fifth of New Zealand families (18.9 per cent) contained only one parent and 75 per cent contained dependent children. Just over four-fifths of one-parent families had a female parent. This was an increase from five years ago where 17.2 per cent of families were headed by one parent.

parenthood. At least one of the social parents is not a genetic parent or, if a genetic mother, is not the gestational mother.[4]

Records of genetic lineage

1.9 Many New Zealand children have no official record of their genetic lineage. Birth certificates may be thought to provide that, but they do not always do so and the information is not always accurate or complete. Six per cent of children born each year have no genetic father recorded on their birth certificate. Other children have persons named as parents who are not their gestational or genetic parents, though this fact is not usually disclosed on the birth certificate.[5] Birth certificates give the name and details of the adoptive parents or of persons deemed to be the parents of children born as a result of donor gamete conception.

Māori customary laws

1.10 New Zealand's laws as to parental status have never reflected the customary laws and practices of Māori.[6] Children are often placed temporarily or permanently in the care of family members other than their genetic parents under a whāngai (kinship care) arrangement. Sometimes, placement is made to provide a child for persons who are infertile. The matua whāngai (kinship caregivers) often have greater rights and responsibilities in relation to the child than do the genetic parents.

1.11 For Māori, genetic parents have no exclusive rights to possession of their children – they hold them in trust for the whānau, and the wider hapū and iwi. A Māori child's knowledge of their whakapapa is critical to their sense of identity and place in the world. Though they may not live with their genetic parents they will always know who they are and will usually have contact with them. Their whakapapa enables them to understand how they are connected to their ancestors and members of their living whānau, hapū and iwi.

1.12 The Term of Reference that requires us to consider whether the legal presumption that a child have no more than two parents identified in law may seem radical, but, from a Māori cultural viewpoint, it is quite normal for a child to have kinship carers who are no less important than the genetic parents.

Terms of Reference

1.13 Our Terms of Reference call for us to review the legal rules by which parental status is determined. We consider how, and the extent to which, the relationship between children and their genetic parents should be recognised and how parental

---

4 The paper does not address foster parenting, step-parenting or whāngai situations where arrangements are made after birth for the child to be cared for by persons other than a genetic parent.

5 It is open to adoptive parents to request that the words "adoptive parent(s)" be noted on the child's birth certificate. A little-known provision also allows adoptees, from the age of 18 years, to make such a request, although this notation is seldom requested in practice: s 24(3) Births, Deaths, and Marriages Registration Act 1995.

6 Māori customary law and practice, as it relates to the family, has remained outside the mainstream laws of this country: for a detailed account see D Hall and J Metge "Kua Tutu Te Puehu, Kia Mau: Maori Aspirations and Family Law" in Henaghan and Atkin (eds) *Family Law Policy in New Zealand* (11 ed, LexisNexis, Wellington, 2003) 53.

rights and responsibilities should be allocated between affected adults. We also consider what changes or new legal mechanisms may be necessary to ensure that persons bringing up children as parents, whether or not they are genetic parents, have the appropriate legal recognition and support in this role.

1.14 We are required to consider the assumptions underlying the current law; how parental status should be determined in law, and, particularly, the values to be ascribed to a person's social or caregiving relationship with a child, a person's genetic relationship with the child and a woman's gestational relationship with her child.

1.15 We are also asked to consider whether the law's assumption that a child have two parents be changed; whether the law should permit a child to have only one parent recognised in law; what processes and evidence there should be to prove and disprove parenthood; what the effect of disproving parenthood should be, what the legal effects of surrogacy agreements should be as they relate to parental status; and what value the law should attach to agreements between adults as to parenthood.

1.16 Our approach has been to identify those categories of adults and children whose needs and interests are not met by the law's operation and so are most likely to be affected negatively by the current legal rules as to allocation of parental status and responsibilities. These include:

- gamete donors and children conceived by gamete donation;
- all involved adults and children conceived in surrogacy arrangements;
- gay and lesbian families.

1.17 The question to consider in each case is how should the law recognise or not recognise the parental status of the interested persons. We also review the presumption of paternity, how to have more fathers named on birth certificates and posthumous fathers.

1.18 Should the legal status of parenthood be the exclusive preserve of genetic parents with some other legal status going to all non-genetic caregivers? Should the law bestow legal parenthood on all who care for a child on a permanent basis from birth? If so, how should the law do this? What is the appropriate model? Should the law be able to recognise more than two persons as "parents" of any child? Should a child be able to have only one parent recognised in law? Should a birth certificate record genetic parents only? If it records names of substituted parents, as in adoption and donor conceptions, should it indicate that the social parents are not the genetic parents? Does the law give sufficient recognition to agreements reached between people who have a legitimate interest in the care and upbringing of a particular child?

1.19 Issues surrounding parental status where the legal framework is not clear have the potential to be fraught and troublesome and may impact negatively upon the children concerned.[7] The courts have already dealt with cases in these areas where the law is uncertain and have called upon government to attend to these issues.

---

[7] See *P v K [artificial insemination by donor]* [2003] 2 NZLR 787, (2002) 22 FRNZ 677; *Re Patrick: An application concerning contact* (2002) FLC 93-096.

Overarching principle: children's needs and interests

1.20 Parental status laws must reflect the interests and needs of children because these are paramount. Laws must be constructed around the welfare and best interests of children, rather than the rights of adults.

1.21 Children have a fundamental need to be loved and nurtured by adult caregivers in a consistent and caring manner. Clearly, this does not require that children be parented by their genetic parents. Children have, since the dawn of history, been cared for by people other than those responsible for bringing them into the world.[8] As with genetic parents, the responsibilities and commitment that these social parents assume is vital to the child's well-being and development and is of enormous social value.

1.22 Currently, the law recognises non-genetic parents as "legal parents" in two situations: adoption and donor gamete conception.[9] For all other situations, non-genetic parents can acquire legal rights and responsibilities by means of a guardianship or custody order from the Family Court. People who are responsible for actual parenting, particularly when they have assumed this role since the child's birth or early childhood may, with some justification, see guardianship or custody as a lesser status than that of legal parenthood.

1.23 Whereas legal parenthood creates a life-long link between parent and child, guardianship and custody orders continue only until the child reaches the age of 20 years[10] (proposed to be reduced to 18 years).[11] Guardianship and custody orders do not give the child rights of inheritance from the guardian or custodian. These can be revoked at any time by court order. It could be argued that guardianship and custody do not give the social parents or the child the sense of permanence and connectedness that facilitates bonding and attachment. If the social parents feel insecure in their relationship with the child this may undermine the child's sense of security and permanence.

1.24 It might also be argued that the contribution of social parents gives them a greater claim to parenthood than, for example, the genetic father whose only contribution is an act of sexual intercourse with the mother or the woman who has handed the child to others to care for immediately after the birth. On this argument, it would follow that social parents should have no lesser status than that of the genetic parents.

1.25 At the same time, the critical importance of genetic lineage to a child's sense of identity is being increasingly recognised internationally. Laws that create fictional parenthood and extinguish the child's ties with the genetic parents have come under scrutiny. In New Zealand and elsewhere, many children who were adopted or conceived with donated gametes are articulating a need to know their birth origins and "whakapapa". These children have been precluded from gaining knowledge of their entire blood line, not just their genetic parents. This has left

---

8 J Bronowski in *The Ascent of Man* (BBC, London, 1973) saw the willingness of humans to care for orphaned or abandoned children as one of the first signs of civilisation.

9 A person may also be a legal parent without being genetically related to a child if the presumption of parenthood operates and has not been displaced: s 5 Status of Children Act 1969.

10 Guardianship also terminates if the child marries: s 21(1) Guardianship Act 1968.

11 Clause 27(1) Care of Children Bill. Under the Bill, guardianship also ends if the child lives with a de facto partner.

a gap in their sense of identity. Besides its significance for their sense of personal and cultural identity, this information may be vital to the health and well-being of these children because it will enable them to complete their medical history and give them reassurance that they are not marrying or partnering within the lines of consanguinity.

Matters excluded

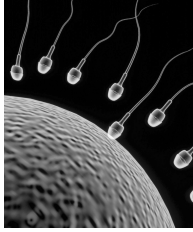
1.26 This paper does not enter into the debate about the contested care of children. It does not examine the laws and procedures by which the care of children after parental separation is determined. Step-parenting, foster parenting and the legal recognition of whāngai are not discussed here either.

Bills before Parliament

1.27 Currently, there are two Bills before Parliament that interconnect with some of the issues discussed in this paper. These are the Supplementary Order Paper to the Human Assisted Reproductive Technology Bill 2003 (HART Bill) and the Care of Children Bill 2003. We set out their provisions where they impact upon the issues raised in our Terms of Reference.

Conclusion

1.28 As a result of the review, we hope we can recommend sound legal changes to New Zealand's parental status laws that will ensure that all children are born into families where the adults involved in their conception, birth and upbringing have legal clarity and certainty in relation to their responsibilities for, and rights in relation to, the child. The proposals will need to ensure social parents can parent effectively and in a manner that supports bonding, security and belonging between them and their children. The proposals will also need to preserve for children access to their genetic lineage. Legal frameworks around parent–child relationships provide critical support to the family unit. By supporting the family unit we are supporting the child.



2

Parenthood, guardianship and paternity

PARENTHOOD

Natural or genetic parenthood

2.1 There is no clear definition of "parent" in New Zealand law. It is assumed, rather than stated, that the woman who gives birth to the child is the child's mother[12] and that the man whose sperm brings about the child's conception is the child's father.[13] In this paper we term natural parenthood "genetic parenthood".

2.2 Parenthood in New Zealand law denotes genetic or gestational parenthood, except in two situations – adoption and donor-gamete conception – where the law gives this status to people who have no genetic or gestational relationship with the child.[14]

2.3 The legal rights and responsibilities of parenthood do not flow from genetic parenthood. They flow from guardianship, which is accorded to most genetic parents automatically by law upon birth of a child.[15] The one exception is the Child Support Act 1991, where liability for financial support of a child flows from the fact of genetic parenthood itself.

Statutory presumption of paternity

2.4 Under section 5 Status of Children Act 1969 a child born to a married woman is presumed to be the child of her husband (or former husband) if born during the marriage, or within 10 months of the marriage being dissolved.[16]

2.5 The purpose of section 5 was to avoid arguments over the paternity of children born during marriage. It had the advantage of establishing parenthood at a time when children born outside marriage suffered social and legal disadvantage. It ensured most children had the care and protection of their mother's husband and that they had succession and maintenance rights.

---

[12] This is derived from the Roman law maxim *mater semper certa est* and is based on the common law principle that motherhood is proved demonstrably by parturition: see *The Ampthill Peerage* [1977] AC 547, 577 (HL).

[13] It used to be said that while motherhood was a fact, fatherhood was a presumption because even though sexual intercourse with the mother could be proven, this in itself was not proof of a child's paternity. With DNA parentage testing it is usually now possible to prove or disprove paternity with a high degree of certainty.

[14] See paragraphs 2.14–2.17.

[15] See paragraphs 2.27–2.40.

[16] Whether by death or by court order.

2.6 Prior to the development of modern DNA parentage testing, the presumption was a useful mechanism for designating paternity. It could be displaced by evidence that another man was the child's genetic father. Today, the presumption continues to provide a simple process for identifying fatherhood in the majority of cases where a child is born within marriage. The child is simply presumed by operation of law to be a child of the mother's husband.[17]

2.7 Without the presumption, the child's mother and father would have to register the child's birth together, with each of them signing a statement that he is the father. This is what parents who are unmarried must do to register the father on the birth certificate. Where there is no cooperation between them, a declaration of paternity can be sought from the Court. The Court would consider DNA evidence of parentage.

2.8 However, the presumption is less relevant and necessary today than it was in previous decades. The law no longer discriminates against children whose parents are unmarried, and a significant and increasing number of children are born into one-parent families or families led by de facto or same-sex parents.

2.9 The presumption of paternity can have anomalous or undesirable consequences. A husband may be wrongly presumed to be the child's genetic father and be entered as such on the child's birth certificate. For example, if a child is conceived after parental separation, but born within ten months of the marriage being dissolved, the mother's former husband is presumed to be the child's father.

2.10 Opinion is divided over whether the presumption of paternity in the Status of Children Act 1969 extends to de facto relationships as well as marriages.[18] While some commentators see the Status of Children Amendment Act 1987 (which applies to de facto partners as well as married couples) as widening the ambit of the 1969 Act,[19] others do not.[20] The prescribed form on which a parent or guardian is required to register the particulars of a child's birth suggests that the Registrar of Births does not acknowledge the presumption of paternity as arising out of de facto relationships. The notes on the official form indicate the father's particulars will be automatically included in the birth register only when he is married to the mother.[21]

2.11 If there is to be a presumption of paternity should it apply only to children born within marriage? The Human Rights Act 1993 makes it unlawful to discriminate against a person on the grounds of that person's marital status. International human rights instruments, which New Zealand has ratified, including the United Nations Convention on the Rights of the Child (UNCROC) and the International Covenant on Civil and Political Rights, affirm the child's right to a family.

---

17 The presumption serves a practical purpose in that it lightens the burden on the executors or administrators of a dead person's estate who might otherwise have to undertake extensive inquiries into parentage.

18 The issue turns on the interpretation of s 5 Status of Children Act 1969 and ss 1 and 2 Status of Children Amendment Act 1987.

19 *Family Law in New Zealand* (11 ed, LexisNexis, Wellington, 2003) vol 2, para 6.504.

20 *The Laws of New Zealand* (Butterworths of New Zealand, Wellington, 2001) "Husband and Wife/De Facto Relationships/Domestic Arrangements/Children", para 128 fn.

21 Form 2 Births, Deaths, and Marriages (Prescribed Particulars and Forms) Regulations 1995.

2.12 If the presumption of paternity does apply to de facto partners of a child's mother, there are practical problems in determining the date on which the relationship commenced and ended.[22] Unlike marriage, where there is a public record of the ceremony and of an order for dissolution of the marriage, there is no equivalent public record of the starting and finishing date of a de facto relationship. It would have to be determined as a matter of law and fact when the relationship was "dissolved" for the presumption to apply.

2.13 In several Australian States and Territories there is a presumption of paternity where a man and woman have cohabited at any time between 44 and 20 weeks before the woman gave birth.[23] There is no equivalent provision in New Zealand.

Questions

Q1 Should the presumption of paternity be retained as part of New Zealand law?

Q2 If retained, should the presumption of paternity be extended to a de facto partner of the child's mother?

Q3 If the presumption of paternity was extended to men in de facto relationships should it be based on cohabitation at any time between 44 and 20 weeks before the birth of the child (as in some Australian States) or on some other basis?

Reallocation of parenthood by statutory deeming provisions: gamete donor conception

2.14 For donor-conceived children, special statutory deeming provisions apply. These can be summarised as follows:

- if a woman who conceives with donated sperm has a husband or male de facto partner who has consented to the procedure, her spouse or male partner is deemed to be the child's father for all purposes and the sperm donor is not the father;[24]
- if a woman who conceives with donated sperm does not have a husband or male partner, or if her husband or partner has not consented to the procedure, the sperm donor is the child's father in law but does not have the rights and liabilities of a father;[25]
- if a woman conceives with a donated egg or embryo she is for all purposes the mother of the child and the egg donor is not the mother.[26]

2.15 Reallocation of parenthood in these situations is effected not by court order (as in adoption) but by statutory deeming provision. These provisions do not apply in the case of children conceived through sexual intercourse, even if the sole purpose of the sexual relationship is to enable the woman to conceive. The High Court

---

[22] Because the presumption applies only to children born within marriage or within 10 months of the marriage being dissolved.

[23] For example s 8 Status of Children Act 1974 (Tas).

[24] Sections 5(1), 7(1), 9(1), 11(1), 13(1) and 15(1) Status of Children Amendment Act 1987.

[25] Sections 5(2), 7(2), 9(2), 11(2), 13(2) and 15(2) Status of Children Amendment Act 1987.

[26] Sections 9(3) and 13(3) Status of Children Amendment Act 1987.

has decided that the deeming provisions apply where a child is conceived by self-insemination of donor sperm, without the involvement of a health professional or fertility clinic.[27] These reallocations are open to the criticism that they create a "legal fiction" about the child's genetic parenthood.

2.16 The Care of Children Bill 2003 proposes to amend the laws governing parenthood by granting parental status to the same-sex partner of the mother of a child born by means of donor gamete conception. The mother's partner will be deemed to be the child's parent if they live together as a couple and the partner has consented to the procedure.[28] The sperm donor is deemed not to be the child's father.[29]

Reallocation of parenthood by court order: adoption

2.17 In adoption, the adoptive parents are deemed to be parents of a child, and the parenthood status of the birth parents is extinguished.[30] The consent of the birth parents must usually be obtained to the proposed adoption.[31] This reallocation of genetic parenthood in adoption, as well as the reallocation of the rights and responsibilities of parenthood, has been criticised for creating a legal fiction. The Law Commission issued a report entitled *Adoption and Its Alternatives* in 2002. Its findings are referred to in this paper where they interconnect with issues considered in this discussion paper.

Māori customary practices: whāngai

2.18 Māori whāngai placements are not recognised under the Adoption Act 1955.[32] Indeed, the characteristics of such placements are radically different from closed stranger adoption.[33] The interaction between mainstream law and whāngai placements is not reviewed in this paper. However, an overview of whāngai practices is set out below as a component of the background material to inform the consideration of issues and options for law reform.

2.19 For centuries, Māori have had a recognised practice known as whāngai or atawhai, whereby a child is given to family members to raise.[34] This tradition remains in operation today, particularly in some communities. Whilst the law regarding legal recognition of whāngai has changed throughout history, the custom has been maintained regardless of the legal regime in operation at the time.

---

[27] For further discussion on the deeming provisions in the Status of Children Amendment Act 1987 see chapter 3, paras 3.22–3.33.

[28] Sections 14 and 17 Status of Children Act 1969 to be inserted by clause 167 of the Care of Children Bill 2003.

[29] Section 20 Status of Children Act 1969 to be inserted by clause 167 of the Care of Children Bill 2003.

[30] Section 16(2) Adoption Act 1955.

[31] Unless the Court dispenses with consent under s 8 or finds it expedient to dispense with an unmarried father's consent if he is not the child's guardian under s 7(3)(a) and (b) Adoption Act 1955.

[32] This topic is discussed by the Law Commission in *Adoption and Its Alternatives: A different approach and a new framework* (NZLC R65, Wellington, 2000) paras 183–190.

[33] The Adoption Act 1955 was enacted in very different social circumstances. See Law Commission above n 32, paras 22–27.

[34] Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) para 234, referring to a paper delivered by Hirini Moko Mead at the 1990 Adoption Conference, Victoria University of Wellington, *Tamaiti Whāngai: The Adopted Child: Māori Customary Practices*.

2.20 The giving of a child to others to raise can be permanent or temporary. Children are not the "property" of their parents, but rather belong to the whānau, hapū and iwi. Parents are said largely to hold their children "in trust" for their immediate relatives and the tribe generally.[35]

> In Maori thinking, children are not the exclusive possession of their parents. Indeed the ideas of possession and exclusion, separately or in association, outrage Maori sensibilities. Children belong not only to their parents but also to the whanau, and beyond that to the hapu and iwi. They are a 'a tatou tamariki' (the children of us many) as well as 'a taua tamariki' (the children of us two) … They belong to a descent group but at any given time are held by individuals on its behalf, in trust for future generations.[36]

2.21 While there are countless examples in Māori custom of children being raised by a number of adults in their whānau, sometimes including birth parents but not always, in diverse situations for diverse reasons, the principles that underlie all such arrangements are the same.[37] They are:

- openness;
- placement within the family;
- whakapapa[38] and whanaungatanga.[39]

2.22 Children are aware of their birth parents and other family members and usually maintain contact with them. Children are encouraged to know their whakapapa and how they are connected to others in their hapū and iwi. Placement is not necessarily for all of childhood – it can be for an indefinite period. Ultimately, it depends upon the circumstances. An "atawhai" has been described by one Māori woman as "born of her heart though not her womb".

2.23 There are many situations that could give rise to children being cared for by others, along with or instead of their parents. A common reason is the ability of the proposed caregiver to provide a more stable environment and better quality of life than that proposed by the birth parents. This can be seen where grandparents are responsible for the care of their grandchildren while the birth parents are engaged in employment activities. In whāngai arrangements, grandchildren are able to live with the grandparents and be cared for by them. The grandparents are recognised as being able to spend quality time and energy in nurturing the child, whilst the birth parents are able to focus their attention on providing material needs.

2.24 Infertility is another reason for whāngai arrangements.[40] Loneliness in old age or special skills in nursing a sick baby are others.[41] Instilling cultural knowledge in a

---

35 Mikaere, Ririnui and Pitama "Guardianship, Custody and Access: Maori Perspectives and Experiences" a paper a for Ministry of Justice (August 2002).

36 D Durie-Hall and J Metge "Ka tu te Puehu, Kia Mau: Māori Aspirations and Family Law" in M Henaghan and W Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 54, 63.

37 Law Commission, above n 34, para 236.

38 Genealogy.

39 The centrality of family relationships to the Māori way of life.

40 Law Commission above n 34, para 154.

41 Amiria Stirling reported that as a little girl her grandmother asked her parents if they could take her because she was lonely and her mother, who had other children, agreed. Cited in above n 35, taken from A Stirling and A Salmond *Amiria: The Lifestory of a Maori Woman* (AH and AW Reed, Wellington, 1976) 3.

child marked for leadership is another reason why older persons take over the care of a young child. Indeed, it is and was a common practice for children to be raised by their grandparents for educational purposes. This is a vital way in which mātauranga and Māoritanga (Māori knowledge and culture) is transferred from one generation to the next.

2.25 Grandparents may take grandchildren to assist their own children with the burden of childrearing when they have many children.[42] Whāngai placements are also used as a means of strengthening relations within a hapū or iwi.

> In whanau which are functioning as they ought, parents are expected and expect to share the care and control of their children with other whanau members. Sometimes, especially with firstborn, this means relinquishing their daily care and/or legal control over them to grandparents or other senior relatives, either temporarily or permanently … When children have only one parent for any reason, the lack is supplied by other whanau members; as long as the whanau is functioning effectively, they have no lack of role models.[43]

2.26 Placement of children outside a whānau, hapū or iwi was uncommon. A child who was adopted by a stranger was considered to be vulnerable and to have little protection.[44]

GUARDIANSHIP

2.27 New Zealand law draws a distinction between parenthood, which is based upon the genetic/gestational link between parent and child,[45] and guardianship, which confers on the guardian responsibilities and rights necessary for the care and upbringing of the child.

2.28 Under section 3 of the Guardianship Act 1968 every guardian is entitled to:

- The right to possession and care of the child (unless there is a court order giving custody to someone else).
- The right of control over the upbringing of the child. This includes the right to make (jointly with any other guardian of the child)[46] important decisions about the child's life.

2.29 While the legal definition of guardianship makes no reference to responsibilities, it is clear from section 10(2) of the Guardianship Act 1968 that a guardian has responsibilities towards the child as well as rights. In the recent past, courts have stressed that parenthood is about responsibilities towards the child rather than

---

[42] Mikaere, above n 35, reports observations of Tamaiti Cairns who said he believed that his grandparents could see that because the first four children were born rapidly, many more were to follow. They took steps to ensure his parents did not become overstretched with the weight of childrearing responsibilities by giving him at one week old to his adoptive parents.

[43] Durie-Hall and Metge, above n 36.

[44] Law Commission, above n 32, para 182.

[45] Except where statutory parenthood is conferred by adoption or by deeming provision. See paras 2.14–2.17 above.

[46] This point was emphasised by the majority of the Court of Appeal in *D v S [relocation]* (2001) 21 FRNZ 331, [2002] NZFLR 116 [28].

rights to control the child.[47] It has been said that guardianship gives the guardian rights against others, not rights against the child[48] and that the rights conferred on parents must be exercised for the benefit and welfare of their child.[49]

Natural guardians

2.30 The Guardianship Act 1968 vests in all gestational mothers and most genetic fathers the rights and responsibilities of guardianship. A man is a guardian in law if he is married to the child's mother or is in a de facto relationship with her when the child is born.[50]

2.31 Guardianship flows automatically from their status as the child's legal parents and does not require approval from the Court or any government agency. The law assumes that, by virtue of their parenthood, the child's parents have the necessary commitment and qualities to provide adequately for the child's needs – or to at least make satisfactory arrangements for others to meet those needs. A parental guardian can have his or her guardianship rights removed for serious failure to meet parental responsibilities.[51]

Guardianship resulting from deemed parenthood

2.32 Adoptive parents are deemed to be the child's legal parents and, on the making of an adoption order, acquire guardianship rights and responsibilities in relation to their adopted child.[52]

2.33 The husband or de facto male partner of a woman who conceives using donated sperm is deemed to be the father of the resulting child provided he consented to the procedure.[53] As a parent of the child he acquires automatic guardianship rights and responsibilities if he is married to the mother or was living with her at the time of birth. The sperm donor is deemed not to be a parent of the child.

Children with only one guardian

2.34 While most children have at least two guardians, it is not unusual for a child to have only one guardian. If the father is not married to the child's mother, and was not living with her in a de facto relationship at the time of the child's birth,

---

47 See *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 185; [1985] 3 All ER 402 (HL); *D v S [relocation]* (2002) 21 FRNZ 331, [2002] NZFLR 161 paras [29] and [31]; *L v A* (unreported) 20/11/03, Baragwanath J, High Court Auckland CIV2003-404-4849 para [9].

48 *D v S [relocation]*, above n 47, para [29].

49 *Gillick v West Norfolk and Wisbech Area Health Authority* [1966] 1 AC 112, 173, 185; [1985] 3 All ER 402 (HL).

50 Under clause 17(3) Care of Children Bill 2003 it is proposed to extend this to men who were in a de facto relationship with the child's mother at any time during the period between *conception and birth.*

51 Section 10(2) Guardianship Act 1968.

52 Section 16(2)(a) Adoption Act 1955.

53 Sections 5(1)(a), 7(1)(a), 9(1)(a), 11(1)(a), 13(1)(a) and 15(1)(a) Status of Children Amendment Act 1987.

he is not a guardian unless he obtains a guardianship order through the Family Court.[54] A child adopted by a sole applicant will only have one guardian.[55]

Additional guardians

2.35 It is possible for a child to have more than two guardians. A person other than a natural, adoptive or deemed parent can acquire guardianship rights and responsibilities in relation to a child by way of a Family Court guardianship order.[56] Court-appointed guardians are often described as *additional guardians* to distinguish them from parental guardians who are known as *natural guardians*. There are no restrictions on who can apply for a guardianship order but the applicant must satisfy the Court that the child's welfare will be promoted by making the appointment.[57]

2.36 Where there are two or more guardians of a child, each guardian has an equal right to be involved in important decisions in relation to the child's upbringing. The courts have shown some reluctance to appoint multiple guardians out of concern that the more guardians there are, the greater the risk there is of disagreement over the child's upbringing.

2.37 Unlike parental guardians, a court-appointed guardian can be removed if the Court is satisfied the appointment no longer serves the child's welfare.[58]

When guardians cannot agree

2.38 Each guardian of a child is entitled to be involved in decisions about the child's upbringing.[59] The fact that one guardian has custody of the child does not give that guardian exclusive rights to make decisions about the child's names, religion, education, health care and other important matters. Each guardian has a responsibility to consult with other guardians on such matters. If, after consultation and discussion, the child's guardians cannot agree on an issue, they may apply to the Family Court to determine the matter in accordance with the best interests of the child.[60] In making such an order the Court must treat the welfare of the child as the first and paramount consideration.[61]

Changes to guardianship in the Care of Children Bill 2003

2.39 The Care of Children Bill currently before Parliament contains more detail about guardianship responsibilities. Every guardian will have the right and responsibility

---

54 Section 6(2) Guardianship Act 1968; compare clause 17(3) Care of Children Bill 2003.

55 Section 3(1) Adoption Act 1955 allows a single person to apply for an adoption order. Section 16(2)(b) severs the child's relationship with the birth parents.

56 Section 8(1) Guardianship Act 1968.

57 Section 23(1) Guardianship Act; clauses 21–24 Care of Children Bill 2003 will provide a simplified means by which a step-parent can be appointed a guardian.

58 Section 10(1) Guardianship Act 1968.

59 See the definition of "guardianship" in s 3 Guardianship Act 1968. This is so even if a custody order has been made in favour of one parent: see *D v S [relocation]* above n 47, para [28]; *R v C* 23/8/02, Judge Inglis QC, Family Court, Palmerston North FP054/327/97.

60 Section 13(1) Guardianship Act 1968.

61 Section 23(2) Guardianship Act 1968.

to contribute to the child's intellectual, emotional, physical, cultural and other personal development.[62] The Bill gives examples of decisions that fall within the ambit of guardianship responsibilities and rights:

- the child's name and any changes to that name;
- where and with whom the child shall live;
- medical treatment for the child;
- where and how the child is to be educated;
- the child's religious denomination and practice.[63]

2.40 The Care of Children Bill 2003 recognises that guardians' powers to control the upbringing of children diminish as children grow older and develop the capacity to make decisions for themselves. Clause 15(1)(b) suggests that guardians of younger children should make decisions with the child, and that the role of guardians of older children is to help the child to make a decision.

CUSTODY

2.41 Custody is defined as "the right to possession and care of a child".[64] In practical terms, a custody order determines with whom the child will live and who will be responsible for the child's day-to-day care. A custody order confers narrower rights and responsibilities than guardianship.[65] If parents separate and there is a disagreement over where and with whom the children will live the Family Court may be asked to make a custody order.

2.42 Obviously, a child cannot live in two places at once. The Court will often make a *sole custody order* in favour of one or other parent. The courts have been more inclined recently to make a *divided custody order* (sometimes known as *shared custody* or *joint custody*).[66] Divided custody orders stipulate that one parent shall have custody of a child for certain days of the week and the other parent for the remaining days. The courts have tended to move away from the traditional custody/access dichotomy. In the words of Baragwanath J:

> To assume that the paradigm of a unified marriage in a single home means that the child of separated parents *must* live primarily with one parent or another unless the relationship is harmonious overlooks the possibility that in some cases it may be in the child's best interests to have two homes – not one.[67]

2.43 Changes foreshadowed in the Care or Children Bill 2003 will replace the term *custody order* with *parenting order.* A parenting order will provide for a child's day-to-day care.[68] It may also determine what *contact* a parent will have with his or her child.[69] A parenting order providing for contact with the child is the equivalent to an access order under the Guardianship Act 1968.

---

62 Cause 15(1)(a) Care of Children Bill 2003.

63 Clause 15(2) Care of Children Bill 2003.

64 Definition in s 3 Guardianship Act 1968.

65 *D v S [relocation]* above n 47, para [28].

66 *M v Y* [1994] 1 NZLR 527, [1994] NZFLR 1 (CA); *R v R* (1994) 12 FRNZ 211 (HC).

67 *L v A (unreported)* 20/11/03, Baragwanath J, High Court Auckland CIV2003-404-4849, para [48].

68 Clause 44(1)(a) Care of Children Bill 2003.

69 Clause 44(1)(b) Care of Children Bill 2003.

FATHERS AS GUARDIANS

2.44 A genetic father who is not married to his child's mother or living with her in a de facto relationship at the time of the child's birth is not an automatic guardian under current law.[70] He may be recognised as a legal father, but will have no legal right to make or be consulted about major decisions affecting the child, such as residence, education and religion. If the child's mother decides to place the child for adoption his consent will only be required if the Family Court considers it expedient.[71]

2.45 Some fathers who are not guardians reach an agreement with their child's mother as to contact and the role they will play in their child's life. However, if they are unable to agree, or if the father wants to acquire guardianship rights and responsibilities in law, he needs to apply either for adoption or for an order appointing him an additional guardian. There is no guarantee that a guardianship order will be made, especially if the child's mother opposes the application or the Court finds it would not be in accordance with the child's best interests.[72] Even if a father is not a guardian, however, he can still apply for custody[73] or access[74] as the child's legal parent.

2.46 It has been argued that the current laws governing guardianship are inherently unfair. Some fathers want rights and responsibilities in respect of their children and are critical of laws that withhold guardianship rights that are accorded automatically to mothers and to married and cohabiting fathers. Part of their dissatisfaction stems from the fact that they are liable for child support[75] although they are not guardians and may have limited or no contact with their children. Issues concerning guardianship and fathers are not within the Terms of Reference. They are addressed in the Care of Children Bill 2003.

---

70 Under s 6 Guardianship Act 1968, a man is only a guardian in law if he is married to or living with the child's mother in a de facto relationship at the time of the child's birth. The Care of Children Bill 2003 will extend this provision to men who were living with the mother at any time during the period between conception and birth.

71 The Family Court has developed a set of rules by which the expediency of requiring the father's consent can be assessed. The father's consent will usually be required if (i) he has been granted or has applied for a guardianship order; (ii) a declaration of paternity or paternity order has been made naming him as the father; or (iii) a maintenance order has been made against him or he has contributed towards the child's maintenance.

72 See *K v B* 24/8/90, (1990) 6 FRNZ 604, [1991] NZFLR 168; *C v M* (unreported) 12/11/93, Judge Inglis QC, Family Court Wanganui 083/086/92; *McDermott v Kena* (2001) 21 FRNZ 168, [2001] NZFLR 954; *B v G* (unreported) 12/3/97, Judge Grace, Family Court Nelson FP 042/227/95; *G v B* (unreported) 3/2/98, Judge von Dadelszen, Family Court Hastings FP 366/96 compare *Guardianship of B* (1986) 4 NZFLR 306; *Parsotam v Lyall* (unreported) 25/3/03, Judge Moss, Family Court Wellington FP085/430/01.

73 Section 11(1) Guardianship Act 1968.

74 Section 15(2) Guardianship Act 1968.

75 Section 7 of the Child Support Act 1991 sets out the classes of persons who fall within the definition of "parent" under the Act. These include persons who are registered as the parent on the child's birth certificate and any person in respect of whom a paternity order or declaration is made: s 7(a), (d) and (f).

Changes foreshadowed in the Care of Children Bill 2003

2.47 The Care of Children Bill, if passed in its present form, will make a notable change in the law by making more fathers guardians of their children. Two additional groups of fathers will become entitled to automatic guardianship of any child conceived on or after the commencement of the Act:

- fathers who have lived with the mother at any time between the child's conception and birth;[76]
- fathers whose name and particulars are registered on the child's birth certificate with the mother's consent.[77]

2.48 The first of these provisions is not retrospective.[78] The second provision may be retrospective and confer guardianship on fathers whose name was on the birth certificate prior to the Care of Children Bill coming into force, but statutory provisions are usually interpreted in a way that avoids restrospectivity. It might be argued that mothers who agreed to the father's name being included on the birth certificate at a time when this did not confer guardianship should not suddenly be thrust into the position of having the father as co-guardian.

2.49 The Bill further strengthens the position of non-cohabiting fathers in that clause 19(4)(a) states that the Court *must* appoint a father as a guardian of the child on application unless to do so would be contrary to the child's best interests and welfare. This is a significant change in existing guardianship laws. It introduces what amounts to be a rebuttable presumption that it will be in a child's interests to have a father with guardianship responsibilities and rights. The Bill falls short of providing automatic guardianship to all genetic fathers.

The place of fathers in adoption

2.50 The Ministry of Justice has advised that, as part of its current review of adoption legislation, it is recommending that social workers be required to make reasonable efforts to identify and locate the father of a child intended for adoption in order to seek his consent. This accords with the Law Commission's recommendations in *Report 65 Adoption and Its Alternatives* and stems from a recognition that a father has a right to be consulted before steps are taken to obtain an adoption order that will extinguish his fatherhood. The principles of natural justice support such a right.[79] Support can also be found in the child's right to know about his or her birth origins.[80]

---

[76] Clause 17(3) Care of Children Bill 2003 makes a father a guardian if he was married to or living with the mother as a de facto partner at any time during the period from conception until the child was born.

[77] Clause 18 Care of Children Bill 2003.

[78] Clause 17(4) Care of Children Bill 2003.

[79] See s 27(1) New Zealand Bill of Rights Act 1990.

[80] For further discussion see chapter 5.

3

Donor gamete conception

WHAT IS DONOR GAMETE CONCEPTION?

3.1 Donor gamete conception is one aspect of Assisted Human Reproduction (AHR), which is the collective name for a range of procedures used to assist couples or individuals to conceive children. It is a procedure whereby donated sperm and/or eggs are used to conceive a child. The result is that one or more of the child's social parents will not be his or her genetic parent(s). Donor gamete conception has been most commonly used by heterosexual couples when natural conception is not possible as a result of male, female or joint infertility, but in recent years has been used also by single women and some lesbian couples.

3.2 There are special parental status rules for the reallocation of parenthood in donor gamete conception. This chapter reviews the practices of donor gamete conception in New Zealand, considers what legal parental status rules apply and what legal changes may be needed. A list of the common terms used in this chapter is included in the preliminary pages of this paper.

THE PRACTICE OF DONOR GAMETE CONCEPTION IN NEW ZEALAND[81]

Clinic setting: practices

3.3 In the past three decades specialist fertility clinics[82] have gradually taken over the treatment of infertility from obstetricians, gynaecologists and general practitioners. Since approximately 1977, donor sperm has been used as a treatment for male infertility at these clinics. Prior to this, private obstetricians/gynaecologists and some general practitioners arranged donor insemination on occasion.

3.4 Until around 1990,[83] sperm was donated on the basis that the donor's identity would be kept anonymous, although non-identifying information was usually

---

[81] The information in this section has been gathered from interviews carried out in 2003 by the Law Commission with fertility clinics nationwide and individuals with experience of traditional or partial surrogacy.

[82] All clinics must be accredited to the Fertility Society of Australia Reproductive Technology Accreditation Committee (RTAC) and follow their Code of Practice. This requires that New Zealand clinics obtain ethical approval from the New Zealand National Ethics Committee on Assisted Human Reproduction (NECAHR) for all new procedures. Most donor gamete procedures or treatments are standard procedures and do not require case-by-case approval from NECAHR, unlike in vitro fertilisation (IVF) surrogacy treatments.

[83] Until 1983 in Wellington.

available to recipients. Prior to 1987, anonymity was considered to be desirable because it ensured the donor could not later find himself burdened with legal parental responsibilities in relation to the child. Anonymity was also favoured because it was thought to maintain privacy and protect the child's family from interference by the donor. Since 1992, egg donations have also been able to be carried out as a result of advances in reproductive technology. The Status of Children Amendment Act 1987 clarified the legal relationship that existed between donors and donor-conceived children and reflected these attitudes and beliefs.

3.5 Public consciousness of the harm that secrecy and deception does to families, and to children in particular, was raised following the closed adoption debates that led to the Adult Adoption Information Act 1985. Clinics began altering practices so that now comprehensive records of donors are kept, including information about the donors' medical history and identifying characteristics, their interests and talents, educational achievements, work history, family history, why they want to be a donor, important influences and life experiences. In some cases, donors and the recipient families even meet prior to conception.

3.6 Though practices differ, for the past decade, clinics have not generally accepted prospective donors unless they are willing to provide non-identifying information about themselves to the child and his or her family. Clinics advised the Commission that it only became possible to depart from full anonymity practices when the Status of Children Amendment Act was passed in 1987, because this released donors from legal liability being owed to the child. Donors must now sign a form consenting to be willing to be approached by the clinic at some later date to consider disclosing more information and their identity to the child and the child's parents. Basic information is disclosed to prospective recipients at the time they seek treatment. Other wording requires them to agree to consider being identifiable to the child at age 18.

3.7 Since 1993, when a complaint was received by the Human Rights Commission, all clinics have accepted women without partners and women in lesbian relationships for donor insemination. Between a third to just under a half of all donor insemination is carried out on single women and women in same-sex relationships. Use of donor sperm by heterosexual couples has declined in recent years as better techniques have been developed that enable the use of semen from men with exceptionally low sperm counts.[84]

3.8 There are two types of gamete donor. Some are recruited by clinics from among the public via newspaper advertisements. We refer to these donors as "clinic recruited". In the course of treatment some donors may become known to the recipients. Others remain unidentified.

3.9 Others are recruited personally and brought to the clinic by the recipients. We refer to these as "personally recruited" donors. They are almost always known to the recipients.

Unidentified donors

3.10 In the early days of donor insemination, donors were often medical students, hospital staff or the partners of hospital staff. Today, donors are fewer in number

[84] Intracytoplasmic sperm injection (ICSI) is a technique where a single sperm can be removed from the male partner's reproductive tract and injected into an egg. If an embryo is formed it can be transferred into a woman's uterus.

and the type of donor has changed. Whereas previously donors were typically young, single males, today, many are older with their own families. It has been estimated that each clinic receives no more than six new donors per year.[85] The donors are not paid for the donation, although a contribution towards travel expenses is usually offered.

3.11 Clinics ascertain and abide by the wishes of the donor as to how his sperm is to be used. For example, he is typically asked if he consents to his sperm being used by heterosexual couples, single women, lesbian couples, overseas patients and in conjunction with in vitro fertilisation (IVF). He is also asked if there are any restrictions he wishes to place on the use of his sperm.[86] This is considered consistent with the best interests of the child should the child want to meet the donor at a later date.

3.12 Clinics limit the sperm donated by one person to four to six families. Some will not offer "cross-cultural" sperm donation – it must be collected from a donor of the same or similar ethnicity as the recipient woman's partner. The number of children being born each year from the use of donor sperm treatment from fertility clinics is estimated to be 100 to 150 per year. The number of children born from the use of donor eggs is estimated to be 20 to 30 per year. Both donors and recipients receive counselling prior to consenting to the procedures. In one Auckland fertility clinic, donor support and information meetings are held. Support groups are also held for parents whose child is conceived through the use of donor eggs or sperm.

3.13 As part of the compulsory counselling prior to gamete donation, the parties discuss their intentions and what type of contact they will maintain (if any) once the child is born. This is usually recorded in writing by the counsellor. Future contact often includes, as a minimum, an agreement about photographs being exchanged and the donor being available to give information on family history and so on. Some recipients might anticipate the donor playing a larger role in the child's life, particularly if they are single women or a lesbian couple.

3.14 Donor gametes can also be used in IVF procedures where an embryo is created outside the body and then placed into the uterus. The embryo can be formed from donor sperm, donor eggs or both. Hence, a female partner in a heterosexual couple may give birth to a child to whom her only relationship is a gestational one. The male partner may have no genetic relationship to the child.

Known donors

3.15 There is an increasing acceptance of known donors being recruited directly by the recipients from among family, friends and contacts. About half of all egg donors are estimated to have been personally recruited by the recipient couple.[87] In one clinic, 10 per cent of sperm donors are known while 65 per cent of all egg donors meet with the recipients before the procedures are undertaken.[88] Egg donors are particularly interested in knowing the recipients of their gametes.

---

[85] Above n 81.

[86] Fertility Associates Form "Consent to Donate Sperm as a Clinic-Recruited Donor".

[87] Above n 81.

[88] Above n 81.

The private setting

Known donors

3.16 Private, known donor inseminations also take place, particularly in the lesbian and gay communities.[89] While egg donations cannot take place without medical assistance, sperm donations can. There is no reliable evidence as to the incidence of such arrangements. Agreements may be made as to the form of contact that the sperm donor will have with the child and family. These may or may not be recorded in writing and vary from arrangements for the male donor to have full, shared parental responsibility and rights with the mother and her partner, to being a known male figure in the child's life without parental responsibilities and rights, to having no ongoing contact at all – although none of these agreements will have legal effect in the absence of a court order. It is not known what attempts are made to undertake health checks on the donors in these situations to protect the health of the intending mother and the child.

Gay and lesbian families

3.17 Though the incidence is not known, it is notable that the Census data for 2001 recorded a doubling of same-sex couples with children to 1356 in number from 684 in 1996.[90] While some of these children will have been born when their parents were in heterosexual relationships prior to entering a gay or lesbian relationship, or may be whāngai children or children of extended family members, many of them will have been conceived within the same-sex relationship.

3.18 There is very limited research on New Zealand lesbian and gay families. Of 10 mothers (all in lesbian couples) interviewed for her thesis[91] Bree found that eight of the 10 had consciously chosen known male donors,[92] despite having the option of assisted fertility with unidentified donors. Figures from Australia suggest lesser but still significant numbers using known donors.[93] There is now considerable

---

89 The Law Commission interviewed Dr Liz Harding, a doctor working for the Auckland Family Planning Association, who offers a service providing counselling and screening for gay and lesbian couples wishing to use donor insemination.

90 Lisa Melville *Children and Young People in New Zealand: Key Statistical Indicators* (FAIR Centre, Wellington, June 2003) 17.

91 Caroline Bree "Lesbian Mothers: Queer Families. The Experience of Planned Pregnancy" unpublished thesis presented in partial fulfilment of the requirements for the degree of Master of Health Science School of Nursing and Midwifery (Auckland University of Technology, Auckland, December 2003).

92 Bree reported: "Despite access to assisted fertility, the women in this study usually sought an involved father, as they felt that this would be the best option for their child. While there was a tension between wanting to 'find the right man' and the biological imperative of achieving a pregnancy 'before it was too late', the couples spent around two years finding 'a good father' and negotiating beliefs about parenting, such as no physical punishment. Fathers spend more time with their children (an average two days a week for two year olds) as the preschoolers became increasingly independent of their mothers. In all cases, lesbian mothers are delighted with the relationship between their child and her/his father."

93 McNair and Dempsey "Queer Parenting: A thriving endeavour" a presentation of preliminary data at the Australian Institute of Family Studies seminar, University of Melbourne, 21 February 2002. In that survey of 85 lesbian mothers who responded to the specific questions, 44 per cent said their children had a known father and 48 per cent had a donor father. Seventy-five percent of fathers were involved with the children and 40 per cent of donors were involved.

research demonstrating that children in lesbian families have similar outcomes as children raised in heterosexual families.[94]

3.19 A characteristic of such families is their diverse nature. Pihama comments:

> For lesbian and gay-led families in Aotearoa there is not one single definitive way of being; instead, families are diverse. Family types range from a redefined form of 'nuclear' family i.e. two mothers and children or two fathers and children living together through to more complex and extended arrangements.[95]

3.20 The Family Court of Australia decision in *Re Patrick*[96] referred to research demonstrating that although lesbian and gay families are increasing in number they cannot be characterised as an homogenous group and may take many forms. Such families may have two mothers; two mothers and one father; two mothers and two fathers; and, rarely, two fathers.[97]

Unknown donors

3.21 It is understood from anecdotal accounts that unidentifed donor conception takes place privately. In these situations, a third party acts as the agent and arranges for the woman wanting to be inseminated to obtain semen for the purpose of insemination.

LEGAL POSITION UNDER CURRENT LAW: WHO THE PARENTS ARE AND WHAT RIGHTS AND RESPONSIBILITIES THEY HAVE

3.22 The Status of Children Amendment Act 1987 contains a series of rules by which the parental status of children born through donor gamete conception is determined. These rules are based on the marital status of the women recipient of the sperm, egg or embryo.

A child conceived using donor semen[98]

3.23 If the woman who bears the child is married or has a male de facto partner, and the husband or partner has consented to the donor insemination procedure, then

---

94 Another study: R Chan, B Raboy and C Patterson "Psychosocial adjustment among children conceived via donor insemination by lesbian and heterosexual mothers" (1998) 69 Child Development 443–457. The study compared psychosocial adjustment among children conceived via donor insemination by lesbian and heterosexual mothers. It assessed children with lesbian parents as well-adjusted, high on social competence and low on behavioural problems and their development unrelated to variables of family structure and parental sexual identity.

95 L Pihama "Reconstructing meanings of family: lesbian/gay whanau and families in Aotearoa" in Adair and R Dixon (eds) *The Family in Aotearoa* (Longman, Auckland, 1998) 188.

96 *Re Patrick: An application concerning contact* [2002] FLC 93-096.

97 The Court cited a survey at a Sydney Lesbian Parenting Conference of 84 women in 2000, which found 66 per cent of respondents said the donor had no parenting responsibilities or decision-making role; 12 per cent reported a sharing of parental responsibilities; 22 per cent had regular contact with the donor; 33 per cent had some contact and 31 per cent had no contact. The Court indicated these results were similar to studies conducted in other countries.

98 The Status of Children Amendment Act 1987 refers to children born as a result of artificial insemination, donor semen implantation or transfer, or donor embryo implantation using donated "semen" rather than "sperm".

her husband or partner is, for all purposes, the father of the child and the semen donor is not the father.[99]

3.24 If the woman who bears the child is unmarried or unpartnered, or has undergone the donor insemination procedure without the consent of her husband or partner, then *the donor is the child's genetic father, but he does not have any rights or liabilities towards the child and the child has no rights or liabilities towards him.*[100]

3.25 The donor can only acquire rights and responsibilities towards the child if he later obtains an adoption, guardianship or custody order or if he marries or lives in a de facto relationship with the mother.[101]

3.26 Hence, in the case of married women who use donor sperm, the donor is, via the deeming mechanism in the Status of Children Amendment Act 1987, made to disappear without a trace from the resulting child's life. The deeming mechanism removes the donor's status as the child's genetic father as well as removing from him all the rights and responsibilities of a father. From birth, the child is deemed to be the child of the mother's husband or partner in all respects. There is no first birth certificate issued as in adoption.[102] It would appear to be unlawful for the genetic father's name to be recorded on the birth certificate in a case of donor insemination where the recipient is a married or partnered woman and the husband has consented to the insemination. The child will not inherit from the donor father in cases of intestacy, nor have the right to file a claim against his estate under the Family Protection Act 1955. The donor father will not have to pay child support for the child.[103]

3.27 Donors whose sperm is used by unmarried women have greater rights should they wish to make or retain contact with a child conceived with their gamete. The fact that the Status of Children Amendment Act 1987 covered unmarried woman was novel when it was enacted. It came into force well over a decade after similar legislation had been passed in many comparable overseas jurisdictions, and was novel in its application to unmarried woman.[104]

3.28 In the case of an unmarried woman or a married or partnered woman who conceives with donor sperm without the consent of her husband or male partner, the donor remains, in law, the genetic father of the child but he has none of the rights and responsibilities of a father. The High Court, in the case of *P v K*, described the donor's status as a "shell father". However, there seems to be nothing preventing the donor from having his name recorded on the child's birth

---

[99] Status of Children Amendment Act 1987: s 5(1)(a) and (b), s 7(1)(a) and (b), s 9(1)(a) and (b), s 11(1)(a) and (b), s 13(1)(a) and (b), s 15(1)(a) and (b).

[100] Section 5(2)(a) and (b), s 7(2)(a) and (b), s 9(2)(a) and (b), s 11(2)(a) and (b), s 13(2)(a) and (b), s 15(2)(a) and (b).

[101] Section 6 Guardianship Act 1968 compare clause 17 Care of Children Bill 2003.

[102] Though this becomes closed when an adoption takes place and a new birth certificate is issued.

[103] Section 7(4) Child Support Act 1991.

[104] In the United States, the Uniform Parentage Act 1973 was passed as a non-binding model statute to guide the development of state legislation. It has identical provisions to the Status of Children Amendment Act 1987 but did not refer to the position of unmarried woman and dealt with only donor sperm and not donor eggs. It was said to be based on the presumption of paternity, the purpose of which was to ensure all children would be born legitimate, even if born as a result of an adulterous affair. Australia, Canada and the United Kingdom also have enacted similar deeming legislation.

certificate with the mother's consent. Likewise, it does not appear to prevent the donor from having contact with his child.[105] Nor would it seem to prevent a declaration of paternity being made in the donor's favour[106] or his being served with notice of an application by the mother's same-sex partner for guardianship of the child.[107]

3.29 Hence, recent decisions indicate a trend for courts to give fullest possible effect to the remaining rights of donor fathers in these situations. One reason may be the Court's desire for the child to have a "father"[108] in more than name. There may also be a concern for the child's need and right to have knowledge of his or her genetic lineage and identity. It is unclear whether a donor's genetic relationship to the child would be recognised in relation to the crime of incest or for the purpose of the law as to prohibited marriages.[109]

A child conceived using a donor egg[110]

3.30 The Status of Children Amendment Act 1987 deals also with egg donations.[111] The woman who bears the child is for all purposes the mother of the child and the ovum or embryo donor is deemed not to be the mother.[112] Like the sperm donor, the egg donor also has no parental responsibilities or rights and cannot be recorded on the child's birth certificate as the mother. In law, the woman who gave birth to the child is the child's mother. Her husband or partner is deemed to be the child's father, provided he consented to the procedure, regardless of whether he produced the semen by which the child was conceived.

---

[105] In *P v K* above n 7, the High Court held that although the genetic father could not apply for access under s 15 Guardianship Act, he could, with leave, apply for a custody order placing the child in his care on specific days and times.

[106] See *Young v Hemmes* Paterson J, 23/9/03, HC New Plymouth M10/00 where the High Court made a declaration of paternity in favour of the genetic father of an adult child despite the fact he had been legally adopted as a child and had another legal father. The Court recognised the emotional importance to the man of having the declaration made and did so in spite of objection from the genetic father; *W v B (Protection Order)* (1998) 16 FRNZ 479; *K v F* (1983) 2 NZFLR 1; *Re Fagan (dec'd)*; *Walker v Fagan* [1999] NZFLR 222.

[107] M *v* C 004/355-D02; Robinson, FCJ, Family Court, Auckland, 13 November 2003. The Family Court ordered that an unidentified sperm donor be served with an application of guardianship by the recipient woman's same-sex partner. His concerns were the child's need and right to know his identity and seemed to suggest, following *P v K*, above n 7, that a donor could apply to the Court if he wished to have contact with the child. This is despite him having donated semen on the basis that he was waiving parental rights and liabilities and electing anonymity. The Court indicated that it was in the child's interests that the identity of the donor was held on the Court file because court records were better safeguarded than clinic records.

[108] It would seem less likely that the Court would make such an order in relation to a guardianship application by the male partner of a women who conceived a child via donor gametes when she was single.

[109] Section 130 Crimes Act 1961 (incest), s 15 Marriage Act 1955 (prohibited marriages).

[110] The Status of Children Amendment Act 1987 refers to a child born as a result of donor ovum or donor embryo implantation or transfer.

[111] This is unusual compared with legislation in comparable jurisdictions that predated the development of egg transfers.

[112] Section 9(3)(a) and (b), s13(3)(a) and (b), s15(3)(a) and (b).

Conception through private self-insemination

3.31 It was decided in *P v K* that the deeming provisions apply where a child is conceived by self-insemination with donor sperm, even where it was intended that the donor would have some involvement with the child as a father.[113]

3.32 In that case, the High Court heard an appeal from a claim under the Guardianship Act 1968 brought by a known sperm donor who had given his semen to a lesbian couple in a private arrangement on the understanding that he and his partner and family would play a part in the child's life. The relationship broke down after the child's birth and he was denied access. The High Court held that the Family Court had erred in finding that the donor had no standing to seek access to the child by means of a custody order although his parental rights and responsibilities had been extinguished under the Status of Children Amendment Act 1987.[114]

Conception through sexual intercourse

3.33 A man may participate in sexual intercourse for the sole purpose of enabling a woman to achieve a pregnancy, with the joint intention of them both that he is to have no rights or responsibilities in relation to the child. It is generally agreed that the special rules established by the Status of Children Amendment Act 1987 do not apply in this situation because conception resulting from sexual intercourse falls outside the legal definitions of "artificial insemination"[115] and "assisted reproductive procedure in that Act". In law, the donor will be the father of the child although will not be a legal guardian unless the woman is his de facto partner or spouse. The donor will be liable for child support should the mother claim it.

PROPOSED LEGISLATIVE AMENDMENTS[116]

3.34 Under the changes to the Status of Children Act 1969 foreshadowed by the Care of Children Bill 2003, privately arranged self-insemination will be covered under the Status of Children legislation.[117] The Bill effectively re-enacts the provisions of the Status of Children Amendment Act 1987, but extends the Act's provisions so as to give the same-sex partner of the birth mother of a child born through

---

[113] In *P v K*, above n 7.

[114] The donor was not able to apply for an access order under s 15(2) Guardianship Act because he was not the child's legal father, but he could apply for a custody order with leave of the Court as "any other person". A similar fact situation presented itself in *Re Patrick: An application concerning contact* (2002) FLC 93-096 in Australia, and there have been several similar fact cases in the United States where the donor insemination legislation covered only married women. See above n 104.

[115] The term "artificial insemination" is used in s 5(1) Status of Children Amendment Act 1987 but is not defined, but insemination through sexual intercourse with a donor is unlikely to be held to be "artificial".

[116] Note also proposed amendments to the Human Assisted Reproductive Technology Bill. The term "assisted reproductive procedure" (see clause 5 Supplementary Order Paper No 80, 29 April 2003) is defined as a "medical, scientific, or technical procedure performed for the purpose of assisting human reproduction". It is unlikely that self-insemination with the semen of a privately arranged known donor would be seen as a "technical procedure".

[117] Under Part 4 of the Care of Children Bill 2003, a new section 14 is to be inserted in the Status of Children Act 1969 by section 167. It defines AHR procedure as "one of the following artificial human reproduction procedures (whether or not the procedure is carried out in a clinic setting or with assistance of an independent registered health professional)".

donor gamete conception the same parental status as is enjoyed by a de facto male partner in cases of donor gamete conception.

3.35 If enacted, the Care of Children Bill 2003[118] will have the effect that:

- The lesbian partner of a woman who bears a child using donated sperm, whether privately or with medical assistance, will, provided she has consented to the procedure, *be for all purposes a parent of the child*[119] and must be treated as far as practicable in the same manner as the father or other parent of the child.[120]
- *The semen donor is for all purposes not a parent.*[121]

3.36 A known sperm donor who wishes to be an active parent to his child must negotiate a parenting agreement with the mother and her partner or spouse.

CASE STUDIES: DONOR GAMETE CONCEPTION

3.37 To illustrate the current and proposed legal parental status rules, we set out the following case examples.

CASE EXAMPLE ONE

Margerita's family

In 1989, Lucia and Fernando wanted to have a family but Fernando had a low sperm count. The couple attended a fertility clinic and Fernando was first treated using ICSI (Intracytoplasmic Sperm Injection) but this failed. Lucia was then inseminated with semen from an unidentified donor. Lucia conceived a child and Margerita was born.

Legal position

Lucia is Margerita's genetic and birth mother and has automatic parental responsibilities and rights to care for her. Fernando is 'deemed' to be Lucia's father because he is married to Lucia and knew of and consented to the procedure. Fernando's name is recorded on her birth certificate as her father.

This remains the same under the Care of Children Bill 2003.

---

[118] Part IV of the Care of Children Bill 2003 also extends to same-sex couples the provisions that apply when a sperm donor marries or becomes a de facto partner of the child's mother. The 1987 Act provided that where, after the child's conception, a sperm donor marries or becomes a de facto partner of the mother he will have the rights and liabilities of a father of the child and the child will have reciprocal rights and liabilities towards him. The Bill will have the effect that an ovum donor who, after conception, becomes a same-sex partner of the mother will have rights and liabilities towards the child. To avoid the (unlikely) situation that the mother of a child conceived with donated sperm and a donated ovum marries or lives with the sperm donor and later lives with the ovum donor (or vice versa) only the first partner will acquire rights and liabilities in respect of the child.

[119] Section 17(1)(b) Status of Children Act 1969 to be inserted by clause 167 Care of Children Bill 2003.

[120] Section 14(2) Status of Children Act 1969 to be inserted by clause 167 Care of Children Bill 2003.

[121] Section 20(2), s 21(2) Status of Children Act 1969 to be inserted by clause 167 Care of Children Bill 2003.

Later

Lucia and Fernando decided to keep the circumstances of Margerita's conception a secret. Fernando was embarrassed by his infertility and feared Margerita might treat him differently if she knew he was not her genetic father.

Consequently, Margerita grew up assuming Fernando was her genetic father, although she was aware they were very different. She neither looked nor acted like him. During puberty she suspected she was not his child when she found an old letter of her mothers in which she had talked about Fernando's infertility. Her fears were allayed, however, when she secretly sent away for her birth certificate and saw Fernando registered as her father.

As a young adult, Margerita develops a serious bone condition and requires bone marrow from a family member. She then discovers that Fernando cannot be a donor because he has no genetic connection to her. She is deeply traumatised by this discovery on top of her battle with her health problems. She feels betrayed by her parents and her psychological state hinders her recovery.

Legal position

Margarita has no legal right to obtain records of her genetic father's identity because she was conceived prior to the Human Assisted Reproductive Technology Bill 2003 becoming law. (It is not yet law.) She may ask the clinic in which she was conceived to contact him to see if he would make contact with her. The clinic may be able to assist her with medical information about the donor's family.

CASE EXAMPLE TWO

Michael's family

Anna and Bill want a child. Anna was born without ovaries but with a uterus. She cannot produce eggs but can bear a child. Her friend Claire has offered to donate an egg to be fertilised by Bill's sperm but carried by Anna. Claire does not want to have a primary parenting role but wants to have some contact with the child. All agree that the child will know Claire is the genetic mother and have contact with her. The IVF procedure is successful and eventually Anna gives birth to Michael.

Legal position

Michael has two parents with legal responsibilities and rights in relation to him. These are Anna and Bill. Anna is Michael's gestational mother and is his legal mother by operation of the Status of Children Amendment Act 1987. She is recorded as his mother on his birth certificate, and has automatic parental responsibilities and rights. Bill is Michael's genetic and legal father and is recorded as such on his birth certificate. He has

guardianship rights and responsibilities in respect of Michael because he is married to Anna and knew of and consented to the use of Claire's ovum to achieve conception. Claire, although she is Michael's genetic mother, is not recorded on the birth certificate and is deemed by law not to be Michael's legal mother.[122] As a donor, she has no parental status at all.

This will not change under the Care of Children Bill 2003.

Later

The friendship between Anna, Bill and Claire breaks down and the couple decide to move to Australia with Michael. Because Claire is neither a guardian nor a legal parent, she can do nothing to prevent this happening. Her only legal avenue would be to apply for leave for custody of Michael. She could not apply for access because that is only available to parents and she is not a 'parent' in law.

If Anna and Bill never tell Michael the truth about his conception he will be unlikely to know Anna is not his genetic mother unless, as was the case with Margerita, something unusual occurs to raise this as an issue.

CASE EXAMPLE THREE

Moana's family

Miriama and Eleanor are lesbian partners. They agree that Eleanor will bear a child with semen supplied by a friend, David. The three of them entered into a written agreement which provided that Miriama and Eleanor would be responsible for the day-to-day care and upbringing of the child, but that David's name would be registered as the father in the birth particulars, and that he and his gay partner would have access one day a week. Conception took place privately by way of self-insemination and Moana was born.

Legal position

Moana has only one parent with legal responsibilities and rights for her care. That is Eleanor. She is an automatic guardian because she is Moana's birth mother. Miriama, though caring for Moana on a day-to-day basis as a primary parent, has no legal responsibilities or rights in relation to her. She can apply to be a guardian of Moana and, with Eleanor's consent, will probably be granted it. She could apply for an order giving her joint custody of Moana.[123] She could also, theoretically, apply to adopt Moana as a single adoptive parent, but the Court would be unlikely to make her Moana's adoptive parent because it would extinguish Eleanor's parenthood.

---

[122] Section 13(3)(b) Status of Children Amendment Act 1987.

[123] Section 11(1)(a) Guardianship Act 1968 and see *M v Y* [1994] 1 NZLR 527.

David, the genetic father, is deemed by law to be Moana's father, but has no rights and responsibilities in respect of her by operation of the Status of Children Amendment Act 1987. He can, however, be registered on Moana's birth certificate as her father if Eleanor consents. If Eleanor were not to consent, he would need to prove to the satisfaction of the Registrar-General that he is Moana's father. Alternatively, he could apply to the Court for a declaration of paternity.

If Miriama and Eleanor's relationship breaks down and Eleanor refuses Miriama access to Moana, Miriama would have to go to the Family Court and argue for guardianship and custody. If she is in conflict with Eleanor the Court may not give her guardianship. Miriama would be ineligible to apply for access because she is not a parent.

If Miriama and Eleanor's relationship with David breaks down, he too would have to go to court to continue to see Moana. It is most unlikely that he would be granted guardianship because of the operation of the Status of Children Amendment Act 1987 that extinguishes his parenthood, but he may be granted custody if he could convince the Court that it would be in Moana's best interests for her to have a relationship with her genetic father. He could only get such access by means of a condition attached to a custody order or by a wardship order.

Changes under the Care of Children Bill 2003

If the Care of Children Bill becomes law, Miriama, as Eleanor's de facto partner, would be deemed a parent by law.[124] She would also be a natural guardian because she was living in a de facto relationship with Eleanor between the time of conception and birth.

David would not be a father for any purpose, rather than at present, where he is a father without rights and liabilities. However, Miriama and Eleanor could consent to him being appointed guardian, which would give him these rights and responsibilities and they all could enter into a parenting agreement together.

CASE EXAMPLE FOUR

Cory's family

Cory has two mothers and two fathers, Teresa and Maryanne who live together in one house, and Sean and Elliott who live together nearby. His four parents entered into an agreement before his conception that Sean and Maryanne would be Cory's genetic parents, that Maryanne would conceive via self-insemination and that all four would be equally responsible for his upbringing and care. They agreed to a 50/50 shared

[124] Regardless of whether Moana is born before or after the coming into force of the Act as the provisions apply retrospectively.

care arrangement, which commenced when Cory was three months old and started staying over with his fathers. All four agreed that they would contribute equally to the costs of raising Cory.

Current legal position

Although both Sean and Maryanne are Cory's genetic parents, only Maryanne has guardianship. Sean, as a donor, has no rights and liabilities towards Cory under the Status of Children Amendment Act 1987.

Teresa and Elliott have no parental status, but could apply to the Court for guardianship and shared custody along with Sean. It is doubtful whether this would be successful, however, as a result of the Court's traditional reluctance to appoint multiple guardians. Sean, as a father who donated sperm to an unmarried woman, could apply for an order for custody from the Court if his relationship with Maryanne and Teresa breaks down. He could not apply for access as a "parent" because, as a donor, his parental status is removed.

Position under the Care of Children Bill 2003

Teresa, as Maryanne's live-in partner, would be deemed a parent of Cory and would have status as his natural guardian. Sean, despite being Cory's genetic father, would not be a parent in law. Neither Sean nor Elliott would have any rights and responsibilities for Cory's care unless the Court appoints them guardians or they enter into a parenting agreement with Maryanne and Teresa.

CASE EXAMPLE FIVE[125]

Benson's family

Jack and Marta desperately wanted a child but were both infertile. He had a nil sperm count, while she had her ovaries removed during treatment for ovarian cancer. Her uterus was intact, however, meaning she would be able to carry and give birth to a child if she got pregnant. The couple sought the assistance of a fertility clinic, which created an embryo for the couple in the laboratory using a donor egg and donor sperm. This embryo was transplanted successfully into Marta's uterus, who became pregnant and eventually gave birth to Benson.

Jack and Marta had met the female donor, Simone, at the clinic prior to her eggs being harvested. They agreed with her during counselling to exchange photos and emails after the birth to let her know how the baby was getting on. The sperm donor was unidentified, but they did have access to limited non-identifying information about him and his family from the clinic.

[125] Embryo donation is not currently approved but it is possible that it will be authorised in the future.

Position under current law

Under the Status of Children Amendment Act 1987, Jack and Marta are deemed Benson's genetic parents. They have parental rights and responsibilities to care for him. The donors are deemed not to be his parents and have no rights and responsibilities in respect of the child.

Jack and Marta can be entered on Benson's birth certificate as his parents. Their names and details are entered onto his birth certificate as his mother and father.

Position under the Care of Children and Human Assisted Reproductive Technology Bills

There would be no change to Jack and Marta's status as parents and guardians. The information collection and storage provisions of the Human Assisted Reproductive Technology Bill 2003 will mean that Benson will be able to access information about his donor parents from either the fertility clinic, if it is still operating, or the central register. However, he will be dependent on Jack and Marta telling him that they are not his genetic parents.

REALLOCATING PARENTHOOD IN DONOR GAMETE CONCEPTION AND SURROGACY: ISSUES

3.38 The difficulties in allocating parental status, which are raised by the use of assisted human reproduction arrangements, are well expressed in a report by the New York State Task Force on Life and the Law:

> With assisted reproductive technologies, it is now possible for a child to be born with three biological parents – a man who provides the sperm, a woman who provides the egg, and another woman who carries and delivers the child – and one or more additional "social" parents, who intend to raise the child but who lack any biological ties. These situations challenge long-standing assumptions about the meaning of parenthood and the legal significance of biological and social relationships in defining family bonds. What are the relevance of genetic, gestational, and rearing contributions to parenthood, given that each of these contributions can be provided by different people? Should all children have one parent of each gender as a matter of law, regardless of the circumstances under which the child was born? What are the roles of intent and contract in determining parental rights and responsibilities?[126]

3.39 New Zealand's parenthood laws have been based on a model of two parents who are simultaneously the child's genetic and social parents. The genetic and social mother is also the gestational mother. As with adoption law, adjustments have been made to the law to deal with donor gamete conceptions to accord with the two-parent mother/father model. The egg donor is replaced by the gestational mother and the sperm donor is replaced by the mother's spouse or partner.

---

[126] New York State Task Force on Life and the Law *Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy* (New York, 1998) 327.

Further adjustments are being made by the Care of Children Bill 2003 to ensure the social parent in a same-sex relationship is treated the same as the opposite-sex parent. This has some precedent overseas.[127]

3.40 The Status of Children Amendment Act 1987 and the changes proposed by the Care of Children Bill 2003 both transfer the fact of genetic parenthood and all rights and responsibilities of the genetic father to the spouse or partner of the mother. With egg donation, full status and responsibilities are given to the gestational mother and her husband or partner.[128] The changes in the Care of Children Bill will treat same- and opposite-sex partners as co-parents. They will remove legal parenthood from the donor, whether or not the mother is married or partnered. Where a child has more than two social parents, only the child's mother and her partner or spouse will be recognised as having legal parental rights and responsibilities towards the child. An egg or sperm donor who wants to be involved in the child's upbringing will have to register a parenting agreement with the Family Court.

3.41 Clearly, donor gamete conception practices require society to find legal mechanisms to transfer legal parental responsibilities and rights from genetic parents to social parents (the caregiving parents). It is evident from the hypothetical case studies that the current legal situation has the potential to leave many families, and children within them, without the support of clear legal structures. This lack of clarity poses risks to donor-conceived children and their families. Besides the need to determine legal parental relationships, there is also a need for the law to take cognisance of the needs of children to know their genetic identity. Children conceived via donor sperm and eggs within heterosexual relationships are left, under the current and proposed laws, entirely dependent upon their parents to tell them their true genetic lineage. The Human Assisted Reproductive Technology Bill will require clinics to maintain a register of information for donor-conceived children but will not alter this.

DEEMING PEOPLE TO BE PARENTS: STRENGTHS AND WEAKNESSES

Strengths

3.42 There are strengths in the deeming model. It provides clarity and stability to the social parents and the parent–child relationship in heterosexual two-parent families. These social parents have formed the intention to have a child and are taking on all the rights and responsibilities of parenthood. Families and children may suffer if gamete donors' rights are not extinguished because the donor could

---

[127] In *Gill v British Colombia (Ministry of Health) (No1)*, 40 CHRR 2001 D/321 the BC Human Rights Review Tribunal found that the Registrar of Vital Statistics acted unlawfully when he refused to register the births of two children in the names of their social parents (two women) on the basis that he had to record genetic parentage. The Act provided that certificates could be issued in the name of parent and parent (rather than mother and father) and, whereas female non-genetic social parents were refused registration, male non-genetic parents were routinely recorded. No questions were asked. The Tribunal indicated that there was also power for the Registrar to prescribe forms that ask whether either parent is genetically related to the child and to gather information about the gender of the co-parent; to record the identity of the sperm donor, if different to the partner of the birth mother and identity of the egg donor, if different from the birth mother, or any other information.

[128] This is not strictly necessary, because under general law, the gestational mother is the child's mother.

disrupt otherwise stable families. This is particularly so when the family was created with the expectation that the donor would not retain parental rights.[129]

3.43 The deeming mechanism also provides clarity and reassurance to gamete donors who want to donate their gametes on an altruistic basis but do not want to take on any future liabilities of parenthood in relation to the child. It is also straightforward and simple and does not require non-genetic parents to take any legal steps in court to establish parenthood. They have a right to be entered as a parent straight onto the child's birth certificate from birth.

Weaknesses

3.44 There are also weaknesses in the functioning of the deeming provisions and some of these weaknesses remain under the proposed changes to the Human Assisted Reproductive Technology and the Care of Children Bills.

Legal fictions and the right to know

3.45 The deeming provisions create a legal fiction by ignoring the fact the child has a different genetic lineage at the same time as removing all rights and responsibilities of parenthood from the gamete donors. Are legal fictions a good idea? Adoption laws and practices were based on a legal fiction that the past could be concealed to the point where there was no legal recognition of the birth parents' existence. This was considered best for the birth mother and child. This assumption proved flawed. Some adoptees reported problems in establishing a sense of identity. Fundamental characteristics, such as similarity in common interests, thinking patterns, behaviour, personality traits and physical attributes, may be missing in an adoptive family.[130]

3.46 As is discussed in chapter 5, donor-conceived children worldwide are now articulating a loss of identity as adoptive children have done. In response to these concerns the Human Assisted Reproductive Technology Bill will require that all donor details be kept by clinics and key details sent to the Registrar-General of Births, Deaths and Marriages on birth of the child. Fuller details are sent after 50 years or when the clinic closes. However, it does not solve the problem that the child will not know about his or her genetic origins unless the parents tell. Nor will the new framework record details of donors for children born of donor sperm in private arrangements.[131]

3.47 In relation to adoption, the Law Commission proposed that the legal effect of adoption be reformulated to effect a transfer of permanent parental responsibility from the birth parents to the adoptive parents, rather than a blanket transfer of

---

[129] This was the reason given by the New York State Task Force above n 126 for its recommendations that, even where the woman was unmarried, donors were to be required to decide whether to relinquish all parental rights and responsibilities. That had to be recorded on the forms so that the recipient women/family could decide whether to use the semen. The Task Force stated at page 348: "Even those of us who would prefer reproduction to remain within the marital unit believe that for the best interests of children, other family structures, once created, should not be disturbed or dismantled to the detriment of the child".

[130] Law Commission, above n 32.

[131] These will include both children born into heterosexual and lesbian or gay parent-led families. If the parents fall out with the donor and decide against telling their children of their genetic parentage, the children will be unaware of their birth origins.

genetic and legal parenthood. It was seen as important that the law recognised that the child's birth parents and their families still exist and may have some role in the child's life.[132] The Commission proposed that adopted children have two birth certificates – one showing only the names and details of the adoptive parents, the other showing the names and details of both the adoptive and the birth parents. The full certificate would be available as of right to the child, the birth parents and the adoptive parents, but would not be available for general public search.

3.48 The Law Commission also recommended that birth parents and adoptive parents be encouraged to draw up a parenting plan, setting out their agreements on contact, access to medical history, exchange of information, photos and so on. We discuss parenting agreements in chapter 6.

3.49 In view of all that is known of the need and right to know identity, to purport to cancel out the fact of genetic parenthood when children are conceived by donor gametes may be inappropriate. A better mechanism might be to record genetic and gestational lineage for all children as it truly is – while introducing a fast-track system to transfer parental rights and responsibilities to the people who will be raising the child.

3.50 The respective merits in having the child's genetic parents and gestational mother (if different to genetic mother) all recorded on the birth register, as opposed to a special register, require assessment. Consideration also needs to be given to how the law can extend to private arrangements taking place outside clinics. However, if either of the above systems is adopted, the child still remains without a means of finding out whether they have been conceived by donor gamete or by a surrogacy arrangement.

3.51 Baroness Warnock, Chair of the Warnock Committee on Human Fertilisation and Embryology in the United Kingdom in 1984, which recommended a similar legal enactment to the deeming mechanism, was reported recently as saying: "I strongly believe that in any case of artificial insemination by donor the birth certificate of the child should bear the words 'by donor'".[133] There may be merit in this compromise position. A child's genetic lineage would not be recorded on the birth certificate, but there would be a notation to alert the child to the existence of other genetic parents.

Exclusive two-parent model

3.52 A further weakness of the deeming mechanism is that it does not accommodate situations where more than two persons are involved in the conception, birth and upbringing of a child. The law will continue to recognise only two of them as the parents. Only the mother and her spouse or partner will have status as parents.

3.53 A child may have more than two genetic parents (a genetic father and mother, and a gestational mother) and more than two social parents. This is particularly so in gay and lesbian families, and Māori and other ethnic groups who live in

---

[132] Although the law has not yet changed, adoption practices are now openly promoted by the government adoption agency, the Department of Child, Youth and Family Services, and the courts are construing the Adoption Act 1955 so as to recognise the reality behind the legal fiction. See also *Young v Hemmes* above n 106.

[133] (23 September 2003) *BioNews* 226, 2. See: <http://www.bionews.org.uk> (last accessed 1 March 2004).

extended families. While the two-parent legal structure fits well in a European-derived nuclear, heterosexual family tradition, is it the best way to deal with the complexities of all families in New Zealand? Heath J in *P v K* raised this issue in the following way:

> In 1968 Parliament is likely to have regarded the conception and rearing of children by their biological parents as a core value of (pakeha) New Zealand society. Of course, for many Maori and, indeed, other ethnic groups, a greater emphasis is placed on the participation of the extended family in the rearing of children. In this context, the Maori concept of whangai, a customary practice of adoption, should be noted. In my view, the concept of whangai is of relevance when considering how the law should respond, at a policy level, to problems of the type disclosed by this case because it focuses on an extended nature of 'family' group; each member of that group can be responsible for differing types of interaction with the child.[134]

3.54 The Care of Children Bill 2003 proposal is that other persons involved in the care of children will be recognised by way of parenting agreements. Does this mechanism accommodate all situations? While some lesbian/gay families will be comfortable with the non-genetic parent being deemed to be a parent, and the genetic donor's parenthood being cancelled in all respects and replaced by the same sex-partner, others will not. Many such families deliberately choose a known donor so that a father can be involved in their children's lives. The substitution mechanism proposed by the Bill may be seen to set a divisive and undesirable order of rights and responsibilities that may not reflect the agreements of all the potential parents. Why not grant more than two parents legal parental status from birth, if this is what they all agree on?

Should the deemed parent be vetted? Do donor gamete conceived children have adequate protection?

3.55 Another possible weakness in the mechanism is that it allows people without a genetic connection to the child to have the rights and responsibilities of parenthood from birth without any vetting. Before two strangers to the child can take on parental rights and responsibilities via adoption, they are required to be approved by a state agency as suitable parents. Most donor gamete conception procedures differ in that the child will usually have one caregiving parent who has a genetic link. The law has previously recognised one genetic connection as adequate in that step-parent adoptions have been allowed to proceed without a social work report, although the Court is moving away from approving adoptions in these circumstances because of the extinction of the child's genetic parents.

3.56 When considering fast-track parental status orders in surrogacy arrangements, the Brazier Committee in the United Kingdom recommended DNA testing to ensure that one of the parties is the genetic parent of the child, prior to legal parental status being transferred to the non-genetic parent.[135] If not, applications had to be by way of adoption. The issue to consider is whether the child is adequately protected without any social worker check, so long as one parent is a genetic parent.

3.57 See chapter 7 for options for conferring and recording parental status in donor gamete conception and surrogacy.

---

[134] *P v K*, above n 7, para 200.

[135] M Brazier, S Golombok and A Campbell *Surrogacy: Review for Health Ministers of Current Arrangement for Payments and Regulation,* Report of the Review Team CM4068, HMSO (London, 1998).

4

Surrogacy

4.1 In this chapter we consider the parental status of the various people involved in surrogacy arrangements, and discuss what legal changes might be made to recognise better the roles the parties play in relation to the child born of surrogacy.

4.2 In this discussion paper, we call the woman who gestates or carries the child the *surrogate mother*. We call the persons who arrange with the surrogate mother for her to gestate a child for them the *commissioning parents.* When the commissioning parents are in a caregiving role with the child we call them the *social parents. Full surrogacy (IVF)* is where the child has no genetic connection to the surrogate mother. *Traditional* or *partial surrogacy* is where the child is the genetic child of the surrogate mother. We speak of *genetic relationship* when referring to a child having been conceived using the gamete of a parent, and *gestational relationship* when referring to the relationship between the child and the woman who gives birth.

4.3 Surrogacy usually involves a woman agreeing to carry a child for another couple on the basis that she will pass the child to them to raise from birth.[136] Surrogacy can take many forms but the most common arrangements involve:

- A woman conceiving a child through sexual intercourse with the commissioning husband;
- A woman being artificially inseminated with the commissioning husband's semen;
- A woman having an embryo transferred to her womb that has been created using the gametes of the commissioning couple;
- A woman having an embryo transferred to her womb that has been created using a donor ovum and donor sperm;
- A woman having an embryo transferred to her womb that has been created using a donor ovum or donor sperm and the gamete of one of the commissioning parents. [137]

[136] Definition taken from the report of the Ministerial Committee on Assisted Reproductive Technologies, *Assisted Human Reproduction: Navigating our Future* (Wellington, July, 1994) para 7.2.

[137] In the first two examples above, the surrogate mother is the genetic and gestational mother of the child. Some commentators have observed that it is the commissioning mother who should be termed the "surrogate" because it is she who has no genetic or gestational connection with the child but will assume the role of primary caregiver from birth.

4.4 Surrogacy arrangements are occurring in New Zealand both privately and with the assistance of fertility clinics using in vitro fertilisation (IVF). There are currently no laws expressly governing surrogacy, although provisions in the Human Assisted Reproductive Technology Bill (the HART Bill) propose banning commercial surrogacy and making surrogacy agreements unenforceable.[138]

4.5 Where surrogacy is being practised, major questions arise about the legal parental status of the parties involved in the arrangement. In law, the baby is the surrogate mother's child (and her husband or male partner's, if she has one) even though one or both of the commissioning parents may be genetically related to the child and both parents intend to assume responsibility for the child's day-to-day care from birth. If the child is conceived via IVF in New Zealand at least one commissioning parent will always be the child's genetic parent.[139]

4.6 In private arrangements the surrogate mother is always the child's genetic parent. Private arrangements commonly involve the commissioning father providing his semen for use in self-insemination, although, in some cases, a donor's semen may be used or the semen of the surrogate mother's husband or partner.[140]

HISTORY OF MODERN SURROGACY IN THE WESTERN WORLD

4.7 Over the past three decades surrogacy has gained a heightened international profile in the Western world. In July 1978, the world's first baby was born in the United Kingdom, having been conceived using IVF. In vitro fertilisation meant that an embryo could be transferred to a woman's uterus that had been fertilised outside her body using her egg and her partner's sperm or, alternatively, the sperm of a third-party donor.[141]

4.8 The procedure opened up the possibility that a fertilised embryo could be implanted into the uterus of another woman, rather than the woman who had produced the eggs. For the first time, a woman could gestate and give birth to a child to whom she had no genetic relationship. A woman who did not have a uterus could, with the help of a surrogate, have her own genetic child, despite her inability to gestate or give birth. It was just a matter of time before couples with female infertility looked for ways of having a child through IVF, with the child being gestated by a surrogate mother.

4.9 Private surrogacy arrangements became possible and more appealing as the public became aware that conception could be achieved in private, without sexual intercourse or medical assistance, using a syringe. Women began offering themselves as surrogate mothers and agencies were established to facilitate these arrangements.

---

[138] Clauses 11 and 12 HART Bill to be inserted by Supplementary Order Paper 80/2003.

[139] This is because surrogacy using IVF requires medical intervention and the National Ethics Committee guidelines have always required that one commissioning parent in any surrogacy arrangement be genetically related to the child. See appendix 7 for a copy of the guidelines.

[140] Private arrangements that involve a surrogate mother's egg and donor sperm are similar to adoption, insofar as they result in the child being raised after birth by a genetically unrelated couple (the commissioning parents).

[141] Robert Edwards *Life Before Birth – Reflections on the Embryo Debate* (Century Hutchinson, London, 1989).

4.10 However, two highly publicised court cases, a year apart, demonstrated the types of serious moral, ethical and legal issues that surrogacy arrangements can raise.

The Baby Cotton case[142]

4.11 In 1985, UK resident Kim Cotton entered into a surrogacy arrangement with a US couple to be artificially inseminated with the husband's semen and carry a child for them. The agreement was arranged through an agency and Ms Cotton was paid for her services.

4.12 After the baby's birth in England the Social Services Department issued an order preventing the mother from relinquishing the baby to the commissioning couple. Ms Cotton responded by leaving the hospital without the baby, thereby leaving it without a primary caregiver. The commissioning father applied to the Court in turn for care and control of the child, which was granted on the basis that the commissioning couple were the best persons to care for the child as the birth mother had relinquished her rights.

The Baby M case[143]

4.13 The second case occurred in the United States in 1986. A surrogate mother gave birth to a child conceived using the commissioning father's sperm and her own egg, but later changed her mind about relinquishing the baby.

4.14 Baby M was handed over to the commissioning couple three days after birth, but was later returned to the surrogate mother on her request. She disappeared with the baby. The commissioning couple instructed a private detective to locate the mother and then filed proceedings in court to enforce the surrogacy contract. The agreement was upheld at first instance but overturned on appeal. The appellate court ruled that the surrogacy contract was void and unenforceable, and determined the issue in accordance with the best interests of the child. The commissioning parents were given custody of Baby M, although the mother was also awarded visitation rights as the child's natural mother.

International responses

4.15 The cases sparked widespread ethical and moral debate on the impact of surrogacy arrangements on the birth mother and the child. Some argued that surrogacy "commodified" the child and exploited the birth mother. Others saw it as beneficial insofar as it provided otherwise infertile couples with the opportunity to become parents and was consistent with female reproductive autonomy and the right of adult parties to enter into their own contractual arrangements.

4.16 Many jurisdictions responded promptly by passing laws prohibiting surrogacy and making it unlawful to advertise or facilitate such arrangements. Some passed what can be described as "ambivalent half measures", neither supporting surrogacy

---

[142] Robert Edelmann "Psychological Assessment in Surrogate Motherhood" in R Cook, S Day Sclater and F Kaganas (eds) *Surrogate Motherhood: International Perspectives* (Hart Publishing, Portland (Oregon), 2003) 146.

[143] Edelmann, above n 142.

arrangements nor prohibiting them entirely. Many drew a distinction between commercial surrogacy, which was generally outlawed, and compassionate surrogacy arrangements.

4.17 Recently, a small number of jurisdictions have provided legal support for surrogacy arrangements in limited circumstances, and have created laws reallocating parental rights and responsibilities. Those approaches are discussed later in paragraphs 4.69–4.81.

SURROGACY IN NEW ZEALAND

Background[144]

4.18 Until recently, government policy in New Zealand has been not to legislate but to hold a "watching brief" in the area of surrogacy. In 1984, the Department of Justice released an initial discussion paper on the issue, although this failed to identify any clear consensus on the way to proceed with policy.

4.19 The area remained unregulated until 1993 when the Government established the Interim National Ethics Committee on Assisted Reproductive Technologies (INECART). A fertility clinic application to carry out IVF compassionate surrogacy[145] was refused by INECART; a stance that was criticised by the Ministerial Committee on Assisted Reproductive Technologies in 1994.[146]

4.20 In 1995, INECART was replaced by the National Ethics Committee on Assisted Human Reproduction (NECAHR), which was established to consider surrogacy and other issues.[147] It gave ethical approval for applications for non-commercial surrogacy using IVF in 1997, and issued draft guidelines indicating the conditions upon which it was prepared to approve IVF surrogacy arrangements on a case-by-case basis.

IVF surrogacy under NECAHR

The clinic guidelines

4.21 Cases involving full IVF surrogacy continue to require NECAHR approval in accordance with the current clinic guidelines.[148] In certain circumstances, the committee may depart from the guidelines, but on a case-by-case basis.

---

[144] A full history of the development of surrogacy policy in New Zealand is given by Ken Daniels "The Policy and Practice of Surrogacy in New Zealand" in R Cook, S Day Sclater and F Kaganas (eds) *Surrogate Motherhood: International Perspectives* (Hart Publishing, Portland (Oregon), 2003) 55.

[145] Refers to a situation where a friend or sister offers to carry a baby for an infertile couple and where the birth mother is more likely to be part of the child's extended family and life. Ministerial Committee on Assisted Reproductive Technologies, above n 136, 112.

[146] The Committee commented at page 112 of the report: "We have no objection in principle to IVF compassionate surrogacy. In particular cases, for example, where the parties appear not to appreciate what IVF compassionate surrogacy involves or where there is doubt about the genuineness of consent, it would be appropriate to refuse to proceed. This however is a matter of looking at each case on an individual basis."

[147] Information from NECAHR Annual Report to Minister of Health for year ending December 31/12/02.

[148] The current clinic guidelines are set out in full in appendix 7.

4.22 The principles set out in the guidelines indicate an intention to balance the harms and benefits of reproductive technologies in ways that:

> … respect individual's wishes, demonstrate caution in relation to possible harms, and give due respect to society's evolving norms. In particular, the guidelines acknowledge the intrinsic worth of every person, who must not be used as a means to an end, for example through commercialisation and commodification.[149]

4.23 The principles also stress that:

> Tikanga Maori has an important role, reflecting values evident in New Zealand society generally. Notions of caring for children in the wider whanau, gifting children through whangai, and knowing whakapapa underpin the guidelines. There is also emphasis on caring family relationships and altruism within families and among friends.[150]

4.24 Key requirements for approval under the guidelines are that one or both commissioning parents should be the potential child's genetic parents; that there should be a medical condition that precludes pregnancy; that the birth mother should preferably be a family member or close friend; and that pregnancy and childbirth expenses may be paid but that there should be no payment in lieu of employment.

4.25 The guidelines also state that the birth mother and her partner should have completed their family; that both parties must have had legal advice independent of each other relating to the legal issues, and that both parties must have submitted to a counselling assessment in which they have been confronted with the emotional and legal risks and challenges of such arrangements.[151]

4.26 The provider or fertility clinic must explicitly set out in its application the risks to the birth mother's safety during treatment and pregnancy and include any relevant documentation from her medical advisers. It must also treat the mother in accordance with the Reproductive Technology Accreditation Committee (RTAC)[152] guidelines and keep NECAHR informed on the progress of the case through to the birth and proceedings for adoption or guardianship if there are any.

The NECAHR experience under the guidelines

4.27 There have been 30 applications for IVF surrogacy arrangements since the guidelines were issued in 1997. Of these, 24 have been approved, three declined and a further three either withdrawn or deferred pending additional information. NECAHR has advised that, as of February 2004, four of the approvals have resulted in live births, one of which has included twins.[153]

4.28 It remains unclear why so few live births have resulted from the 24 approvals. It is presumed that some applicants or their surrogate mother may have changed their minds about proceeding during the approval period. Other reasons could be that their circumstances may have changed, or that attempts at IVF treatment have been unsuccessful.

---

[149] Guidelines, para 2.73.

[150] Guidelines, para 2.74.

[151] Assurances that legal advice and counselling have been given must be made in a report to NECAHR.

[152] The Committee is based in Australia but all New Zealand clinics are members.

[153] Information obtained from the Secretary of NECAHR, Jenny Hawes, on 20 February 2004.

Non-IVF (private) surrogacy in New Zealand

4.29 Private self-insemination surrogacy arrangements have been and continue to be made in New Zealand. They can proceed without NECAHR approval and can be given effect to privately without medical intervention and without sexual intercourse. In private arrangements the child is always genetically related to the surrogate mother.[154]

4.30 There is no reliable means of knowing the incidence of private surrogacy in New Zealand. Not all surrogacy arrangements result in adoption. From the Commission's consultations, a common scenario seems to be that the surrogate mother enters her own name and the commissioning father's name on the birth certificate without any other steps being taken to transfer or establish the commissioning mother's legal parental status in relation to the child. The commissioning parents have custody of the child and care for the child on a day-to-day basis.

4.31 In four cases known to the Commission adoption orders have followed a surrogacy arrangement.[155] There are likely to be other unreported decisions. Media reports in the early 1990s indicate there were other cases where commissioning parents adopted the child.[156] Adoption applications may also proceed under the guise of step-parent adoptions, where the fact that the child arose from a surrogacy arrangement is not disclosed to the Court. A surrogacy arrangement can also be hidden if the surrogate mother registers the names of the commissioning parents on the child's birth certificate having previously registered herself with her doctor, midwife or hospital in the name of the commissioning mother. This would be unlawful but there is anecdotal evidence that it has happened.

4.32 There is now a website where people who are considering entering into a surrogacy arrangement can gain information, advice and support from people who have already gone through the experience.[157] The site also acts as a forum in which intending commissioning parents and intending surrogate mothers can make contact with each other and begin negotiations. Contacts are also made through other international surrogacy websites, magazines and television shows.

4.33 While preparing this paper the Law Commission contacted two women who have been surrogate mothers in the last three years. We also met with a commissioning couple whose child was 19 months old, and spoke to a third woman who wishes to be a surrogate mother and who was seeking a commissioning couple at the time. There are clearly others who have engaged in private surrogacy or who are trying to set up arrangements. The details of some of these interviews are set out in the boxes below.

---

[154] The surrogate mother's egg and the commissioning father's sperm is used in the conception.

[155] *Re Adoption of P* [1990] NZFLR 385 McAloon J; *Re Adoption of G* (3 February 1993) District Court, Invercargill Registry, Adopt 6/92 Neal J; *Re H* (13 August 2003) Family Court, Wanganui Registry FM-2003-034-17 Callinicos J.

[156] Articles in *Dominion Sunday Times* (21 April 1991); *Dominion Sunday Times* (2 June 1991); *More* (December 1990) 30; *New Zealand Women's Weekly* (19 March 1990) 42; *New Zealand Women's Weekly* (21 May 1991) 36; *New Zealand Women's Weekly* (27 May 1991) 36; *New Zealand Women's Weekly* (17 May 1993) 24.

[157] <http://www.surromomsonline.com> (last accessed 3 March 2004).

Babies O and P

M has taken part in two surrogacy arrangements for two different couples over the past three years. She gave birth to a baby girl, O, for a couple in Auckland in March 2001, and gave birth to a baby boy, P, in June 2003. In both cases, the children were conceived at her home via the "syringe method", using the sperm of the commissioning fathers. M is a "traditional surrogate" as the children were conceived and gestated using her own eggs. She is their genetic and gestational mother.

M told us that she had always known that she wanted to be a surrogate. As a single mother with one child, she found motherhood "wonderful" and knew that she could carry and give birth easily. For her, surrogacy was a gift that would enable the commissioning parents to give a lifetime of care and nurturing to the child.

M initially made contact with O's parents after seeing an article about an intending surrogate mother in the *New Zealand Women's Weekly*. M contacted this woman who forwarded her some of the letters she had received from intending commissioning parents. M responded to a letter from O's parents and contact was made.

In the second case, P's parents, who live in Australia, got in contact with M through a website.

The couples in both cases were seeking a surrogate as a result of female infertility. M says she chose to enter into the arrangements because she got on well with the couples and found them to be most interested in what they could give the child. Both couples were also willing to enter into "open" surrogacy arrangements.

M did not receive monetary payment in either case (because it is her view that this would be "selling a child"), although O's father did do some carpentry work for her as a token of the couple's gratitude.

In both cases, M and her family (her mother, grandmother and son) developed strong relationships with the commissioning couples before and after the births, and have remained in regular email and phone contact since. M has photos of the children but states clearly that she does not consider them her own. She refers to herself simply as the "tummy mummy" and wants the children to know her by her first name.

M has just returned from a trip to Australia with her son to see P and his parents. She told us her son had been very excited after P's birth. He told his school class about his mother's surrogate pregnancy and bought P some special clothes.

Legal issues and status

O's commissioning parents chose to draw up a "statement of intentions" prior to her birth which, while not legally binding, set out the parties' intentions and their agreed positions in the event of the unexpected.

O's commissioning parents are now her legal parents via adoption. Although O's original birth certificate showed M as her legal mother and the commissioning father as her legal father, the couple proceeded with adoption after birth. However, O could not be handed over to her parents immediately because of the Adoption Act requirement that a baby intended for adoption must not be taken into the home of the adoptive parents until the consent for adoption is signed (10 days after the date of birth). O's parents stayed in M's mother's house during this time.

P's case was dealt with more informally. Although M talked through all contingencies with the commissioning parents, the parties opted not to draw up a written agreement detailing their positions. P's parents also elected not to adopt. After P was born, the couple cared for him in a motel in the city until his birth certificate, certificate of Australian nationality by descent and an Australia passport could be obtained. They then returned with him to Australia.

P's commissioning parents now have day-to-day care of P, but do not have formal parental rights and responsibilities under New Zealand law. P's father is not a guardian for the purposes of the Guardianship Act 1968, although he is his genetic parent and registered father on his New Zealand birth certificate. P's social mother has no legal status in relation to the child.

Baby J

Baby J was born to K, a first-time surrogate mother in early 2002. Like M, K was a traditional surrogate who was commissioned by Mr and Mrs A to conceive a child using Mr A's sperm and her own egg. K is a single mother of three children who, at the time of being commissioned, had recently separated from her husband. He supported her decision, which was a long held ambition of hers.

The As first made contact with K through a website. Mrs A had already had a hysterectomy for medical reasons before meeting Mr A. She had two children from a previous relationship. The As and K developed a friendship and entered into the surrogacy arrangement after meeting in person. The As say they were willing to compensate a surrogate mother for reasonable expenses, but did not want to feel that they were "buying a baby" or that the surrogate mother was primarily motivated by money. Money did change hands but the amount was not disclosed.

The As and K maintained a close relationship during the pregnancy. The As visited K a couple of times in another town and were present at each scan. Six weeks prior to the birth, K and her youngest child moved in with the As because of medical complications. They stayed with the As until 10 days after the birth before returning to their hometown. K's husband cared for their two older children. Mr and Mrs A were open with their family, friends and work colleagues about the surrogacy arrangement.

Since the birth 19 months ago, the As and K have visited each other five times and remain in regular contact. The couple say that their son knows K by her first name and that they will explain her role to him when he gets older.

The As chose to avoid the legal system in entering into the surrogacy. They did address certain issues with K before conception (such as what they would do in the case of multiple births or disability) but they did not have a formal written agreement. Nor did they adopt J because it was the view of Mr A that the "law should not interfere" and that he should not have to adopt his own child. The birth certificate shows K as the mother and Mr A as Baby J's father. Mr A had not understood that he was not J's legal guardian until his meeting with the Commission.

Mr A has made it clear that he and his wife never doubted that K would hand over the child, despite the concerns of some family members that, as a first-time surrogate, K might not be able to part with the child. This was not a problem and K was very focused on her role as surrogate. The one negative experience occurred at the hospital when a charge nurse put a security guard on K's door to stop Mrs A removing Baby J. The As were offended and stressed by this attitude.

THE STATUS OF THE CHILD OF A SURROGACY ARRANGEMENT

4.34 The child of the surrogacy arrangement is born into a situation where his or her social or caregiving parents may have no legal responsibilities and rights in relation to the child. The surrogate mother is the child's legal mother, even if the child is conceived with the egg of the commissioning mother or a donor egg.[158]

4.35 The commissioning father will only be the child's father in law if the surrogate mother is single and his sperm is used. If the surrogate mother is married or in a de facto relationship, her husband or partner will either be presumed or deemed to be the child's parent, providing he knew of and consented to the procedure.[159]

4.36 Where the surrogate's husband is *deemed* to be the child's parent, the commissioning father will have to adopt the child in order to secure parental status, even if he is the child's genetic father.

4.37 Where the surrogate's husband or partner is only *presumed* to be a parent, the presumption may be displaced on proof of the commissioning father's paternity. However, even then, the commissioning father would need to apply to the High Court for a declaration of paternity, and to the Family Court to be appointed

[158] Sections 9(3), 13(3) and 15(3) Status of Children Amendment Act 1987.

[159] If the child was conceived by way of natural intercourse, the surrogate mother's husband is presumed to be the child's father by operation of s 5 Status of Children Act 1969. If the child is conceived by way of self-insemination or with medical assistance using donor sperm, the Status of Children Amendment Act 1987 operates to deem the surrogate mother's husband or partner (if she has one) the legal father for all purposes.

the child's guardian, even if he was registered as the child's father on the child's birth certificate.[160]

4.38 The only way in which commissioning parents can acquire full legal parenthood of the child is by obtaining an adoption order.[161] However, that route is possible only if they are married to each other and may be unpalatable to some. Mr A in the Commission interview had taken no steps to secure legal responsibilities and rights in relation to his child because he considered it wrong that he should have to adopt his own child to become a legal father.

4.39 If adoption is not pursued, the legal situation is unsatisfactory because neither commissioning parent has any legal rights and responsibilities in relation to the child they are raising, even though the father's name may be registered on the birth certificate.[162] Difficulties can arise where the social parents seek to enrol the child at school, apply for a passport for the child, or consent to or refuse medical treatment on the child's behalf. Problems can also arise if the social parents separate and there is a dispute over the care and upbringing of the child. It may be confusing and embarrassing for children to have their surrogate mother named on their birth certificate rather than the person they recognise as their mother.

4.40 If the HART Bill becomes law there will still remain a disjunction between the child's legal parents and actual caregivers. While the Bill makes surrogacy agreements unenforceable, it does not address parental status issues.[163]

Surrogacy arrangements where adoption has been used to gain legal parental status

4.41 The Adoption Act 1955 prohibits adoptive parents from advertising for a child, paying money for a child and from having the child in their home with a view to adoption. In the past, the courts have overcome these difficulties in the few adoption cases that involved surrogacy, but the path has been far from easy.

4.42 In *Re Adoption of P*[164] the Court was asked to make an adoption order in favour of commissioning parents four years after a surrogacy arrangement. Despite concerns that the applicant couple had breached the Adoption Act by advertising and paying money to the birth mother and by assuming care of the child without approval from the Department of Child, Youth and Family Services (CYFS), the Court made the orders for adoption on the basis that the commissioning parents were suitable

---

[160] Under s 6 Guardianship Act 1968, a father is only a guardian if he is married to or living with the child's mother when the child is born. This is set to change under the Care of Children Bill 2003, which will see a father become an automatic guardian if he is registered as the father on the child's birth certificate with the legal mother's consent, or if he is married to or living with the mother at any time during the period between conception and birth.

[161] The commissioning parents may make application for guardianship but that does not give them the status as a parent – just the rights and responsibilities of parenthood.

[162] They would need to apply for a guardianship order from the Family Court: but note that under clause 18 Care of Children Bill 2003 a father will become an automatic guardian of his child if his particulars are registered on the child's birth certificate. It is unclear whether this provision will apply retrospectively.

[163] The nature of the legislation concerns issues to do with human assisted reproduction, not parentage.

[164] *Re Adoption of P* above n 155.

candidates and that the money was paid for maintenance purposes during pregnancy, not for adoption.[165]

4.43 A similar approach was taken in *Re Adoption of G*[166] where the Court made final orders for adoption on the basis of the suitability of parents, despite the facts of the case showing a number of apparent breaches of the Adoption Act 1955. The commissioning parents had entered into a surrogacy arrangement after being declined on two previous occasions by CYFS as adoptive parents because of their poor financial situation and marital conflict. They had paid $12 000 to the surrogate mother, had care of the child since its birth and had possibly made some untrue statements to the adoption social worker when interviewed.[167]

4.44 There have been fewer difficulties where the adopting parents were full genetic parents to the child. In *Re Adoption of H*[168] a final order for adoption was made in respect of a baby girl born as the result of a full (IVF) surrogacy arrangement. The judge made a final order immediately on the grounds that "special circumstances" existed because the baby was the full genetic child of the commissioning parents. The gestational mother had consented to the adoption.

4.45 In *Re Adoption of G* and *Re Adoption of P* the Court's approach was that breaches of the Adoption Act 1955 did not bar the making of an adoption order, though these factors were matters to be taken into account by the Court when assessing the suitability of the applicants as parents. Another court might take the approach, as the Brazier Committee has done in the United Kingdom,[169] that any argument that payment is for the surrogacy and not for the baby is specious. The HART Bill will make payments unlawful but will still allow payment of expenses.[170] Payment of expenses may still breach the Adoption Act 1955, however.

4.46 It is clear from the facts of *Re Adoption of G* that the commissioning parents suffered stress and anxiety during the adoption process because they were not aware that it was unlawful to take the child into their home after birth if they were contemplating adopting the child. The Department of Child, Youth and Family Services took the view that adoption orders should not be made because the applicants had breached the Adoption Act 1955. This demonstrates the difficulties in using adoption as it is currently formulated as a means of granting parental status to commissioning parents.

4.47 The Law Commission, in *Report 65 Adoption and Its Alternatives*,[171] addressed surrogacy issues as they related to adoption, indicating the view that surrogacy

---

[165] They had advertised in the newspaper "Nelson couple desperate for a child" and paid the surrogate mother $375.00 per week for 40 weeks (a total of $15 000).

[166] Unreported (3 February 1993) DC Invercargill Adopt 6/92 Neal J.

[167] The Court made adoption orders on the basis that: the parents were fit and proper people to be parents; the adoption would be consistent with the best interests of the child; the marriage had proved strong; their financial situation had stabilised; and that they were generally well-meaning and honest during their interview with the social worker. The Court concluded that any untruths were likely to have been as a result of stress and motivated by a desire to protect the surrogate mother, that the money paid to the surrogate was intended for the purposes of surrogacy not adoption, and the parents had not intended to adopt the child when they took it immediately after birth.

[168] Unreported (13 August 2003) FC Wanganui FAM-2003-034-17.

[169] M Brazier, S Golombok and A Campbell above n 135.

[170] Clause 12(4) permits payment of counselling, legal and some medical expenses.

[171] Law Commission, above n 32, paras 543–579.

arrangements could be fitted within an adoption model but needed adaptations to address the "front end" issues that surrogacy raised: for example, screening of the surrogate mother and commissioning parents before the arrangement was entered into. The Commission favoured screening by CYFS given that the child might not be genetically connected to both of the commissioning parents.

THE ETHICAL DEBATE[172]

4.48 Recent reports and research data indicate that surrogacy continues to take place despite attempts to prohibit or regulate it.[173] Surrogacy appears to be being used as a "last resort" by commissioning couples who cannot achieve or sustain pregnancy because of female infertility. For the most part, these arrangements appear to go to plan.

4.49 Although the public debate around surrogacy is relatively new and has been heightened with the development of new birth technologies, records of surrogacy arrangements date back to the Bible. In Genesis, Sarai could not conceive a child with her husband so arranged for her maidservant Hagar to sleep with him. She later threw Hagar and her baby son out of the house. That was clearly an unhappy ending, although, interestingly, the child stayed with the birth mother. There is no reason to doubt that similar arrangements have been made throughout the ages.

4.50 When surrogacy using birth technologies first entered the public consciousness in the 1980s, it aroused intense international controversy for the significant ethical and moral issues it was said to raise. These early concerns predominantly related to concepts of "baby buying", and the notion that surrogacy had the potential to exploit less economically and occupationally advantaged women by those who did not want to go through the inconvenience of pregnancy.

4.51 There is no evidence that surrogacy is being used by some women simply to avoid pregnancy. Research does indicate, however, that surrogate mothers are usually from lower socio-economic groups than the commissioning parents. Some mothers are living alone and have children of their own to support.

4.52 The Brazier Committee's review of surrogacy in the United Kingdom[174] reported in 1997/98 that the perceived public consensus was that surrogacy was now viewed as a legitimate last resort option for infertile couples, but that there remained fundamental concerns about the child's welfare and the protection of the surrogate mother's interests. The Committee rejected claims that surrogate mothers should be paid for their services (as opposed to payment of expenses only) and recommended that the term "expenses" should be strictly defined. This was on the basis that payments may amount to "baby selling" and encourage vulnerable women into acting as surrogates against their better interests.[175] The report's conclusions have been criticised and have not been implemented in the United Kingdom.

---

[172] Law Commission, above n 32.

[173] It is likely that private surrogacy continues to take place in jurisdictions where it is prohibited.

[174] Commercial surrogacy is prohibited in the United Kingdom but parties are free to enter into non-commercial arrangements where "payment of expenses" is permitted.

[175] The Committee found that "expenses" had at times been generously interpreted to circumvent the ban on commercial surrogacy.

The surrogate mother

4.53 Recent overseas research indicates that women are offering themselves as surrogate mothers out of mixed motivations of altruism and financial gain. They are said to have high levels of satisfaction and altruism in providing infertile couples with the "ultimate gift" of a wanted and long-awaited child.[176]

4.54 In the United States, a study of 200 surrogate mothers[177] in 1999 found that the women who participated in the surrogacy programme were emotionally stable, with personalities that enabled them to compartmentalise their roles as surrogate mothers and parents. Typically, they perceived surrogacy as a positive emotional experience, enjoyed pregnancy, had good relationships with their children, and supportive home environments. The study concluded that although most were motivated by an altruistic desire to "help" others, most also saw surrogacy as a means of gaining funds.

4.55 In a 1994 British survey of 19 surrogate mothers,[178] only three said that money was the sole or main reason they entered a surrogacy arrangement, although most said it was a factor in their decision. Eleven women identified the joy and pleasure that was provided for the commissioning couple as the best part of being a surrogate mother.

4.56 All but one of the 19 surrogate mothers had given up the baby to the commissioning parents after birth.[179] Five spoke of their sorrow and distress about parting with the child, but said that these emotions were mixed with happiness for the commissioning couple and satisfaction at having played a key part in helping them create a family. All but two were in some form of contact with the commissioning family after the birth and all believed the child should be told the circumstances of its birth. The women reported few hostile responses from others.

Commodifying children

4.57 Little is yet known about children born of surrogacy and the impact surrogacy can have on their personal and emotional development. Although perceptions are growing that it may not be harmful,[180] early expressed concerns were that the children might grow to feel they have been "bought" by their commissioning parents or given away by their birth mother. Feelings of being bought and sold could have the potential to make children feel they need to be worth the expense.

---

176 R Cook, S Day Sclater and F Kaganas (eds) "Introduction" in their book *Surrogate Motherhood: International Perspectives* (Hart Publishing, Portland (Oregon), 2003) p 10 and fn 20.

177 B P Aigen *Motivations of Surrogate Mothers: Parenthood, altruism and self actualisation (a three year study)* (The American Surrogacy Centre, 1996). The study was sponsored by the American Surrogacy Centre. <http://www.surrogacy.com/psychres/article/motivat.html> (last accessed 27 February 2004).

178 E Blyth "I wanted to be interesting. I wanted to be able to say 'I've done something interesting with my life': Interviews with surrogate mothers in Britain" (1994) 12 Journal of Reproductive and Infant Psychology 189–98.

179 The one who did not said that she had an emerging realisation as the pregnancy progressed that the commissioning parents were not people she would entrust with the care of a baby.

180 The British Medical Association third review of surrogacy in 1995 concluded in its report that "although little evidence is available, the risk of serious psychological harm to the child is considered low if open acknowledgment is made from an early stage in the child's life". See *Changing Conceptions of Motherhood: A Report on Surrogacy* (British Medical Association, London, 1995).

4.58 Others have argued[181] that children born of a surrogacy arrangement have unique advantages, in that they know they were much wanted and that their creation was a conscious and joyous achievement, rather than an unplanned or regretted sexual encounter. If payment were involved it could also be argued they would know their birth mother had been properly compensated rather than exploited.

4.59 The prohibition in UNCROC against "the abduction of, the sale of or traffic in children for any purpose or in any form" would not appear to be breached where surrogacy arrangements are made, particularly where payments other than expenses are not paid. Surrogacy arrangements are made before a child is conceived or born. Also, the courts' approach to date has been that where money did change hands it was not a payment for the baby but maintenance for the mother during pregnancy.[182]

Surrogacy and Māori customary practices

4.60 The 1994 Ministerial Committee on Assisted Reproductive Technologies commented when considering surrogacy that: "the understanding of family and parenting held by many Māori may (be) different from those of Pakeha".[183] It was concerned that regulation in this area should not cut across Māori customary practices. In considering surrogacy, the Ministerial Committee concluded:

> No rules should be developed which prohibit ordinary sexual relations or whangai, or which place in jeopardy the prospect of a surrogate mother's playing a part in the offspring's life or the offspring's right to information about genetic origins. There should be transparency and accountability in surrogacy. Openness rather than secrecy is to be encouraged.[184]

4.61 Māori customary practices of whāngai or atawhai are similar to surrogacy, insofar as the child is cared for by persons other than the birth mother, and the matua whāngai (adopting parent/s) are given a child to raise – often because of their own inability to have a child.

4.62 However, there are also significant differences, the main one being that the whāngai child will nearly always remain within the wider family structure of the birth mother, whereas in surrogacy there is often no familial connection between the surrogate mother and the commissioning parents.[185]

4.63 Because the commissioning parents will usually need to adopt a child born of surrogacy in order to obtain legal responsibilities and rights as parents, the child may not have a relationship with or even know his or her birth mother. The information the child has will depend entirely on the decisions of the commissioning

---

[181] See Eric Blyth and Claire Potter "Paying for it? Surrogacy, Market Forces, Assisted Conception" in R Cook, S Day Sclater and F Kaganas (eds), above n 176.

[182] See *Re Adoption of P*, above n 155, para 7.39; *Re Adoption of G* above n 155, para 7.40.

[183] Ministerial Committee on Assisted Reproductive Technologies, above n 136, 109.

[184] Ministerial Committee on Assisted Reproductive Technologies, above n 136, 118.

[185] Although the child born of surrogacy is almost always related genetically to one or both the commissioning parents and, as was demonstrated by the Commission's interviews, the arrangement can lead to a close relationship forming between the surrogate mother and her family and the family of the commissioning parents.

parents.[186] By contrast, whāngai children will almost always know their birth parents and the circumstances surrounding their conception and birth.

4.64 Other differences include the methods of conception and the fact that some surrogate mothers are paid for carrying a child.[187] Whereas natural intercourse is the norm in whāngai, conception is usually achieved in surrogacy through self-insemination or with fertility clinic assistance using advanced human reproductive technologies.

WHAT IS HAPPENING OVERSEAS?

4.65 Western governments have responded in three ways to the existence of surrogacy since the *Baby M* and *Baby Cotton* cases.[188] Some jurisdictions prohibit all types of surrogacy and so issues of legal parental status do not arise. Others have introduced limited legislative measures such as bans on commercial surrogacy arrangements, while in others there has been no legislative response at all.[189] In these latter situations any reallocation of parental status must be fitted into existing models, the most common being adoption. In only a few legislatures have steps been taken to provide a tailor-made, fast-track mechanism to transfer legal parental responsibilities and rights to commissioning parents in surrogacy rather than by means of adoption.

Prohibition

4.66 In many American States,[190] some European countries[191] and in the States of Queensland and Tasmania, Australia[192] surrogacy has been banned by imposing civil and criminal penalties on those who enter into or facilitate surrogacy arrangements.

Partial facilitation[193]

4.67 In other jurisdictions in the United States, Australia and in the United Kingdom, there are no laws specifically prohibiting compassionate surrogacy arrangements, although commercial agreements are banned and/or the contracts made unenforceable. Kentucky, Louisiana, Nebraska, Washington, Victoria, Australia

---

[186] However, in all three of the private surrogacy arrangements discussed with Commission staff the child knows or will know the birth mother.

[187] Although this will be illegal under the HART Bill.

[188] See paragraphs 4.11–4.14 of this chapter.

[189] New Zealand was in this category until the HART Bill.

[190] A few jurisdictions such as Arizona prohibit all forms of surrogacy see: Ariz. Rev. Stat. Ann. 25-218(A) 1995. Others proscribe only commercial surrogacy: for example, Ky. Rev. Stat. Ann. 199.590 (4) (Baldwin (1996)); La. Rev. Stat. Ann. 31-8-2-1 (West (1997)); Mich. Comp. Laws. Ann. 722.859 (West (1993)); NY Dom. Rel. 123 (McKinney Supp. 1997–98).

[191] Surrogacy is illegal in Austria, Germany, Sweden, Norway and Italy. Commercial surrogacy is prohibited in France, Denmark and the Netherlands. In Finland, Greece and Ireland surrogacy takes place without legislative provision. Source: European Society for Human Reproduction and Embryology "World's first study on surrogacy reveals high quality parenting and no problems" (1 July 2002). See <http://www.eurekalert.org/pub_releases/2002-07/esfh-wfs062902.phb> (last accessed 1 March 2004).

[192] Surrogacy Contracts Act 1993 (Tas); Surrogate Parenthood Act 1988 (Qld).

[193] If the HART Bill is passed in its current form New Zealand will be in this category.

and the Australian Capital Territory, for example, have all passed laws that deem paid surrogacy contracts unenforceable. In Victoria, it is also illegal to advertise or receive payment for surrogacy, although altruistic surrogacy is allowed. Even though compassionate surrogacy has been permitted in these jurisdictions, laws have not been passed reallocating parental rights.

Inaction

4.68 There are no laws covering surrogacy in New South Wales and Western Australia. Adoption applications are considered on a "best interests of child" basis with the courts commenting that they would not want their decisions to grant adoption to be seen to approve such arrangements.[194]

Enactment of laws dealing with reallocation of parenthood

4.69 The United Kingdom, Israel, and the States of Florida, New Hampshire and Virginia[195] have all enacted legislation to reallocate parenthood in surrogacy arrangements. Diverse legal mechanisms have been used to do this. So long as the parties in Israel and the three US States comply with set criteria, the law facilitates the legal recognition of commissioning parents as parents with legal responsibilities and rights in relation to the child. The UK model is less prescriptive in determining which parents can access this fast-track procedure.

Israel

4.70 Israel is the only country to have a comprehensive surrogacy regulatory scheme, although this applies to full (IVF) surrogacy only. Legislation followed the 1994 Aloni Commission report[196] that considered the social, ethical, legal and religious implications of IVF fertility treatments. It recommended that IVF surrogacy be allowed on the basis of the principles of privacy and autonomy, but that surrogacy arrangements be regulated via prior approval from a statutory body. Although the report had envisaged altruistic unpaid surrogacy, the subsequent legislation has allowed for commercial arrangements.

4.71 Since the law was passed in 1996, the statutory committee, established under the legislation, has approved 89 of 109 applications. By 2002, 30 children had been born. There are now also comprehensive practice guidelines prepared by the Committee to complement the legislation.

4.72 Commissioning parents can acquire legal parental status by obtaining a parentage order shortly after the child's birth. The baby is handed over to the intending parents in the presence of a child welfare officer as soon as possible after birth, although the officer becomes the child's sole legal guardian until a parentage order is made. The order must be applied for by the commissioning parents within seven days of birth. The Court will make the order on a report from the welfare

---

194 *Re A and B* (2000) 26 Fam LR 317; [2000] NSWSC 640 Bryson J.

195 Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law 5756–1996 (Israel); Florida Stat. Ann 742.16 (West 1996); New Hampshire Rev Stat. Ann 168-B; Va Code Ann 20–185.

196 See Elly Temen "Knowing the Surrogate Body in Israel" in R Cook, S Day Sclater and F Kaganas (eds), above n 176, 158, 260–279.

officer, unless the order would be inconsistent with the welfare of the child. The birth mother can challenge the order applied for on the basis that it is not consistent with the child's welfare. The parentage order is registered in a special register, which records the name of the child before and after the order, the date and place of birth, and the name of the birth mother and intended parents. The child has access to the register upon reaching maturity.

Regulation in US jurisdictions[197]

4.73 A system of prior approval operates in New Hampshire and Virginia where a judge must approve a surrogacy agreement before it is entered into by the parties. The approval becomes a judicial parental order 72 hours after birth in New Hampshire and 180 days after the surrogate mother's last attempt at artificial conception in Virginia. During the prescribed period, the surrogate mother can terminate the contract in which case she and her husband become the child's legal parents. Once an order is made the parental rights of the surrogate mother and her partner are automatically terminated and vested in the commissioning couple.

4.74 In Florida, the courts will make an order prior to the birth of the child that the commissioning parents will be the child's legal parents from three days after birth, so long as the mother has not challenged the order during that time.

Requirements in US jurisdictions and Israel

4.75 Many of the requirements for pre-approved surrogacy agreements in Israel and in the US jurisdictions that lead to parental orders are contained in statute or regulation.[198] Some of the typical requirements are:

- age – parties must be over or under a certain age;[199]
- marital status – parties must be married (or in the case of the birth mother must not be married);[200]
- fertility status – the commissioning mother must be medically infertile or unable to gestate a child;[201]
- medical requirements – to reduce the risk to the mother and child;
- genetic link – commissioning parents may be required to have a genetic link with the child or be prohibited from having one;[202]
- religious beliefs – parties must share the same religious beliefs.

---

[197] Radhika Rao "Surrogacy Law in the United States: The Outcome of Ambivalence" in R Cook, S Day Sclater and F Kaganas (eds) above n 176, 23, 29.

[198] Although some are set in Israel by the statutory committee that approves the surrogacy arrangements.

[199] For example, in Israel a commissioning mother must be younger than 48 years and a commissioning father younger than 59 years. Surrogate mothers must be older than 18 years and 21 years in Florida and New Hampshire respectively. In Israel, surrogate mothers must be older than 22 but younger than 40 years of age.

[200] As is the case in Florida, New Hampshire and Israel.

[201] There may also be a requirement for the surrogate to have given birth at least once, to have had no more than one caesarean section or had no more than a certain number of previous births. Florida, New Hampshire, Virginia and Israel all have laws covering these areas.

[202] For example, there may be a requirement that only full (IVF) surrogacy be used or that relatives of the intending parents be prohibited from acting as surrogates, as occurs in Israel.

The United Kingdom

4.76 The United Kingdom does not regulate surrogacy but does have some legal provisions governing the type of arrangements that can be made. The Surrogacy Arrangements Act 1985 bans commercial surrogacy and makes it illegal to recruit mothers or to advertise or negotiate contracts on a commercial basis. The Human Fertilisation and Embryology Act 1990 (HFEA) makes surrogacy agreements unenforceable.[203] Non-profit contracts are permitted whether arranged privately or through a not-for-profit organisation.

4.77 The HFEA sets requirements for infertility treatment centres, including places where surrogacy arrangements may be made. Centres must be licensed and must take account of the welfare of the child. The HFEA Code of Practice sets out matters that are considered relevant to the child's welfare. These are:

- the commitment of the commissioning couple and family to having and bringing up the child;
- the ages and medical history of the couple and their family;
- the needs of the child or children born as a result of the treatment (including their need for a father);[204]
- the risk of harm to any child including the risk of inherited disorders, problems during pregnancy, concerns regarding neglect or abuse; and
- the effect of a new baby on any existing child of the family.

4.78 Apart from these conditions for medically assisted surrogacy arrangements, parties are free to set the terms and conditions of their contracts or arrangements without state supervision. Section 30 of the Act allows them to apply to the Court for a parental order.

Parental orders

4.79 The HFEA also makes legal provision enabling the transfer of parental status in surrogacy. Provided that the commissioning parents are married, they can obtain a "parental order" that provides them with parental rights and responsibilities.[205] The order can only be obtained with the birth mother's consent, which cannot be given until six weeks after birth.

4.80 After the order is made, two birth certificates are issued: one on which the child is registered in the name of the commissioning parents and that is publicly accessible, and the other that contains the name of the birth mother, which is held in private and can be accessed by the child at the age of majority (18 years in the United Kingdom).

4.81 The parental order does not extinguish the surrogate mother's legal responsibilities, but rather gives additional rights to the commissioning parents. Academic writers point out that this leaves open the possibility of the surrogate mother applying for access at a later date. The alternative route taken by

---

[203] Section 36 Human Fertilisation and Embryology Act 1990 (UK).

[204] This requirement has generated some controversy and is likely to be removed.

[205] Section 30 Human Fertilisation and Embryology Act 1990 (UK).

commissioning parents to obtain legal status is by means of adoption.[206] Under adoption law, a birth mother's consent can be dispensed with on the grounds that it is being unreasonably withheld but there is no such provision in relation to parental orders. On this basis, adoption in the United Kingdom provides greater protection from subsequent claims by the surrogate mother for the commissioning parents in assuming care for the child.

4.82 The 1998 Brazier Committee, which reviewed the operation of the surrogacy provisions in the United Kingdom, recommended that commissioning couples not have access to the fast-track parental order unless they had proved:

- they complied with the payments requirement;
- at least one of them was proven to be the genetic parent of the child via DNA parentage testing; and
- neither of the parents had a criminal record of child abuse or related criminal conduct.[207]

Incidence of surrogacy overseas

4.83 There are no reliable figures on the incidence of surrogacy overseas, mainly because arrangements can be conducted privately, even in countries where surrogacy is prohibited. However, it has been estimated by the non-government organisation Childlessness Overcome Through Surrogacy (COTS)[208] in the United Kingdom that 200 children have been born of surrogacy over the past 15 years.[209] In Israel, there have been 30 births since 1996 and "many thousands" are reported as having been born in the United States.[210]

THE WAY AHEAD FOR NEW ZEALAND

4.84 Ten years ago the Ministerial Committee on Assisted Reproductive Technologies commented on the need for proper methods of protection and ongoing monitoring of surrogacy in New Zealand. In relation to parental status, it considered that the law functioned satisfactorily for the few cases that arise, but that if surrogacy were to become a commonly accepted practice some review of the law might be necessary. Since then, NECAHR has issued guidelines approving and regulating IVF compassionate surrogacy arrangements.

4.85 There is clear evidence that a number of children have been born as a result of private surrogacy arrangements in this country. Even if the numbers are small, there should be an appropriate mechanism for the reallocation of parental status,

---

[206] The main organisation representing surrogate mothers in Britain, COTS (Childlessness Overcome Through Surrogacy), criticises bureaucratic aspects of the processing of s 30 applications but still advises intending parents to follow this route rather than adoption. See Gene Dodd "Surrogacy and the Law in Britain: Users' Perspectives" in R Cook, S Day Sclater and F Kaganas (eds) above n 176, 118.

[207] M Brazier, S Golombok and A Campbell above n 135.

[208] Childlessness Overcome Through Surrogacy is a lobby group that provides support and information in the United Kingdom. It came into being after the *Baby Cotton* case.

[209] R G Lee and D Morgan *Human Fertilisation and Embryology: Regulating the Reproductive Revolution* (Blackstone Press, London 2001) 197.

[210] R Edelmann, above n 142, 144.

particularly given that the Government has never prohibited surrogacy and, under the HART Bill, intends to prohibit only commercial surrogacy. The surrogate mother and her husband or partner, conversely, are placed in the unfavourable position of being the legal parents of a child whom they never intended to raise or assume responsibility for. The mismatch between legal responsibility and intended and actual responsibility inevitably creates uncertainty and has the potential to place significant stress upon the caregiving adults in the child's family at a time when the child needs stability and calm.

4.86 For options for conferring and recording parental status in surrogacy see chapter 7.

5

Children and identity

5.1 Most children know their genetic parents as the people who care for them on a daily basis. In the unusual situation that they have never met nor had contact with one or both of their genetic parents, it is still likely that they will know something about them.

5.2 There are, however, four groups of children who may encounter real difficulties in obtaining information about their genetic parents.[211] These groups are:

- children conceived using donated gametes (eggs, sperm or embryo);
- children born as a result of a surrogacy arrangement;
- children who have no record of their father on their birth certificate;
- adopted children (particularly those under the age of 20 years).[212]

5.3 This chapter considers the needs and rights of children to know their genetic origins. Our focus is on the first three groups of children. Adopted children were the subject of a Law Commission report *Adoption and Its Alternatives* published in 2000, and so their situation is not discussed here. We examine New Zealand's historical approach to legal parenthood, the social and legal developments that have affected children's abilities to access knowledge of their genetic parents, and the measures that might be taken to give fuller effect to the need for and evolving right of children to know their genetic identity.

Children born of donor gametes

5.4 Children conceived through the use of donor eggs, sperm or embryos and who are raised in a heterosexual two-parent family, will not know that their social parents are not their genetic parents unless they are told. Children who are raised by a single parent or by same-sex parents will be aware from an early age that another person or persons must have been involved in their conception because of the missing opposite-sex parent.

5.5 Children born as a result of donor gamete conception with clinic involvement have the advantage that information about any donor is likely to be held by the

[211] This would also include a gestational mother where she was different to the genetic mother.

[212] The Adult Adoption Information Act 1985 was passed to give adopted children aged 20 and over the right of access to information held by the State about their birth parents: in many cases this information does not include the name and details of their birth father.

clinic.[213] Most New Zealand clinics began collecting non-identifying information about donors in the late 1980s.[214] If the clinic is still in existence and has collected this information, the child should be able to access it, provided it hasn't been destroyed.[215]

5.6 Children conceived earlier than the late 1980s and those conceived privately through self-insemination with donor sperm will find it difficult to access information about their genetic parents. They will be reliant on their social parents to provide them with this information.

Children born into a surrogacy arrangement

5.7 Children born as a result of a surrogacy arrangement and handed over to commissioning parents immediately after birth may be unaware of the circumstances surrounding their conception and birth. They may not know that they were gestated by, or conceived with an egg of, a woman other than their social mother. They may be unaware that the man who they identify as their father is not their genetic father.[216] Children who learn later of the circumstances of their conception and birth may find it difficult to obtain the name and details of their gestational mother and their genetic parents. If a fertility clinic has been involved in facilitating conception, the child may be able to obtain this information from the clinic. In other situations there may be no public or private records from which the child might trace the surrogate mother or the genetic parents.

5.8 Because surrogacy arrangements involve negotiation and agreement between the commissioning parents and the surrogate mother, and because they rely on trust on both sides, there is likely to be a personal relationship between them that may continue after the child is born. In some situations it is a relative or friend of the commissioning parents who agrees to act as surrogate mother. For these reasons it may be easier for a child born into a surrogate arrangement to obtain information or have contact with his or her gestational mother.

Children with no registered father on their birth certificate

5.9 A small but growing number of children have no father recorded on their birth certificate. There has been a steady increase in the number of children born to unmarried parents and this trend is likely to continue.[217] Of the 58 262 children whose births were registered with Births, Deaths and Marriages in 2000, nearly

---

[213] See chapter 3 for details of donor gamete conception in New Zealand.

[214] When donor gamete conception procedures first became available they were sometimes carried out by private medical practitioners. In such cases, information might be obtained from the doctor's records.

[215] The information is personal information and might be obtained under the Privacy Act 1993, but note that s 29(a) permits the refusal of disclosure of personal information where it would involve the unwarranted disclosure of the affairs of another person.

[216] Under the current NECAHR guidelines children must be genetically related to at least one commissioning parent if carried by a surrogate mother.

[217] Between 1981 and 1991 the number of New Zealanders aged between 20 and 39 years living in a de facto relationship increased by 84 per cent.

4000 (6.84 per cent) had no details of their father shown on their birth certificate as at 22 October 2003.[218] Other official figures show a similar pattern.[219]

5.10 The fact that their father's name and details do not appear on their birth certificate does not necessarily mean that these children do not know about their father. They may have been given information about him by their mother or a relative. They may have met him. They may even have an ongoing relationship with him throughout their lives. However, a significant number will have no knowledge of their father and will have no means of obtaining this information from a public record. There are also suggestions that between 1000–5000 children per year may have a man other than their genetic father recorded on their birth certificate.[220]

Historical approaches to openness and the child's right to know

5.11 Throughout the nineteenth century and first half of the twentieth century it was believed that ex-nuptial children should be sheltered from the realities of their conception and birth and should be brought up to believe that their social parents were their genetic parents.[221] The strong emphasis on marriage as the only proper basis for cohabitation and procreation, and the social and legal disadvantages suffered by children born outside marriage, led many to conceal from children the truth about their genetic origins. Adoption laws provided a means of creating fictional genetic parenthood in favour of the child's social parents, while at the same time severing the child's relationship with the birth parents.

5.12 Only in the 1970s did legal moves towards greater openness in parent–child relationships commence. The passing of the Status of Children Act 1969 saw illegitimacy removed as a legal status. Open adoption was practised from the 1980s. After the passage of the Adult Information Adoption Act 1985 adult adoptees could access information about their birth parents.

5.13 Three landmark events also gave impetus to a shift away from children being regarded as objects of concern, to being recognised as autonomous individuals with rights to be respected and treated fairly. The International Year of the Child (1979) engendered debate about the position of the child in New Zealand society. This was followed by the English House of Lords decision in *Gillick*[222] in 1985, and the adoption of the United Nations Convention on the Rights of the

---

[218] Information supplied by the Registrar-General of Births, Deaths and Marriages in 2003.

[219] Information provided by the Minister of Social Services in April 2003 indicates that some 16 500 mothers then receiving the Domestic Purposes Benefit did not name their child's father and, accordingly, received a reduced rate of benefit. The Minister estimated that the cost of this failure to identify the fathers was more than $600 million.

[220] Estimate provided by Dr Richard Fisher, Fertility Associates, speaking at the Sex and Science Conference at the Auckland University of Technology, North Shore Campus, 26 June 2003, who based his estimate on overseas data.

[221] As in cases of mis-attributed paternity or where a man knowingly assumed care and responsibility for another man's child, holding himself out as the genetic parent.

[222] *Gillick v West Norfolk and Wisbech Area Health Authority* (1986) AC 112, [1985] 3 All ER 402; (HL). The Law Lords held by a majority that children do not remain under the control of their parents until they reach adulthood but can give valid consent to their own medical treatment when they have sufficient maturity and understanding to weigh the risks and benefits of the proposed treatment. The formulation covers a range of matters other than medical treatment.

Child (UNCROC) by New Zealand in 1993. In ratifying UNCROC, the New Zealand Government made a commitment to the international community to implement the rights set out in the Convention. A number of Articles have a bearing on the relationship between parents and their children. These include:[223]

- children's right from birth to know their parents and to be cared for by them (Article 7.1);
- the right to preserve their identity and family relations from unlawful interference (Article 8.1);
- the right to maintain personal relations or direct contact with their parents if separated from them (Article 9.3); and
- the right to seek and receive information of all kinds (Article 13(1)).

5.14 Though "parent" is not defined, it clearly relates to genetic parenthood in Articles 7.1 and 8.1. The Convention lays down general principles that are relevant to the child's right to know his or her genetic origins. It applies to all persons under the age of 18 years regardless of nationality, ethnicity, age, sex or the marital status of their parents.[224]

5.15 The Geneva-based Committee on the Rights of the Child, which monitors implementation of the rights in UNCROC, recommended in September 2003 that New Zealand ensure that adopted children have the legal right to access information about their genetic parents.[225] While there is no reference in UNCROC to the rights of children born as a result of donor gamete conception or surrogacy, it is likely that the Committee would reach the same conclusion on the basis of the right in Articles 8.1 and 13.1 to seek and receive information of all kinds.

The Māori perspective

5.16 Moves towards giving children access to information about their birth origins have been boosted by a growing awareness that a regime of secrecy conflicts with customary values and child-rearing practices of Māori and Pacific peoples.

5.17 For decades it had been a source of concern that members of a child's whānau, aiga or extended family had no standing in relation to the adoption of Māori or Pacific Islands children under the general law.[226] Māori customary law views the child as part of the broader family group and not exclusively the child of the parents. It is of great importance for Māori children to know their whakapapa and turangawaewae (traditional home).

---

[223] The Convention is set out in full in appendix 1.

[224] The Convention was drafted in 1989 before the development of many new birth technologies but is considered to apply equally to children born of donated gametes, surrogacy and children of same-sex couples.

[225] Concluding Observations of the Committee on the Rights of the Child: New Zealand CRC/C/15/Add216/ 3/10/03 para 34(b).

[226] See, for example, Department of Social Welfare *Puao-Te-Ata-Tu: The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (Government Printer, Wellington, 1986) app II 22–24.

5.18 In 1994, the Ministerial Committee on Assisted Reproductive Technologies placed this right to know identity in the following context:

> Although the right to know genetic origins is an aspect of the best interests of the offspring and flows also from the principles of te Tiriti and justice, we consider it of sufficient importance in Aotearoa/New Zealand that it must be listed as a separate principle. In some places overseas this principle is not accepted at all, but we believe that the position is different here. Knowledge of whakapapa allows Maori to access constitutional rights and cultural strengths. Pakeha also recognise that genetic origins are very important for some people as they discover their own identity.[227]

CHILDREN BORN OF DONOR GAMETES AND SURROGACY

Lessons from adoption

5.19 Adoption research shows that many adopted children have a psychological need to know the true identity of those who brought them into the world. It gives them the ability to place themselves in a social context, a sense of continuity with their past and a complete biography.[228] Concealment and secrecy can lead to a sense of bewilderment when adoptees learn later in life that the persons they have treated as their parents are not their genetic parents.[229] The fact that the adoptee's birth origins are cloaked in secrecy may convey the impression that there is something shameful in their past. Later discovery by adoptees that their social parents have withheld this information from them may engender resentment.[230]

5.20 Over the last 20 years there has been a move away from "closed adoption", which created a wall of secrecy separating the adoptive parents and the child from the birth parents. It was only when the Adult Adoption Information Act 1985 came into force in 1986 that adopted children (at the age of 20) were able to obtain information about their birth parents.[231] The Adoption Act 1955, while it facilitates closed adoptions, does not stand in the way of open adoption practices and the Department of Child, Youth and Family Services (CYFS) supports open adoption and facilitates meetings, the exchange of information and, sometimes, ongoing contact between the two families. The Department of Child, Youth and Family Services has a statutory obligation to provide adoptees who have reached the age of 20 years with identifying information about their birth parents.[232]

---

[227] Ministerial Committee on Assisted Reproductive Technologies, above n 136.

[228] J Fortin *Children's Rights and the Developing Law* (2 ed, LexisNexis, UK, 2003) 383. The formation of an individual's personal identity typically includes knowing how they are connected to others within their extended family network, and from whom they have inherited their physical characteristics, character traits, talents and quirks: see L Shanner, R Harris, E Blyth "Building Families through Donor Conception" (2002) 9–2 Journal of Infertility Counselling 18.

[229] Note the comments of Holman J in *A v L (contact)* [1998] 1 FLR 361, 366.

[230] Law Commission, above n 32.

[231] Sections 4 and 9 Adult Adoption Information Act 1985.

[232] Section 9(1) Adult Adoption Information Act 1985.

Parallels between adoption and children born of donor gametes and surrogacy

5.21 Although very little research has been done on the outcomes for children born as a result of donor gamete conception, there is now evidence that children conceived with donor sperm may suffer some of the same genealogical confusion experienced by adoptees.[233]

5.22 Useful information emerged from a conference held in Toronto, Canada in June 2002, which was attended by donor-conceived children[234] and professionals working in the area. The pain resulting from secrecy was a recurring theme among donor-conceived children and the professionals working with them. Common emotional responses included grief, anger, loss, shame, depression, a sense of not belonging, an inability to trust or bond with others, a sense of incomplete identity and feeling of abandonment and rejection. Many children sensed they were different from their social parents well before they were told. It was important to some children to know whether they had half-siblings – be they the donor's own children or other children conceived with his sperm. A common concern raised was their inability to access information about the medical history of their genetic parents.[235]

5.23 Some donor-conceived children are told about the circumstances of their conception at a time of family crisis (commonly on the death or divorce of a family member). They report that discovery of their birth origins at this time is doubly traumatic. They have to cope with the fact that their parents have withheld vital information about their birth origins as well as deal with the crisis that precipitated disclosure of this information.[236]

5.24 Recently, there has been a turning of the tide in favour of donor-conceived children being told the truth of their origins. It has been said that "[t]o bring up a child under a false impression is a moral wrong to the child"[237] and that "[n]ot giving information manipulates and limits the choices open to the deceived person".[238] Another commentator has argued that:"if [donor insemination] is seen as a loving act for the child's benefit there is no reason to taint the procedure with a lie that could prove extremely destructive to the child".[239]

---

[233] See New York State Task Force on Life and the Law, above n 126, 363 and n 12; *R & Anor v Secretary for State for Health and Anor* [2002] EWHC 1593 (Admin), [2002] 3 FCR 731.

[234] Also referred to in the literature as "donor offspring". "Children" here refers to those persons who were conceived through the use of donor sperm, eggs or embryos, even if they are now young persons or adults.

[235] *The Offspring Speak* a report to Health Canada on an international conference of donor offspring (Toronto, 12 August 2000) paras. 2.6.1–2.6.3, see also Shanner, Harris, Blyth, above n 228, 18.

[236] Royal Commission on New Reproductive Technologies *Proceeed with Care: Final Report on New Reproductive Technologies* (Canada Communications Group, Ottawa, 1993) 465.

[237] H McGavin "Sperm Donor Children Have Right to Know Fathers, says Warnock" (13 May 2002) *The Independent*, London.

[238] B Atlas "Lifting the Veil of Secrecy: the rights of donor conceived individuals" dissertation for LLB (Hons) University of Auckland (June 2003) 15; see also J Triseliotis 2nd Australian Adoption Conference (1978) 28.

[239] G J Annas "Fathers Anonymous: Beyond the Best Interests of the Sperm Donor" (1980) 14 FLQ 11.

5.25 These views have been echoed in the findings of a number of international bodies. The Royal Commission on Assisted Human Reproduction in Canada found that "maintaining secrecy about the means of conception can be contrary to the best interests of the child".[240] In the United Kingdom, Baroness Warnock, who chaired the committee responsible for the groundbreaking 1984 Warnock Report on assisted human reproduction, has recently advocated strongly for openness, saying support for donor anonymity in the report was wrong.

5.26 In a recent English decision[241] the Court had to consider whether children conceived of donor sperm have a right to information about their donor fathers, and whether failure to provide this information breaches their right to respect for (their) private and family life under Article 8.1 of the European Convention for Human Rights, now incorporated in the Human Rights Act 1998 (UK). The Judge accepted the genuineness of the plaintiffs' evidence regarding their disappointment and distress at not being able to obtain information about their donor father and viewed it as "entirely understandable that children conceived by AID [Artificial Insemination by Donor] should wish to know about their origins and in particular to learn what they can about their genetic father, or, in the case of egg donation, their genetic mother". He added that he did not find this at all surprising, bearing in mind the lessons that have been learnt from adoption, adding that:

> A human being is a human being whatever the circumstances of his conception and an AID child is entitled to establish a picture of his identity as much as anyone else. We live in a much more open society than even 20 years ago. Secrecy nowadays has to be justified where previously it did not.[242]

5.27 There is little research on children born of surrogacy arrangements. We do not know how many commissioning parents tell their children about the circumstances of their conception, or at what age the children are told. Surrogacy arrangements usually involve personal contact between the commissioning parents and the surrogate mother prior to conception. The lack of enforceability of surrogacy arrangements means that there needs to be a trusting relationship between those involved. The people involved in surrogacy arrangements with whom the Commission has spoken all wanted their arrangement to be open. The Commission understands that there has been continuing contact between the surrogate mothers, the commissioning parents and members of their respective families.

How many people tell their children

5.28 Overseas surveys have shown that many parents of donor-conceived children choose not to tell their children about the circumstances of their conception. In all reported surveys nearly half of all parents did not intend to tell their child and less than 40 per cent had formed a clear intention to tell.[243]

---

[240] Royal Commission on New Reproductive Technologies, above n 236, 464.

[241] *R & Anor v Secretary for State for Health and Anor* [2002] EWHC 1593 (QBD Admin), [2002] 3 FCR 731: Scott-Baker J held that the Convention was engaged on the facts of the case before him but the question of whether a declaration of incompatibility with the Convention was left open for further argument.

[242] Above n 241, para 47.

[243] New York State Task Force on Life and the Law, above n 126, 364 n 18 and 368 n 47.

5.29 The clinic professionals who have spoken to the Commission have all stressed the importance of honesty and access to information for children born of donor gametes. They report that in their counselling of recipient couples they encourage them to tell their children at an early age. However, the limited data that exists in New Zealand indicates that a majority of parents are not telling their children of the circumstances of their conception and the identity of the gamete donor(s). A study conducted by the University of Auckland showed that only a quarter of parents had told their children.[244]

Challenges to the child's right to know

5.30 There is not universal support for the notion that children have a right to know who their genetic parents are. Emily Jackson, senior lecturer in Law at the London School of Economics, makes the point that a significant proportion of the population, perhaps as many as 10 per cent, are in fact genetically unrelated to their presumed fathers. She comments that infidelity may be a statistically greater threat to accurate knowledge of our genetic origins than the relatively small number of children born using donated gametes or embryos. Mothers are under no obligation to name their children's fathers when registering their births and that, in this respect, "mother's interests in keeping the father's identity secret are allowed to trump children's interests in knowing the truth".[245] She also stresses that it would be difficult to enforce any right to information about one's genetic origins unless there is a requirement that this information be recorded on the child's birth certificate or a duty were imposed on parents to tell their children.

5.31 The UK Government announced in January 2004 that from 1 April 2005 people who donate eggs, sperm or embryos will lose their right to anonymity. Gamete donors will be identifiable to the children conceived from their donation when the children reach 18 years, in the same way that adopted children can access information.[246] Most, but not all, clinics in the United Kingdom were opposed to the removal of anonymity, expressing concerns that they would find it harder to recruit donors at a time when there were not enough coming forward. Public Health Minister Melanie Johnson MP, in announcing the proposed changes, commented that it was unfair that donor-conceived children did not have access to the same information as adopted children. She added that the adults involved can decide what they do but the children cannot choose whether or not to be born.[247] The UK Government will assist in advertising campaigns encouraging people to donate gametes on an identifiable basis.

---

[244] Dr Vivienne Adair "Interim Report on Parents of Donor Children"(University of Auckland, undated approx 2002).

[245] "Donor Anonymity and Rights" (27 January 2004) *BioNews* 242. See: <http//www.BioNews.org.uk> (last accessed 27 February 2004).

[246] Source: *BBC News* (21 January 2004) <http://news.bbc.co.uk/2/hi/health/3414141.stm> (last accessed 1 March 2004).

[247] Announcement made at annual conference of Human Fertility and Embryology Authority reported as "Donor Anonymity to be removed in UK" (27 January 2004) *BioNews* 242, 2 <http://www.BioNews.org.uk> (last accessed 27 February 2004); "Donor children will have right to know" *The Guardian* (22 January 2004).

5.32 The New South Wales Health Minister also announced early this year that sperm and egg donors will lose their anonymity as part of a shake-up of the State's legislation on assisted human reproduction. A draft Bill that is currently being circulated will establish a central register of sperm and egg donors and will allow donor-conceived children to trace their genetic parents when they reach the age of 18 years.[248]

Proposals in the Human Assisted Reproductive Technology Bill

5.33 The Human Assisted Reproductive Technology Bill (HART Bill), introduced as a private member's Bill in 1996 and significantly amended by a Supplementary Order Paper in April 2003,[249] contains detailed provisions that will allow donor-conceived children access to information about their genetic parents at the age of 18 years.[250] These provisions will not be retrospective.[251]

5.34 The Supplementary Order Paper outlines six principles that will guide service providers. One of these principles is that "donor offspring should be made aware of their genetic origins and be able to access information about those origins".[252] An obligation is placed on providers to collect certain standard information about all donors (including the donor's name, date, place and country of birth and ethnicity).[253] Providers must keep track of births resulting from donor gametes and notify the Registrar-General of Births of the child's name, date and place of birth and sex.[254]

5.35 If a donor-conceived child aged 18 or older asks a provider or the Registrar-General for information, it must be given to them and they will be told whether the donor has asked for information about them.[255] The guardian of a child under 18 years of age can make the request. Children aged 16 or 17 can seek an order from the Family Court that they are to be treated as if they are 18 years old. The

---

[248] See "New South Wales to Shake-up Fertility Laws" (27 January 2004) *BioNews* 242 3 , <http://www.BioNews.org.uk> (last accessed 27 February 2004).

[249] See appendix 6.

[250] Clause 55 Human Assisted Reproductive Technology Bill as proposed to be inserted by Supplementary Order Paper 80/2003: the Family Court can make an order that a 16 or 17 year old have access to this information where satisfied it is in his or her the best interests: clause 60.

[251] They will apply only where the gametes from which the donor-conceived child was conceived were donated after the coming into force of the Act: clause 40 Human Assisted Reproductive Technology Bill.

[252] Clause 5(d) Human Assisted Reproductive Technology Bill as proposed to be inserted by Supplementary Order Paper 80/2003.

[253] Clause 44 Human Assisted Reproductive Technology Bill as proposed to be inserted by Supplementary Order Paper 80/2003.

[254] Clauses 50, 55 Human Assisted Reproductive Technology Bill as proposed to be inserted by Supplementary Order Paper 80/2003.

[255] Clauses 47(1), 48(1) Human Assisted Reproductive Technology Bill as proposed to be inserted by Supplementary Order Paper 80/2003. The Registrar-General will have a record of the donor's name and place of birth. The clinic will have information as to the donor's ethnicity, height, hair colour and personal and family medical history (cl 44).

order will entitle them to information and enable them to consent to the disclosure to the donor of information about them.[256]

5.36 Providers must retain information about donors for 50 years. After that period, or if they cease business, they must pass their records to the Registrar-General who will hold the information indefinitely.[257] These legal changes are to be welcomed and will give donor-conceived children the right to the name, address, date and place of birth and personal and medical information about their donor parent when they reach the age of 18 years.[258]

5.37 Donors can access information about their donor-conceived child held by clinics or the Registrar-General, where the child consents to the donor being given this information and has attained the age of 18 years (or the Court has ordered in the case of a 16 or 17 year old that the child be treated as being 18 years old).

Outstanding issues

5.38 Despite a steady move towards openness in proposed laws and policies, there remain obstacles in the way of donor-conceived children having access to information about their genetic origins. A critical issue is that they are entirely dependent upon others to tell them the circumstances of their conception or birth. Unless it is readily apparent that another person or persons were involved in their conception and birth (as in the case of same-sex parents) they may never know that one or both of their social caregivers is not their genetic parent.

5.39 Secondly, the HART Bill does not address the needs of children conceived privately through self-insemination with donor sperm or children of private surrogacy arrangements. There is no obligation for information about the donor to be recorded or retained in the case of private arrangements. Thirdly, they do not address the needs of children conceived prior to the Bill coming into effect.

5.40 Another barrier is that children have no right to the information until the age of 18 (unless they succeed in getting a court order that they are mature enough to receive the information at 16 or 17).[259] Donor-conceived children under the age of 18 will not have access to information about their birth origins unless their guardian makes a request on their behalf or they obtain an order that they be treated as if they are 18. In this respect, the HART Bill is inconsistent with Articles 7 and 13.1 of UNCROC and with the evolving international recognition on children's right to know.[260]

---

[256] Clause 60 Human Assisted Reproductive Technology Bill as proposed to be inserted by Supplementary Order Paper 80/2003. This provision appears to have been introduced to avoid the Bill offending the age discrimination provisions in s 21(1)(i) Human Rights Act 1993.

[257] Clause 45(2) and (3) Human Assisted Reproductive Technology Bill as proposed to be inserted by Supplementary Order Paper 80/2003.

[258] Clauses 44, 45, 47, 48 Human Assisted Reproductive Technology Bill as proposed to be inserted by Supplementary Order Paper 80/2003.

[259] Clauses 55 and 60 Human Assisted Reproductive Technology Bill as proposed to be inserted by Supplementary Order Paper 80/2003.

[260] The Law Commission, in its consideration of adoption law reform, could see no reason for a fixed chronological age at which children could be given available information about their birth parents.

5.41 Clause 57 of the HART Bill allows a provider to refuse to disclose information to a donor-conceived child where the provider is satisfied that disclosure is likely to endanger any person. There is no similar restriction in relation to adoption information. It is hard to envisage situations where the receipt of information about one's donor parent would put the donor parent or any other person at risk. There are other legal protections available should such a situation ever arise.[261]

5.42 Another potential barrier relates to the integrity of information storage systems and the fact that information will have to be collected from two different sources. Clinics are relied on to obtain, store and release information to donor-conceived children. While clinics will be required to advise the Registrar-General of Births, Deaths and Marriages of the basic details of the birth of a child conceived of donated gametes,[262] they only have to forward more detailed information about gamete donors 50 years after the date of the child's birth or if the clinic closes.[263] It might be argued that there are risks associated with leaving it to private sector agencies to store this information, particularly where there is no government regulation of such agencies. In such a fast-changing area there must be some uncertainty whether current clinics will be operating in 50 years' time. There are no penalties set by the HART Bill where a clinic fails to collect, store and make available information.

OPTIONS: BIRTH CERTIFICATES AND REGISTERS

Ensuring a record is kept

5.43 A child conceived as a result of donor gametes or surrogacy may have several persons in their life, all of whom have been involved in their conception, birth and upbringing: a sperm donor, an ovum donor, a gestational mother and one or more social parents who have formed the intention to have the child. As indicated previously, the law in New Zealand (and historically in most overseas jurisdictions) has traditionally favoured an approach that eliminates some and replaces others so that only two persons are recorded on the child's birth certificates as parents. The existence of the others is removed entirely from the legal record.

5.44 However, that approach is changing. In reality, a child's genetic ties cannot be erased. Why then should the law purport to do so? The negative impact upon donor-conceived children who are now adults bears striking similarity to that identified by many children in closed stranger adoptions. A vital part of their sense of self is missing, even when they have had a happy and stable family life. The HART Bill in New Zealand will ensure there is a record of the names and some details of gamete donors where insemination has occurred at fertility clinics. However, children conceived outside clinics or in surrogacy arrangements will have no official record of their donor parent(s) or gestational mother.

---

[261] Under the Trespass Act 1980, Harassment Act 1997 and Domestic Violence Act 1995.

[262] Clause 51(1) Human Assisted Reproductive Technology Bill as proposed to be inserted by Supplementary Order Paper 80/2003.

[263] Clause 45(1) Human Assisted Reproductive Technology Bill as proposed to be inserted by Supplementary Order Paper 80/2003.

5.45 The question becomes: what is the best way of ensuring that all children's birth records can be retained and accessed? Should social parents have rights to decide if, when and how to disclose such information?

Option 1: registering the social parents on the birth certificate and keeping a separate register of the child's genetic parents

5.46 This retains the status quo and how the situation would remain under the Care of Children and HART Bills. Currently, the spouse or partner of the birth mother is deemed in law to be a parent and is automatically recorded on the birth certificate, though not the genetic parent. The Care of Children Bill will extend this to include same-sex partners of the child's birth mother.

Disadvantages of option one

5.47 Private donor inseminations are not covered. Children, including adult children, have no means of knowing their genetic identity unless their parent/s disclose this. The information may no longer be accessible when their parents die.

5.48 The disadvantages could be reduced by the following:

- Including details of private donor gamete conceptions and surrogacy arrangements on the central register.
- Placing a legal obligation on gamete donors, birth mothers, commissioning parents and social parents in private donor insemination and surrogacy situations to notify relevant genetic and gestational information to the Registrar-General so that genetic details from private arrangements can go on the register.
- A unit within the Registrar-General's office could be established with responsibility for collecting these records and ensuring they are accurate and complete. There would be a legal obligation to provide information to donor-conceived children and others with a proper interest in the child's lineage on request.
- Placing a duty on parents to tell their children.

Option 2: a dual birth certificate regime

5.49 Children born by way of donor gamete conception or surrogacy could have two birth certificates. There would be a private birth certificate and a publicly available certificate. The private certificate would show the child's full genetic parental lineage, recording the names and details of the child's parents, any donor parent and, for children born through surrogacy, the gestational mother. It would record the roles the individuals had played. For example, if gametes had been donated the record could indicate "sperm or egg donor". If the mother was a full surrogate it would record "gestational mother". Hence, children could have two mothers recorded on their private birth certificates. The full birth certificate would be accessible only to those named on it. No legal rights or responsibilities would flow from being named on this certificate.

5.50 The public birth certificate would record the names of the social parents, those who have the legal rights and responsibilities of parenthood. Where there were

two opposite-sex parents it would be indistinguishable from any other birth certificate. Where there were two same-sex parents both would be recorded. Where there were more than two social parents to the child all names would be recorded.

Advantages over option one

5.51 No legal fiction is created because the birth certificate would record the true details of the child's genetic parentage.

Disadvantages

5.52 The child will still have no means of knowing his or her social parents are not his/her genetic parents unless told.

ENSURING CHILDREN KNOW HOW TO ACCESS THE RECORD

Legal duty

5.53 A legal duty might be placed on the child's parents to tell their children of the circumstances of their conception and birth. A possibility might be to require parents to tell their children before the age of 12 years, as issues of identity become more important for children as they reach their teenage years. The evidence suggests, however, that the earlier children are told the easier it is for both parents and child. Research suggests most parents want to tell their children but lack the support to do so.[264] Young children born to surrogacy arrangements are able to incorporate a sense of themselves with two mothers. They know their surrogate mother as their "tummy mummy".[265]

5.54 A penalty need not be prescribed for failure of parents to meet this responsibility, but a penalty could be imposed if a parent wilfully failed to provide the Registrar-General with information about persons involved in the child's conception and birth after a formal request had been made by the Registrar-General.

Requiring clinics to provide education, counselling and encouragement to recipients to tell their children of their genetic origins

5.55 Although there would have to be counselling and encouragement provided to parents were a duty to be imposed, an option would be not to place a duty on parents, but, rather, to remind them through education and counselling of the importance of giving children honest and accurate information about their birth

---

[264] Ken Daniels, a social worker and international expert on children of donor gametes, has spoken of support programmes in Germany where families of children born through donor gametes come together to learn from each other how best to manage such disclosures. Child and Youth Policy Conference (Wellington, 26 November 2003).

[265] See interviews with New Zealanders with children born via private surrogacy in chapter 4, 'Babies O and P' and 'Baby J'.

origins, and providing them with guidance as to when and how to tell their children. This already happens as part of the counselling in New Zealand fertility clinics, but clinics indicate there are serious issues relating to funding. Parents have often seriously stretched their budgets paying for fertility treatment in the first place.

5.56 Clinics could be obligated to cover telling children as part of counselling. In the United Kingdom, a Code of Practice lists the types of counselling that must be offered to people receiving fertility treatment, although there is apparently a low take-up rate (18–20 per cent of people being treated). The Code itemises counselling as to the advantages and disadvantages of openness and how the means of conception might be explained to relatives and friends, but does not specifically refer to counselling on the need to tell children.[266] An alternative to counselling would be to invite parents to participate in discussions with others who have borne children as a result of gamete donation. This allows parents to learn from the shared experiences of others. It can be helpful for parents to observe other families where the children know of and can talk openly about their birth origins.

Annotation of public birth certificate[267]

5.57 This could be a requirement in all cases where the child is conceived by donor gametes or surrogacy. The Registrar-General would place an annotation next to the name of the social parent who is not a genetic parent or gestational mother on the publicly available birth certificate, such as "by donor" or "by surrogacy". Alternatively, it could indicate the operation of the relevant law such as "by parental status order" or by reference to a statutory provision (for example, section 5 of the Status of Children Amendment Act 1987). The latter could be seen as protecting the privacy of the parent and child, at the same time as being a clear indication that the parent is not the genetic or gestational parent of the child. These notations could be added to the public birth certificate automatically or only where the parents have consented.

5.58 This would be similar to the option adoptive parents have in requesting that the words "by adoption" appear on their child's birth certificate. It could be optional or compulsory. It would ensure that the child will know at some stage that he or she was conceived by donor gametes or born to a surrogate mother, which may prompt them to seek the original records. It would also provide parents with a strong incentive to tell their children in a natural way of their birth identity as they grow up.

5.59 Some parents may feel the annotation opens them up to invasion of their privacy in situations where they must produce their child's birth certificate. For example, when they present the certificate to enrol their child at school, the principal and administration staff will all have access to this information – they will know the child is not genetically related to one or both of his or her social parents.

5.60 Some parents may feel that telling a child of its origins is a matter that should be left to their discretion and judgement. Some children also may feel the annotation

---

[266] R G Lee and D Morgan above n 209, 182–188.

[267] This was the suggestion made by Baroness Mary Warnock in 2003. See H McGavin above n 237. Baroness Warnock headed the UK Committee of Inquiry into Human Fertilisation and Embryology in 1984.

invades their privacy and feel embarrassed by their difference from their peers – though children do not generally need to access birth certificates until their teenage years. Further, if the parents are open and relaxed about the child's birth origins, the child is much more likely to feel comfortable and relaxed.

5.61 If a fiction is allowed to be maintained on a public birth certificate it could be said to be buying into the qualities of shame and secrecy. When true details are disclosed on a birth certificate, parents do not have the easy option of not telling their child the truth. Disclosure assists parents to tell the truth and so facilitates healthier family relationships. Another possibility might be that, if the parents have not agreed to a notation being placed on the birth certificate, it would be open to the child to have this added at some later time – but, again, the child would need to know his or her genetic origins to be able to request this.

5.62 Such notations would alert children to the circumstances of their conception and birth if they have not been told by their parents. They would then be able to obtain further information either by obtaining a copy of the full birth certificate or by requesting information from the register held by the Registrar-General.

5.63 Knowing that their children will discover the truth when they see a copy of their birth certificate should prove a catalyst for parents to tell them about their conception at a young age, before the birth certificate has to be produced publicly. The first option of placing a duty on parents to tell their children might be seen as unjustified interference with parental autonomy and punitive at a time when encouragement is required. The available statistical evidence indicates that a majority of children are not told about the circumstances of their conception by their parents.

5.64 Annotation of the birth certificate and/or placing a duty on parents to tell their children are likely to meet New Zealand's obligations under the United Nations Convention on the Rights of the Child, whereas the option of giving parents full autonomy to decide if and when to tell their children probably would not as this does not ensure the child will know his or her genetic identity. Overseas research indicates that parents find it extremely difficult to tell their children of their true genetic identity.[268] This may be a greater difficulty overseas than in New Zealand, where the debates on openness leading to the Adult Adoption Information Act 1985 and values underlying Māori customary practices in relation to whāngai children appear to have influenced mainstream New Zealand values.[269] If parents do not tell their children, the children and their offspring will lack health and genetic information that may prove vital in later life. There is also the risk that children will find out from some other source and this may strain the parent–child relationship.

Age at which donor-conceived children should have access to information

5.65 Right to know provisions could be extended to provide every child with access to non-identifying information when the child has attained sufficient age and understanding to assess the implications of receiving the information (as opposed

---

[268] Personal communication from Professor Donald Evans, Director, University of Otago Bioethics Centre, Dunedin. See also D Evans (ed) *Creating the Child: The ethics, law and practice of assisted procreation* (Nijhoff Publishers, The Hague, 1996).

[269] Daniels, above n 264 – influence of Māori whāngai practices.

to the age limit of 18 years set by the HART Bill). The problem with a capacity-based test is that someone who has limited knowledge of the child would have to make a judgement about the child's maturity and understanding. Alternatively, there could be no age limit set on when children can access the information on the basis that if they are old enough to ask, they are old enough to know the truth. The reasons for denying access to information to under-18 year olds have not been clearly articulated. They can be criticised as being a form of age discrimination. Proposed new laws in the United Kingdom and New South Wales will give donor-conceived children access only at the age of 18 years.[270]

Options for children born into surrogacy arrangements

5.66 Children born as a result of a surrogacy arrangement raise different issues than children born as a result of donor gamete conception. If their conception resulted from the use of donated gametes the earlier discussion is relevant. However, regardless of whether they are conceived with donated gametes, their gestational mother will not be the woman who assumes their day-to-day care. From consultations carried out by the Commission it is evident that commissioning parents use various methods of acquiring a legal status in relation to the child following surrogacy.

5.67 If the commissioning parents adopt the child, the child, on reaching adulthood, will have the same rights of access to information as any other adopted child.[271] Adult adoptees are entitled to information even if they are living overseas.[272]

5.68 If the commissioning parents obtain guardianship and/or custody orders in respect of the child, the child's birth certificate should show the child's legal parents. This will be the surrogate mother (whether or not her eggs were used) and her husband or partner, if she has one and he consented to the prodcedure.[273] Where the surrogate is single, or where her husband or partner has not consented to the procedure, the name of the genetic father will be shown. If the commissioning father's sperm was used to achieve conception, his name may be shown on the child's birth certificate.

5.69 If the commissioning parents take no steps to acquire legal parental status, the child's birth certificate will record the same details as to parentage as above.

Questions

Registers

Q4 Should children conceived of donor gametes be able to obtain full donor background information from a database held by the Registrar-General of Births, Deaths and Marriages as well as from the clinic that provided the treatment?

---

[270] See "Donor Anonymity to be removed in UK" above n 247, 242 2; "New South Wales to Shake-up Fertility Laws" above n 248, 242 3.

[271] Sections 4 and 9 Adult Adoption Information Act 1985.

[272] Section 5(2)(a)(ii) and 5(2)(d) Adult Adoption Information Act 1985.

[273] The surrogate mother will be the child's legal mother by virtue of her status as the gestational/birth parent. The genetic father will be shown as a parent unless the surrogate mother's husband or partner is deemed or presumed by law to be the father.

Q5 Should the law be extended to allow donor-conceived children under the age of 18 to have access to information on the register about their genetic parents? If so, should there be a lower age or no age restriction?

Q6 If the Supplementary Order Paper to the Human Assisted Reproductive Technology Bill becomes law should steps be taken to assist children conceived prior to its enactment in having access to information about their genetic parents?

Q7 Should children conceived in surrogacy arrangements or private donor gamete conceptions also be able to obtain information from the Registrar-General's database?

Q8 What cultural information should be recorded on the Registrar-General's database? For example, should Māori donors be required to provide information about their hapū and iwi (tribal affiliations), if they know them?

Birth certificates

Q9 Instead of the register, should children born as a result of donor gamete conception or surrogacy have, in addition to the publicly available birth certificate, a private certificate that records the name, town or city of residence and occupation of all persons involved in their conception and birth including both genetic parents, the gestational mother and social parents?

Q10 Should the official, publicly available birth certificate of a child born as a result of donor gamete conception or surrogacy be annotated to indicate that a person named on it is not the genetic or gestational parent? For example, "by donor", "by surrogacy" or "by section 4 Status of Children Amendment Act 1987"?

a) If so, what should such annotation say?

b) Should such a notation be optional and made at the discretion of the social parents?

Duties of clinics and parents

Q11 Instead of annotations:

a) Should there be a legal obligation imposed on parents to inform their children of the true facts about their conception and birth?;

or

b) Should disclosure of such information be left to the discretion of the parents?

Q12 Should clinics be required by law to provide counselling and education and encouragement to recipients to tell their children of their genetic origins? If so, should it be state funded?

REGISTERING FATHERS

5.70 There can be a number of reasons why a father's name and details may not be registered on a child's birth certificate. Unlike a married father, an unmarried father cannot usually be registered unless the child's mother consents to his name being included in the birth particulars.[274] The unmarried father will need to sign either the birth notification form with the mother or provide her with a signed statement accepting paternity.[275] There may be a number of barriers to this occurring if:

- one or both parties do not want him to be identified for personal reasons;
- the man is not aware that he is the child's father;
- the father is absent or unknown;[276]
- the mother registers the name of another man on the birth certificate;[277]
- the mother decides to place the child for adoption;[278] or
- the father's name is not registered to avoid him being liable for child support under the Child Support Act 1991.[279]

5.71 Parties may also prefer not to name the father if, for example, the pregnancy was the result of rape or incest, or there are cultural reasons why naming the father may be embarrassing or distressing for the mother, the father or the child.

Options for achieving higher rates of identified fathers

Education

5.72 In light of the international instruments affirming the rights of children to know their genetic origins, the Government might embark on an education campaign that encourages registration. The relationship between registration and bestowing of legal rights and responsibilities would have to be made very clear. It would have to be stipulated, for example, that this would or would not lead to financial obligations or that this would or would not lead to automatic guardianship responsibilities and rights.

---

[274] See section 15 Births, Deaths, and Marriages Registration Act 1995: for further details of the law governing birth registration see chapter 8.

[275] See section 15(2)(b) and (c), 15(3)(a)(i) and (ii) and 15(3)(b)(i) Births, Deaths, and Marriages Registration Act 1995.

[276] The child's mother may be uncertain of who the father is and wish to avoid the unpleasantness and cost of establishing paternity through the courts.

[277] As is the case, for example, where a child is born as the result of an extra-marital affair, or where a new partner agrees to assume responsibility for the child.

[278] The Adoption Act 1955 allows the mother to adopt her own child thus extinguishing the father's parental status.

[279] A man who is registered in a child's birth particulars will be liable for child support as a "parent" under s 6 and 7(1)(a) Child Support Act 1991, regardless of whether he is a guardian or indeed has contact with the child. The father may refuse to agree to registration of his name to avoid liability, or may agree with the mother to "top up" her reduced level of the Domestic Purposes Benefit if she agrees not to name him as her child's father.

The Swedish approach

5.73 In Sweden, a government agency is responsible for ensuring that, wherever possible, the name of a child's genetic father is recorded as a matter of public record. This is based on a belief that it is in the interests of every child, and the public generally, for them to have an identified natural father.[280]

5.74 There are several reasons why governments may wish to find out and record information about fathers of children. These include:

- Governments' social responsibility in providing children with access to information about their genetic parents from a publicly held register.[281]
- Governments' economic interest in ensuring that men who procreate children bear some of the cost of rearing them.
- The public interest in giving men the opportunity to make a positive contribution to the life of their child, whether by way of emotional or practical support for the mother, or by way of a shared care arrangement or contact with the child.[282]
- The material benefits for children in providing them with information from which they can claim rights of inheritance.

The US approach

5.75 Various strategies have been devised in some of the States in America to establish and record the paternity of children born to unmarried couples:[283]

- In hospitals, paternity establishment programmes have been initiated. The mother and father are interviewed by officials who emphasise the importance of the child having a named father. Fathers are encouraged to make an acknowledgement of paternity.
- Letters are sent to the man named by the mother as the father of her child requiring him to attend an interview or to complete a questionnaire.
- Letters are sent to mothers who have not named the father of their child asking them to attend an interview. If a mother who is receiving public assistance fails to attend the interview her payments will be reduced. For mothers not on public assistance, attendance at the interview is voluntary. In New Zealand, mothers automatically gain less financial assistance if the father is not named.

---

[280] R Pickford "Unmarried Fathers and the Law" in A Bainham, S D Sclater and M Richards (eds) *What is a Parent? – A Socio-Legal Analysis* (Hart Publishing, Oxford) 143, 157 n 31.

[281] The English Court of Appeal decision in *Re H (Paternity: Blood Test)* [1996] FLR 65 is of interest for its forthright endorsement of a child's right to know her true genetic father even though the father was not in a position to care for the child.

[282] In some cases the mother may be unable or unwilling to care for the child and the father, or his family, may be willing to assume responsibility.

[283] See F L Sonenstein, P A Holcomb, K S Seefeldt "What Works in Improving Paternity Rates" (Fall 1993) Public Welfare 26; R A Monson "State-ing Sex and Gender: Collecting Information from Mothers and Fathers in Paternity Cases" (June 1997) Gender and Society 11–3, 279.

- Fathers who deny paternity are offered the opportunity to participate in DNA parentage testing, the costs of which are met by a public fund if the putative father agrees to admit paternity if the test results show a specified level of probability that he is the father.
- Data-matching systems, using school and criminal records, are used to locate named fathers.
- Legal provisions that a putative father who refuses to provide a genetic sample and fails to attend a court hearing is presumed to be the father of the child and can have a default judgement entered against him.

5.76 While some of these approaches to establishing fatherhood may seem heavy-handed they have led to significant increases in the percentage of named fathers.

Questions

Q13 Should efforts be made to increase the number of fathers named on birth certificates?

Q14 Should the government be required to make inquiries into the paternity of every child whose name is not shown on the child's birth certificate, as is done in Sweden?

Q15 Is there merit in any of the approaches adopted in the United States in ensuring that a greater percentage of unmarried fathers are identified in law?

Q16 What other means could be adopted to increase the number of named fathers on birth certificates?

Q17 Are there situations where the father's details should not appear on the birth certificate?

Posthumous fathers

5.77 There are three situations in which a mother may wish to register the name of a deceased father on her child's birth certificate. These are where:

- the father has died during the period between the child's conception and birth;
- the mother has been inseminated with the semen of her deceased husband or partner after his death; or
- the mother is inseminated with donor semen after the death of her husband or partner pursuant to a consent given by him for the procedure during his lifetime.

5.78 In the United Kingdom, there has been significant public debate over the need to provide mechanisms that enable registration of fathers' names in these circumstances. The Human Fertilisation and Embryology (Deceased Fathers) Act 2003 (UK) was passed as a response to a High Court ruling in February 2003 that a restriction on a woman registering her husband or partner's name on their child's birth certificate after his death contravened Articles of the European Convention of Human Rights that establish rights to respect for privacy and family life and freedom from discrimination.

5.79 The Act amends the Human Fertilisation and Embryology Act and allows a man to be registered as the father of a child conceived after his death with his sperm. There is also provision for a man to be registered as a father of a child conceived after his death using an embryo created before his death using donor sperm.[284] The Human Fertilisation and Embryology (Deceased Fathers) Act enables a man to be registered as a child's father, without conferring on the child any legal status or rights as a consequence of registration.

If a father dies between a child's conception and birth

5.80 In New Zealand, there does not appear to be any barrier to a married woman registering her husband's name on their child's birth certificate if he dies during the period between the child's conception and birth. By virtue of section 5 Status of Children Act 1969, he is presumed to be the father of any child born during the marriage or within 10 months of the marriage being dissolved by death. On this basis the deceased father's name could be registered.

5.81 The position of an unmarried mother who wishes to register the name of her deceased de facto partner is more complex. Under the Births, Deaths, and Marriages Registration Act 1995 an unmarried mother would usually need to obtain the father's consent before he can be registered as the father.[285] The only way in which she could register a father posthumously, if he died during the period between conception and birth, would be if:

- she obtained a declaration of paternity or a paternity order naming him as the father;[286] or
- she was able to satisfy the Registrar-General of Births, Deaths and Marriages that the man was the child's father and that he was unavailable[287] to give consent.[288]

5.82 Although the evidence required to satisfy the Registrar-General would be a matter of discretion, one would anticipate that a statutory declaration by the child's mother, confirming that she had been living with her de facto partner at the time of conception, would be sufficient unless there is some disagreement on the part of the deceased's family.[289]

Children conceived after the death of their father

5.83 Where a child was conceived posthumously through the use of the husband or partner's frozen sperm, the Registrar-General would need to be satisfied that the man was the child's father. This would presumably be straight forward, because the fertility clinic would hold written records of the deceased man's consent to

---

[284] An embryo created 12 years earlier has been successfully implanted. BioNews 244 9 April 2004, 4.

[285] Section 15 Births, Deaths, and Marriages Registration Act 1995.

[286] Section 15(3)(b)(iv) or (v) Births, Deaths, and Marriages Registration Act 1995.

[287] "Unavailable" is defined in s 2 of the Births, Deaths, and Marriages Registration Act 1995 to include death.

[288] Section 15(3)(b)(iii) Births, Deaths, and Marriages Registration Act 1995.

[289] Other evidence might include family records, letters, photos, or statutory declarations from family members and friends.

use of his frozen sperm to achieve conception. It is now also possible to remove live sperm from a man shortly after his death to achieve conception, although it is doubtful that this would occur through fertility clinics in New Zealand.[290]

5.84 Where conception was achieved with the use of donor sperm and the deceased husband had, prior to his death, consented to the procedure, it is probable that he would be deemed to be the child's father[291] and likely that the Registrar-General would register his name as such.

Questions

Q18 Should the name of a deceased father be included on the child's birth certificate?

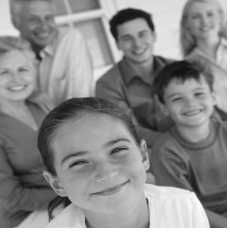
Q19 Should the father's name appear on a birth certificate even if conception takes place years after his death using his frozen, stored sperm?

Q20 Should the father's name only be included on the child's birth certificate where he has given written consent during his lifetime for the posthumous use of his sperm to achieve conception?

Q21 Should an intending non-genetic father be able to be registered on the birth certificate of a child conceived through the use of donor sperm, if he knew of and consented to the procedure, but died before the conception and birth of the child?

[290] New Zealand fertility clinics are prevented by their rules of accreditation under the Reproductive Technology Accreditation Committee from using a dead man's sperm in the absence of his written consent. In Israel, regulations introduced in 2003 enable women to apply for a court order that semen be removed from a deceased husband or partner without his consent in order to achieve conception.

[291] Section 5(1)(a) Status of Children Amendment Act 1987.



6

Agreements

6.1 This chapter reviews the current legal situation regarding agreements that allocate responsibility for the care of children and considers their use in situations where adults are arranging for the conception of a child outside the traditional two-parent family.

CURRENT LAW REGARDING AGREEMENTS

6.2 Agreements are used by parents after separation to guide their responsibilities in the care of their children when they are no longer living together. Children benefit from collaborative parenting and are damaged by a bitter or prolonged contest over their care.

6.3 New Zealand's Family Court system strongly encourages families to reach their own agreements,[292] although the Court will only enforce these agreements if they promote the welfare of the child.[293] Furthermore, agreements between a parent and a non-parent (for example, a grandparent, actual carer, step-parent or matua whāngai) or between carers who are not parents of the child are neither valid nor enforceable.[294]

6.4 Parents or others wanting to enforce an agreement must obtain a guardianship, custody or access order from the Family Court. It is open to the parents to give an agreement legal force by obtaining a consent order, but the Court can refuse to make orders if it is not satisfied they are in the best interests of the child. It was said in *Wise v Wise*[295] that "[w]hile agreement between the parents must always be encouraged, the Court's first duty is to the child". The agreement may

---

[292] Before any proceedings are filed couples can, with a minimum of formality, take advantage of counselling services arranged by the Family Court. Once proceedings are commenced, the parties can be referred to a counsellor or can take advantage of judge-led mediation. One of the duties of counsel for the child is to explore with the disputing parties the possibility of resolving the matters in dispute by agreement. The child's lawyer can alert the adults to the child's wishes and needs and help them focus their attention on the child. Counsel for the child can talk to both parties and can engage in shuttle diplomacy. Where the Court obtains a report from a psychologist, the psychologist is likely to canvass with the parents the benefits of a negotiated settlement.

All of these services are free and are directed towards helping people to resolve their differences by agreement so as to avoid litigation and a court-imposed decision.

[293] Section 18 Guardianship Act 1968.

[294] Section 18 Guardianship Act 1968 applies only to agreements between the father and mother of a child.

[295] Unreported 5/5/03, Judge Inglis QC, FC Hamilton FP 019 316 01 para [15].

carry some weight with the Court on a custody or access application but the Court will make an independent assessment of the child's welfare.

6.5 It should be noted also that:

- a warrant cannot be issued to enforce custody or access rights conferred by agreement;[296]
- a custody or access agreement does not prevent the child being removed from New Zealand;[297]
- the criminal offence of hindering or preventing access can be committed only where there is an order in force.[298]

Care of Children Bill 2003 provision for agreements

6.6 The Care of Children Bill, which, if enacted, would replace the Guardianship Act 1968, contains new provisions about agreements and their enforceability. Clause 41 provides that agreements between parents or guardians cannot be enforced, although some or all of the terms of the agreement that relate to a child's upbringing, day-to-day care or contact can be embodied in a court order and enforced accordingly.[299] Clause 41 does not deal with agreements between people other than parents or guardians.

6.7 Clause 42 of the Care of Children Bill deals with agreements between parents and gamete donors regarding a donor-conceived child's upbringing, day-to-day care or contact.[300] It states that such agreements are not enforceable unless their terms are embodied in a court order with the consent of all parties.[301] Where the parties to an agreement that has been embodied in a court order cannot agree about the role of a donor in the upbringing of the child, any party can apply to the Court for its direction and the dispute will be resolved on the basis of the child's welfare and best interests.[302]

6.8 It has been questioned whether the Care of Children Bill goes far enough.[303] The clauses that deal with agreements between parents are weaker than those in the Guardianship Act 1968 which state that agreements between parents

---

296 See s 19 Guardianship Act 1968 and *Speer v Speer* (1975) 14 MCD 106.

297 Section 20 Guardianship Act 1968 applies only where there is a court order or a pending application for custody or access. But if the child is removed to a country that is a party to the Hague Convention on Child Abduction it may be possible to have the child returned via the Convention: *Christie v Dellabarca* [1977] NZFLR 396, (1996), 15 FRNZ 293 and see *Trapski's Family Law* Vol IV GM.4.06(3).

298 Section 20A Guardianship Act 1968.

299 Clause 41(1) and (3)–(5) Care of Children Bill 2003.

300 The Bill addresses the concerns raised by a full bench of the High Court in *P v K* above n 7, where Heath J commented "Some weight should be given to the ability of adults who choose to use artificial reproductive technologies, to reach agreement with a known donor as to what 'rights' and 'responsibilities' they are to have with regard to the children". He added that "[t]he child has no such choice; hence, the need for a 'best interests' inquiry to evaluate whether it is appropriate to enforce such agreement".

301 Clause 42(3) and (4) Care of Children Bill 2003.

302 Clause 41(6) and clause 4(1)(a) Care of Children Bill 2003.

303 Submission by Family Law Section of New Zealand Law Society to the Justice and Electoral Committee on the Care of Children Bill (24 September 2003).

are "valid" but shall not be enforced where the Court considers enforcement is not in accordance with the child's welfare. Agreements that have no force in law, unless they are incorporated in a court order, achieve little and provide a strong incentive for parents and others to initiate court proceedings and obtain orders to confirm any agreement reached. Clause 42 applies only to donors and recipients and not to their partners or members of their extended families.

Parenting plans: Australian Commonwealth

6.9 Under Australian Commonwealth law, agreements relating to children (known as parenting plans) can be registered in the Family Court and, upon registration, have the effect of a court order. They must deal with at least one aspect of parental responsibility (for example, residence or contact) but may also deal with other matters.[304] Although a parenting plan will usually be agreed upon between the parents of a child, other persons may also be parties. Before the Court will register the agreement, it must be satisfied that registration is in the best interests of the child. Information must be provided to enable the Court to make a judgment on this issue.[305] The Court can set aside a parenting plan where it is no longer in the best interests of the child.[306]

Parental responsibility agreements: United Kingdom

6.10 The United Kingdom courts recognise parental responsibility agreements entered into between unmarried parents or between the parent and step-parent of a child.[307] Parental responsibility agreements must be in prescribed form[308] and confer parental responsibility on the unmarried father or step-parent.

Agreements in donor gamete conception and surrogacy

6.11 Because forms of parenting outside the traditional mother/father model have become more common, and because a child may have social parents who are not the child's genetic parents, it is vital that there be a legal framework that reallocates the responsibilities and rights of those involved in the child's conception, birth and ongoing care and that resolves disputes.

Donor gamete conception

6.12 Agreements have the potential to play an important stabilising and clarifying role in the parenting of a child conceived by donor gametes. All interested parties should be encouraged to reach an agreement prior to the child's conception. Even in cases where children are conceived via unidentified sperm donation there is room for some form of agreement, such as for the exchange of photographs and other information. Clinics currently assist parties who want to make arrangements for the sharing of information or contact with the child.

---

[304] The relevant provisions are contained in Part VII, Div 4 of the Family Law Act 1975 (Cth).

[305] Section 63E Family Law Act 1975 (Cth).

[306] Section 63H(1)(c) Family Law Act 1975 (Cth).

[307] Sections 4, 4A Children Act 1989 (UK).

[308] Parental Responsibility Agreement Regulations 1991 (UK).

6.13 Where the child is conceived using gametes from a known donor, the case for agreements is even stronger. In *Re Patrick*[309] the absence of any pre-conception agreement made it more difficult for the Court to determine the issue, because it had to hear lengthy evidence and decide issues of credibility in order to determine the parties' intentions as to the donor father's involvement. In saying this, the presence of an agreement will not necessarily resolve all disputes, as the facts of *P v K* show.[310]

Surrogacy

6.14 Surrogacy inevitably involves a relationship between the parties both prior to and between the conception and birth of the child. There are greater risks of a relationship breakdown than with donor gamete conception. Although egg donation is a physically invasive and uncomfortable procedure, and must be done close to the time of egg transfer,[311] the genetic mother's actual physical involvement ceases with the retrieval of her eggs. A sperm donor's role, though vital, is brief and non-invasive.

6.15 A surrogate mother, on the other hand, will assume the risks, limitations and discomfort of a nine month pregnancy and childbirth. She faces possible medical complications and the risk of miscarriage with resulting emotional strain. Many changes can occur over the period between conception and birth. The mother or the commissioning parents may have a change of heart. The pregnancy might not carry to term or the child might be still-born. There may be multiple births or the child may have a disability. Events can occur during the pregnancy that cause the parties to review their situation (for example, the commissioning parents may separate or decide not to continue with the arrangement). There are many matters upon which discussion and agreement would be useful, including practical issues such as payment of medical expenses.[312]

6.16 The experience of those people consulted by the Law Commission is that pre-conception arrangements in surrogacy have worked well. Some have drawn up written agreements (knowing that they will be unenforceable) while others have relied on verbal arrangements and mutual trust. In these cases everything has

---

[309] *Re Patrick: An application concerning contact* (2002) FLC 93-096. In this case the mother killed herself and her child after the Court gave the genetic father increased access to the child against her wishes. The discussions as to his involvement prior to conception had been vague and roles undefined. The parties later strongly disagreed as to what had been agreed and understood at the time.

[310] *P v K*, above n 7. In that case, there had been a pre-conception agreement between two same-sex couples. Difficulties arose between them after the child's birth and the known sperm donor sought to enforce the agreement. The High Court reversed a Family Court decision that denied the donor any involvement in the life of his child, expressing concern that the law did not recognise agreements between donors and recipients.

[311] Unlike sperm, eggs cannot be frozen. Eggs are harvested, mixed with washed sperm then incubated for three to five days in a laboratory prior to implantation.

[312] The Human Assisted Reproductive Technology Bill, proposed to be amended by Supplementary Order Paper 80/2003, does not make surrogacy arrangements illegal but states that surrogacy agreements shall not be legally enforceable. While this provision is no doubt intended to protect a birth mother from being forced to relinquish her child, as it currently stands it will prevent other agreed terms from being enforceable. Such terms might provide for contact between the child and the birth mother and between the child and his or her full or half siblings.

gone according to plan and there has been ongoing contact between the families over a period of years. However, things can go wrong, as is evident from high-profile cases overseas.

Transfer of parental status itself by agreement

6.17 Agreements that purport to transfer parental status from a parent to non-parent have never been held as binding under common law.[313] Such agreements were deemed to be contrary to public policy and unenforceable by either party.[314] The policy rationale was that to allow such transactions would be to treat children as property. If parental status could be transferred by agreement, children's security and sense of identity could be placed in jeopardy. The legislature, however, has created two situations where full parental status can be reallocated: by court order (adoption) or by a statutory deeming provision (donor gamete conception).[315] In adoption there is an assessment of the suitability of the adults to be substitute parents before the order is made. In the latter there is no vetting. Should the law allow the transfer of parental status by agreement in other situations and, if so, what protections would be required?

Options for strengthening the legal status of agreements

6.18 There are various ways in which the law could provide a stronger legal framework than currently exists for parties to agreements in donor gamete conception and surrogacy situations.

6.19 Agreements dealing with the upbringing, day-to-day care, or contact with a child could be enforceable provided the Court is satisfied that enforcement of the agreement will be in the best interests of the child.

6.20 Agreements could be registered in court thereby creating a rebuttable presumption in any subsequent proceedings that they be enforced according to their terms, provided the parties have had independent and joint counselling and separate legal advice. Enforcement would be conditional on an abbreviated hearing in which the best interests of the child are evaluated.

6.21 The legislation could provide for counselling or mediation to be available to resolve any disagreements that may arise in relation to the interpretation of, or compliance with, the agreement,[316] or for the Family Court to be given the power to give directions and to make such orders as it thinks proper in relation to the matters in contention.[317]

6.22 Agreements could include provisions designating who will have the legal responsibilities and rights of parenthood, as well as what will be the day-to-day and long-term care arrangements and contact with the child.

---

[313] *Humphreys v Polak* [1901] 2 KB 385.

[314] See A Dickey *Family Law* (3 ed, LBC Information Services, Sydney (NSW), 1997) 338.

[315] However, the law has never prevented parents from delegating to others the day-to-day care of their children. Parents can employ a nanny or foster carer or can send their children to boarding school. They can arrange with a whānau or family member or friend to care for their children. Parenthood and guardianship involves legal status, while the actual day-to-day care of children does not.

[316] See Law Commission, above n 32, para 116 and see clause 41(2) Care of Children Bill 2003.

[317] See clause 42(6) Care of Children Bill 2003.

6.23 Agreements could define the rights and responsibilities of a wider group of persons than just the intended social parents, the surrogate mother and any gamete donors. Some people involved in donor gamete conception or surrogacy who currently have no standing in relation to a child's care or upbringing might be given some role in the child's life by agreement. These include:[318]

- the partner of a gamete donor;
- the parents or siblings or other relatives of a gamete donor (the genetic grandparents, aunts, uncles, brothers or sisters of the child);
- members of the child's whānau;
- the children of a surrogate mother (who may be full or half siblings of the child).

6.24 There might be difficulties if all clinic gamete donation procedures were required to be subject to a pre-conception agreement. Currently, gamete donors sign a form held by the clinic agreeing to waive all parental responsibilities and rights in relation to any child conceived from their gametes. Recipients use the gametes on that basis. The law has traditionally refused to enforce attempts to transfer parental status and the legal validity of these waivers remains to be tested.

6.25 There may be practical difficulties in requiring donors and recipients to meet and sign an agreement. The sperm donation may have been made years previously. The parties may live far apart. There may be a reluctance for the recipient woman to meet a potential sperm donor when the treatment may not result in conception or the woman may discontinue treatment. In those cases, a great deal of time and consideration might be spent in negotiating an agreement that never takes effect. The recipient and her partner might be hesitant to meet with the donor face-to-face out of anxiety that the donor might not approve of them as potential parents. Either party might see a meeting as an unjustified invasion of their privacy.

Parenting plans in adoption: Law Commission recommendations

6.26 When considering the potential for agreements in relation to gamete donation and surrogacy, the proposals in the Law Commission report on adoption law reform are informative. The report proposed that a parenting plan be drawn up between the birth parents that set out their agreement on such matters as the sharing of information and photographs, contact between the child and the birth parents and other family members and inheritance rights.[319] The Commission found the arguments for and against making a parenting plan legally enforceable evenly balanced, but eventually recommended that, in the interests of the stability of the adoptive family, there should be no access to the courts to enforce a plan.[320] The Commission recommended that mediation services be available

---

[318] The donor's partner and the donor's parents were given rights in the agreement drawn up by the parties in *P v K* above n 7.

[319] Law Commission, above n 32, paras 106–116.

[320] By reason of s 16(2) Adoption Act 1955 a birth parent is no longer a parent of the child after the making of an adoption order and there are jurisdictional difficulties in giving a non-parent enforceable rights.

to resolve any disputes.[321] Before a parenting plan could be registered, the Court would have to be satisfied that the parties had been given independent legal advice or, alternatively, that the plan had been developed after consultation with a family and child counsellor. The lawyer or counsellor would have to give written confirmation of this fact.[322]

6.27 See chapter 7 for options for conferring and recording parental status in donor gamete conception and surrogacy.

[321] Law Commission, above n 32, paras, 115, 116.

[322] A copy of the plan must also be supplied with the application along with other information required under the Family Law Rules; see A Dickey, above n 314.

7

Options

CONFERRING AND RECORDING PARENTAL STATUS IN DONOR GAMETE CONCEPTION AND SURROGACY

Introduction

7.1 In this chapter we consider the ways in which the roles of the various people involved in the conception, birth and upbringing of children born through donor gamete conception or surrogacy and into gay and lesbian families might be recognised, and how parental status and parental responsibilities might be reallocated and recorded.

7.2 New technologies, changing social patterns and surrogacy arrangements have resulted in new family situations that challenge traditional assumptions about parenthood and the parenting of children. It is these assumptions that form the underpinnings of the present law. They all challenge the legal model, based on its English origins, where a child has two legal parents: one genetic mother and one genetic father. Theoretically, a child may now have three mothers: a genetic mother, a gestational mother and a social mother. They may also have two social mothers should they be raised in a lesbian couple household. Likewise, with such developments, children may have two or more fathers: a genetic father and one or more social fathers.

7.3 New challenges require new legal responses. How can the law give the persons who are to assume the actual care and parenting of a child the status and powers needed to carry out their responsibilities and maximise the benefit to the child? How can the law ensure that the three or more adults who will play an ongoing role in the child's life each have the appropriate legal status and support? How can the law ensure that children retain knowledge of their genetic lineage where they are being raised by social parents who are not their genetic or gestational parents?

7.4 New Zealand law has long made a distinction between genetic parenthood on the one hand and parental rights and responsibilities (guardianship) on the other. It already does, in specific situations, include non-genetic parents as parents. There are two fundamental questions. Should non-genetic parents be given status as "parents" at law, or some other status such as guardians? Second, if they are to be parents, should they have *parental rights and responsibilitie*s only, with the

donor retaining status as a genetic parent, or should donor parenthood be extinguished altogether? Options one, two and three, set out below, give non-genetic social parents status as "parents". Option 4 gives them status as guardians. Options one and three legally extinguish genetic parenthood. Options two and four transfer parental responsibilities and rights to the social parents, but do not extinguish the fact of genetic parenthood itself.

Principles

7.5 Before looking at the options, we suggest some basic principles as a guide to the best way to reallocate parenthood in these situations. These are:

- that the best interests and welfare of the child should be of paramount importance;
- that children born as a result of gamete donation or surrogacy need and have a right to know about the circumstances of their conception and birth;
- that persons raising children from birth as their "parents" should have the legal rights and responsibilities necessary to nurture and care for the child;
- that there should be respect for the diversity of family relationships and the contributions each person makes towards the conception, gestation and raising of a child;
- that a child can have a number of committed and cooperative adults involved in his or her upbringing, provided always that these people have clear lines of responsibility and mechanisms for dealing with conflict; and
- that children should be given the opportunity to express their views on matters that affect them, and have these views taken into account where the children are of sufficient knowledge and maturity to understand the situation.

7.6 Where the people involved in the conception, birth and upbringing of a child agree on the rights and responsibilities they will assume from birth, this agreement should be recognised in law and given legal effect except where it is contrary to the child's best interests.

OPTIONS FOR ALLOCATING PARENTAL STATUS AND RESPONSIBILITIES

Option 1: Reallocating parenthood by a statutory deeming provision – retaining the status quo

7.7 Sixteen years ago the Status of Children Amendment Act 1987 established rules reallocating the parenthood of children conceived using donor gamete procedures. These rules are very similar to those adopted in earlier times in comparable overseas jurisdictions such as Canada, the United States, the United Kingdom and Australia. In summary, the rules provide:

- a child conceived by means of a donated ovum or embryo is the child of the birth mother;

- a child conceived using donated sperm is deemed to be the child of the mother's husband or male partner (if she has one and if he knew of and consented to the procedure);
- a child conceived with donated sperm to an unpartnered woman, or to a woman whose husband or partner has not consented to the procedure, is a child of the donor father although the donor has none of the rights and liabilities of a father in law.[323]

7.8 The Care of Children Bill, currently before Parliament, would make two important changes to the rules:

- Where a woman has a same-sex partner who consents to the donor gamete procedure, her same-sex partner will be deemed a parent of the child.[324] Thus, the child will have two female parents.
- Where a woman does not have a husband or partner, or where her husband or partner has not consented to the procedure, the sperm donor will not be a father of the child.[325] The child will have no legally recognised father.
- An ovum or sperm donor can become a legal parent of the child conceived with his or her gametes if he or she later becomes a partner of the child's gestational mother.

7.9 The effect of these changes would be that sperm and ovum donors will always lose their parental status by operation of law. The donor can only regain that status by later becoming the mother's husband or partner.[326] The same-sex partner of a mother who has consented to the donor gamete conception procedure becomes a parent of the resulting child by operation of law.

Advantages of retaining the status quo

7.10 The deeming approach has been part of New Zealand law since 1987. It is a simple and straightforward way of reallocating parenthood, insofar as it provides immediate certainty and clarity as to the adults who have legal parental rights and responsibilities once the child is born. The non-genetic parent does not have to take any steps to gain parental status in law. The gamete donor does not have to do anything to remove himself or herself from the legal responsibilities that a "parent" owes a child. Non-genetic social parents are granted that status simply by living in a marital or de facto relationship with the child's birth mother. Non-genetic, gestational mothers are given parental status by giving birth to the child.

7.11 Where a child is going to be raised in a two-parent family and it is agreed that the donor will have no ongoing role in the life of the child, the deeming

---

[323] The full sections of the Status of Children Amendment Act 1987 are set out in appendix 3.

[324] Section 17(2) Status of Children Act 1969 as proposed to be inserted by clause 167 Care of Children Bill 2003.

[325] Section 21(2) Status of Children Act 1969 as proposed to be inserted by clause 167 Care of Children Bill 2003.

[326] Section 22 Status of Children Amendment Act 1987.

mechanism provides a clear expression of the parties' intentions and provides the social parents with the legal rights and legal responsibilities necessary to care for the child. Under the Care of Children Bill, the partner of a recipient woman, whether male or female, gains parental status. Hence, the provision provides the same secure framework for a lesbian led two-parent family as a heterosexual family. Non-genetic parents in two-parent families will have legal clarity and certainty and be empowered to act as parents from the beginning of the child's life.

Disadvantages of retaining the status quo

7.12 The deeming mechanism is based on an adoption model that purports to transfer both genetic parenthood and the responsibilities and rights of parenthood from the child's genetic parents to his or her social parents. The adoption model has been criticised on the grounds that creating artificial parenthood spawns a number of anomalies and distortions.

Extinction of natural parenthood and the creation of legal fictions

7.13 Extinguishing the natural parenthood of the birth parents ignores the genetic contribution they have made to the conception, gestation and birth of the child. It removes in law the genealogical and genetic links between the child and the birth parents. For Māori, a process by which the lineage and ancestry of a child can be expunged, and the child's kinship relationship with their whānau, hapū and iwi extinguished, is alien and unacceptable.[327]

7.14 Under the Care of Children Bill, where a child is born into a two-parent lesbian family or to a single woman, the full parenthood of the donor father is extinguished. Unlike children in two-parent opposite-sex families who are given a replacement legal father, children in these families have no legal father. Some argue that a child should always have a mother and a father recognised in law, even if the father plays no part in the child's upbringing and is unknown to the child. However, is having a father without liability or rights any more advantageous? Such a father was described in *P v K* as being a "shell father".

7.15 The advantage that the latter group of children has over children in two-parent opposite-sex families is that they inevitably know that they have a genetic father who is not their parent and, further to the HART Bill, will ultimately be able to seek out his identity and information about him.

7.16 The downside of the deeming mechanism in heterosexual parent families lies in the enduring legal fiction it creates. The fact of donor conception is obscured more easily than in same-sex families by the child's opposite sex dual parentage. The law, which replaces all parenthood including genetic parenthood, maintains this deception indefinitely. Unless the parents tell, the child will never know.

Suitability of deemed parent

7.17 The deeming provisions in the Status of Children Amendment Act 1987 apply immediately on birth, reallocating parenthood to the non-genetic parents without considering whether the reallocation is in the child's best interests. If the child were to be adopted, the non-genetic parents would have to be vetted by the

---

[327] Department of Social Welfare, above n 226, appendix II.

Department of Child, Youth and Family Services (CYFS) for suitability as parents prior to the adoption order being approved. Is the deeming mechanism sufficient protection to the child? The assumption underlying the law seems to be that because one parent is the genetic parent of the child it is sufficient for that parent's partner to be given all the rights and responsibilities of parenthood. Step-parents can adopt children and the current practice of CYFS is to waive the requirement for a social work report. However, the courts are looking less favourably on step-parent adoptions because this completely cuts out the child's natural parents. An important distinction between adoption and donor gamete conceptions is that, in the latter, two parents have made a decision and commitment prior to the conception to conceive and raise this child together.

Intending donor parents lose parental status

7.18 Where a known donor has been assured of parental opportunities for involvement in the child's life, parental status is nevertheless removed by law. The absolutist nature of the deeming provisions means that the donor loses all parental status, rights and responsibilities in respect of the child. If the donor's relationship with the child's social parents breaks down, the donor faces real difficulties in pursuing a relationship with the child.[328] This makes the child's relationship with his or her genetic parent vulnerable and could deprive the child of a potentially beneficial relationship.

Elevation of non-genetic parent over other adults who care for children

7.19 The deeming mechanism advantages the birth mother's spouse or partner over other persons possibly involved in a child's care. Matua whāngai, grandparents, step-parents and foster parents may all be the primary carers of children even though they are not genetic parents. They can only secure parental responsibilities and rights by means of adoption or guardianship orders. In each case, an order will only be granted after independent judicial scrutiny of their personal qualities and what benefits the child will accrue by granting the application. This was the issue raised in *P v K*: why should husbands and partners be given special privileges that are denied other actual carers?

Surrogacy and deeming parenthood

7.20 There are no deemed parenthood provisions in New Zealand law that apply specifically to children born of surrogacy. The deeming mechanism, as it applies under the Status of Children Amendment Act 1987 and as it will apply under the Care of Children Bill 2003, creates a mismatch between the child's social and genetic parents in surrogacy and their respective parental rights and responsibilities. Under the deeming provisions, the commissioning mother is not the legal mother of the child, despite intending to care for the child and, in some cases, being the child's genetic mother. The commissioning father, even if he is the child's genetic

[328] As was the case in *P v K*, above n 7, although the High Court did find an alternative route to involve the father in the life of the child via an application for custody as "any other person".

parent, may be deemed not to be its legal father if the surrogate mother has a husband or partner who knew of and consented to the procedure.[329]

7.21 It would be possible to legislate that, subject to certain conditions, the commissioning parents are for all purposes the parents of the child and the gestational mother is not a parent.[330] This might seem a simple and tidy solution but it has serious drawbacks. The surrogate mother would forfeit all parental rights without going through a process of choosing to relinquish them after birth, as occurs in adoption. The surrogate mother would be treated as a stranger to the child, despite having gestated and given birth to him or her and, in many cases, being the child's genetic mother.

7.22 A deeming mechanism avoids scrutiny of the commissioning couple as potential parents even in cases where neither one of them is a genetic parent.[331] Adoptive parents are independently investigated by CYFS and the proposed adoption is scrutinised by a judge who must be satisfied that the applicants are fit and proper people to care for the child and that adoption will promote the child's welfare and interests. None of these safeguards would apply if commissioning parents in surrogacy arrangements were deemed to be the child's parents.

Birth certificate records under the status quo

7.23 Under this option, the child's birth certificate records the woman who gave birth to the child as his or her mother (whether or not she is the genetic mother) and her spouse or partner as the father (whether or not he is the genetic father). Nothing is recorded on the birth certificate to indicate the parents are anything other than the genetic parents of the child.

7.24 Many of the disadvantages in this option may be overcome if there was some indication on the birth certificate that one or both of the social parents were not genetically related to the child but obtained their parental status by law (that is, by parental status order or via the relevant section of the Status of Children Amendment Act 1987).

Option 2: Reallocating parenthood by parental status order

7.25 An alternative to the deemed parenthood model would be to introduce a mechanism by which the non-genetic parent[332] could apply to the Family Court to be granted a parental status order in respect of the child for whose care and upbringing they have agreed to take responsibility. It could be termed a parental status order and application could be made before birth.

---

[329] Where conception is achieved via "artificial insemination" and the Status of Children Amendment Act 1987 applies. This is made even more significant by the fact that deeming, unlike the presumption of paternity, cannot be rebutted once the statutory criteria are established.

[330] A Senate Judiciary Committee in the State of Utah has recommended that the names of the commissioning parents appear on the child's birth certificate. BioNews 244 10 February 2004, 6.

[331] Currently, in New Zealand, it is not possible for commissioning parents using IVF surrogacy to be unrelated to the child because NECAHR requires a genetic link with one parent. While this can occur in private arrangements (using the surrogate's ovum and donor sperm), the social parents will have to go through an adoption process to gain legal parental responsibilities and rights in relation to the child.

[332] This includes the partner or spouse of the genetic and/or gestational mother in donor gamete conception, or the non-genetic commissioning parent in a surrogacy arrangement.

Features of the parental status order model

7.26 An interested person would be able to acquire parenthood and guardianship rights and responsibilities for the child by obtaining a parental status order from the Family Court. The gamete donor or surrogate mother would still be recognised in law as the genetic and/or gestational parent for the purposes of birth registration, but would be declared not to be the child's guardian. Accordingly, he or she would have no automatic entitlement to a role in the child's care and upbringing, unless the parties intend that they should be a guardian in law.

Who could apply

7.27 An application to the Family Court for a parental status order could be made by:

- the husband or partner (including a same-sex partner) of the woman who is to give birth to a child conceived with donated sperm (see case studies chapter 3: Fernando, Miriama, Teresa, Jack);
- commissioning mothers and fathers in surrogacy arrangements who do not have legal parental status, whether or not they are genetically related to the child (see case studies chapter 4: P's social mother; O's social mother and Mrs A);[333]
- an egg donor who intends to be a parent (see case studies chapter 4: Claire, if this had been the intention);
- the partner of a sperm donor (see case study chapter 3: Elliott).

7.28 An application could be filed prior to the child's birth but an order would not be made until after the child was born. If the applicant for a parental status order is the child's genetic parent, and the consent of all those concerned is filed in court, the order could be made on the papers without the need for a court hearing. If the applicant is not a genetic parent, or if the consent of any interested party has not been given, a parental status order could be made by the Family Court only if it is satisfied that the order would promote the child's welfare and best interests.

Effect of the parental status order

7.29 The effect of the order would be to give the applicant status as the child's legal parent and the rights and responsibilities that a natural parent enjoys. It would not remove the genetic parental status of the sperm or ovum donor in cases of donor gamete conception, or the genetic and/or gestational status of the surrogate mother in surrogacy, but, where it was sought, would declare that they are not guardians of the child and do not have rights and responsibilities in relation to the child's care and upbringing. If the two birth certificate proposal discussed below was adopted, the name of all parents would be recorded on the full birth certificate, but the publicly available birth certificate would show the names of those granted parental status by parental status order and those other legal parents (such as the birth mother).

---

[333] Genetically related fathers might prefer to apply for a guardianship order, in recognition of the fact that they are already a "parent" but lack legal rights (see case studies chapter 4: Mr A, O's father, P's father).

7.30 Depending upon the form of family arrangement agreed between the parties, the order could simply add a person or persons with parental responsibilities to the existing two genetic parents where it was agreed that all three of them (or more) would accrue parental responsibilities and rights.

7.31 It may be that the effect of a parental status order would be the same as an adoption order if the Law Commission's recommendations in relation to adoption law are accepted by government and incorporated into legislation. The process for obtaining one would, however, be different. The order would be available only to couples of whom at least one has a genetic relationship with the child. Couples without a genetic link with the child would need to pursue adoption to accrue parental status. This adoption process involves scrutiny of the applicants as to their suitability to be parents and a social work report for the Court.

Application to case studies

7.32 Using the case study examples set out in chapter 3, Jack could become Benson's legal father via a parental status order. Marta would not need an order because she is already Benson's mother in law and has rights and responsibilities for his care (despite not being his genetic mother). The order would extinguish the parental responsibilities and rights of the unidentified sperm donor and Simone (the egg donor) in accordance with their agreement prior to conception.

7.33 In the case of Margerita, Fernando could become her legal father via a parental status order. Lucia would not need an order because she would already be a legal mother with full parental responsibilities and rights by virtue of her status as a birth mother. The order would extinguish all responsibilities and rights of the sperm donor because it was agreed he would have no role in the child's upbringing.

7.34 Miriama could become Moana's parent via a parental status order, which would extinguish David's parental responsibilities and rights, as was agreed prior to conception. He could secure his ongoing contact with the child via a parenting agreement as a "parent" from the Court under the Care of Children Bill.

7.35 Teresa and Elliott could become parents of Cory via a parental status order. This would not extinguish the responsibilities and rights of parenthood held by Cory's genetic parents, Sean and Maryanne. All four persons would be parents with legal responsibilities and rights in relation to Cory's upbringing.

Advantages and disadvantages of parental status orders

7.36 Parental status orders would provide the people who intend on assuming day-to-day care for the child with the responsibilities and rights necessary to act as effective parents. It would place primary responsibility for the care of the child on the people who formed the intention to procreate, without creating a legal fiction in the process. It would confer parental status on non-genetic parents without extinguishing the fact of the genetic or gestational parental relationship between the gamete donor or surrogate mother and the child. Where it was applied, it would permanently remove the parental rights and responsibilities of the gamete donors and surrogate mother, if this was the parties' intention. The disadvantage of this option is that people have to take legal steps to become parents, rather than being automatically granted parental status as in deeming. Donors' liabilities and rights are not automatically extinguished, where this is the parties' wishes.

Multi-parent families

7.37 These families are mainly families led by lesbian and gay parents. Where the sperm donor wanted rights and responsibilities for the child (along with the mother's same-sex partner) he could obtain either a parental status order or be registered on the child's birth certificate as the genetic father with the mother's consent. In this way, should the Care of Children Bill be passed, he would become an automatic guardian of the child. If the Bill is not passed, he could acquire parental rights and responsibilities by making a parental status order or guardianship application to the Court. The term "donor" could be redefined so as to be based upon the intention of the parties rather than the means of conception.

7.38 Where all three intend that he have continuing contact with the child but no legal parental responsibilities and rights, he could be recorded on a first birth certificate as a donor father, which would not give him legal rights and responsibilities as a parent. He would not apply for a parental status order but his right to ongoing contact with the child could be given effect to via a parenting agreement, which could be registered in the Court and would be enforceable under the Care of Children Bill.

7.39 Pre-conception parenting agreements and parental status orders would enable gay and lesbian families to consider the options for all parties in deciding to conceive a child. The child's legal relationship with all adults taking responsibility would be certain. If relationships were to break down, the Family Court would ultimately determine care issues on the basis of the best interests of the child.

Parental status orders and surrogacy

7.40 The Care of Children Bill, if enacted, would mean that a commissioning father who is the genetic parent of the child would not have to obtain a court order to secure parental status if he is named on the birth certificate (because he will become a guardian automatically). However, a commissioning mother, even if she is the genetic parent, would have to obtain a parental status order, because motherhood is determined in law by who gives birth to the child. A male partner of a commissioning father would also have to obtain an order.[334] An order could be made prior to birth to take effect at a certain time after birth. This would give the birth mother the opportunity to change her mind about relinquishing the baby. If, for example, in 28 days she did not apply to set the orders aside, they would take effect. If an order was granted prior to birth, the commissioning parents could be allowed to care for the child from birth. Under current law, the commissioning parents are not permitted to have the child in their home with a view to adoption and CYFS has to report on their adoption application. If neither parent is genetically related to the child, a parental status order might not be available and the commissioning parents might have to apply to adopt (which has more safeguards for the child).

---

[334] Note *Re Mark*, No. MLF 6910 of 02; decision of Brown J in Family Court of Australia at Melbourne, 28 August 2003, where the Court made orders for parental responsibility in favour of Mr Y, the male partner of Mr X, the genetic father of the child. The child had been born under a surrogacy arrangement with a woman in the United States who was awarded contact rights. The order was made on the basis that Mark's best interests would be advanced by a legal recognition of Mr Y's role in his life.

7.41 The parental status order could be applied for at any time from, say, six months gestation to 28 days after birth. If granted before birth, it would take effect from birth (except where there was a surrogacy arrangement where it would take effect 28 days after birth). A parental agreement could be attached to the application before the Court as evidence of the arrangements entered into by the parties. If relationships broke down, then, as with any other family breakdown, the Family Court would decide issues on the basis of the best interests of the child.

A model with some parallels

7.42 This model has parallels with parental orders that are available in the United Kingdom in surrogacy situations only.

Option 3: Reallocating parenthood by adoption

Features of current adoption model

7.43 Adoption has been part of New Zealand law since 1881. It has met a variety of social and economic needs during the 122 years that it has been part of the New Zealand social landscape. It is a process by which the genetic parents of a child can abdicate from their parental role and transfer parenthood and its attendant rights and responsibilities to a substitute parent or parents.[335] The child is deemed to be a child of the adoptive parents and the birth parents are deemed to cease to be parents of the child. Adoption provides permanency to parent–child relationships because it is almost impossible to revoke an adoption order.[336]

Current role of adoption in donor gamete conception and surrogacy

7.44 Prior to the Status of Children Amendment Act 1987, adoption was of limited assistance in giving legal parental status to the husband or partner of the mother whose child was born as a result of donor insemination. If he was married to the mother, the child could be registered in his name on the basis of the presumption of paternity. His fatherhood would be a matter of public record. He was unlikely to be challenged in regard to his fatherhood by the sperm donor. The de facto partner of the mother of the child could not rely on the presumption of paternity nor could he apply jointly with the mother to adopt the child because joint adoption applications can only be made by a husband and wife.

7.45 What may have occurred in the past is that, despite the fact that the de facto partner was not the child's genetic father, the mother and her de facto male partner would register the man's name as the child's father. The passing of the Status of Children Amendment Act 1987 resulted in the mother's de facto partner being deemed to be the father of a child conceived with donated sperm. There is no need to resort to adoption law to give him parental status.

7.46 The removal of the deeming mechanism under the Status of Children Amendment Act 1987 and replacement with adoption will not cure the problem

---

[335] Except in the case of step-parent adoptions where a parent and step-parent adopt the parent's child to create a new two-parent family unit: see s 3(2) Adoption Act 1955.

[336] The consent of the Attorney-General must first be obtained and it must be shown the order was made by mistake or material misrepresentation: s 20(3) Adoption Act 1955.

of legal extinction of natural parentage. The legal fiction of genetic parenthood is inherent in both adoption and the Status of Children Amendment Act 1987.

7.47 Also, in adoption, the order is not made until after child is born. This makes sense where decisions about who will parent the child are made after conception and often after the birth itself. However, in donor gamete conceptions, decisions about who will be parenting the child from birth onwards have already been made prior to conception. Adoption in these circumstances denies the social parents the legal certainty about their status prior to and immediately after the child's birth. There seem to be potential advantages to the child if his or her social parents have legal certainty prior to the child's birth. This may give the family unit a greater sense of security at a critical time when bonding between all is taking place.

Surrogacy and adoption

7.48 For parents seeking parental responsibilities and rights in relation to a child born in a surrogacy arrangement, adoption is currently the only process to secure such rights. As the law stands now, this is problematic in that it is a criminal offence to take a child into a home immediately after birth for the purposes of adoption. The important bonding at this time between the child and his or her social parents is interfered with. Advertising for a child to adopt is also contrary to the Adoption Act 1955.[337] Under an adoption order the genetic parent as well as the non-genetic parent must apply to adopt the child. The natural parentage of the genetic parent, and also their guardianship rights if they have them, is extinguished by the adoption order and replaced with full parental rights via adoption. This is seen as unpalatable by some, such as Mr A, who queries why he should have to adopt his own child.

7.49 Clearly, there would have to be changes to adoption law if it were to become the approved means by which commissioning parents could acquire rights and responsibilities in respect of a child. One possibility would be to give commissioning parents, one of whom is a genetic parent, a fast track through the adoption process. Another would be to provide statutory authority whereby CYFS could make inquiries and report on the proposed adoption in advance of the child's birth. So as not to discriminate between parents raising children in surrogacy arrangements, and parents raising children via donated gamete conception, the social work report could be dispensed with unless neither parent was a genetic parent.

7.50 If adoption were altered along the lines of the recommendations set out in the Law Commission report *Adoption and Its Alternatives*[338] some of these perceived disadvantages may be lessened.

7.51 The Commission proposed that the legal effect of adoption be reformulated so that, instead of substituting the adoptive parents for the birth parents, adoption would be a transparent process effecting a transfer of permanent parental responsibility from the birth parents to the adoptive parents. Instead of consigning

---

[337] The Ministerial Committee on Assisted Reproductive Technologies, above n 136, 117, commented that some commissioning couples see this process as cumbersome and an unnecessary burden for the child if an adoption order is not granted.

[338] Law Commission, above n 32.

the birth parents to legal oblivion, the law would recognise that the child's birth parents, and their families, retain a kinship, genealogical and genetic relationship with the child and may have some role in the child's life.

Option 4: Reallocating parental responsibilities and rights by guardianship order

Features of allocation of responsibilities by guardianship order

7.52 Guardianship is an established status under New Zealand law.[339] A guardian is not considered in law to be a "parent" of the child. A guardianship order can be discharged at any time if a court considers it no longer serves the child's welfare. It has two distinct elements: the right to *custody* of the child and the right of *control over the child's upbringing.*[340] A guardian's right to *custody* can be taken away by an order giving sole custody to someone else but a guardian's right to *control over the child's upbringing* is unaffected by a custody order. It must be exercised jointly with any other guardian of the child.

7.53 If it were considered that the only persons who should be termed "parents" in law were genetic parents, then guardianship would be the legal means of empowering all social parents with the rights and responsibilities of parenthood. It would ensure the legal status of parenthood went only to genetic parents.

7.54 A child's genetic parents are usually automatic guardians, with some exceptions. If the deeming mechanism under the Status of Children Amendment Act 1987 was repealed, a new mechanism deeming spouses and partners to be guardians could be put in its place. They would gain automatic guardianship without needing to apply for it.

Advantages of guardianship generally

7.55 Guardians have all the powers and responsibilities necessary to foster the child's development, education and upbringing. They have the tools necessary to do the job of parenting. The term "guardian" is a reminder that children need committed adults to guard or protect them from harm. Unlike adoption, guardianship does not create a legal fiction as to the child's genetic parentage nor does it sever the child's relationship with birth parents, birth grandparents, siblings and so on.

7.56 Guardianship does not have the connotations of ownership of the child that adoption carries. It is not offensive to Māori cultural values. Guardianship orders leave intact children's genetic, genealogical and kinship links with their birth family.

7.57 If parenthood should be about genetic ties, creating legal "parenthood" in favour of a person who has no genetic link to the child could be said to confuse this distinction. A child will also know, if one of his or her carers is a guardian rather than a parent, that he or she has another genetic parent elsewhere.

---

[339] Its origins can be traced back to the Infants Guardianship and Contracts Act 1887, which, in its turn, leads back to English laws formulated under the reign of Charles II.

[340] Section 3 Guardianship Act 1968. The proposed Care of Children Bill refers to day-to-day care rather than custody, but the differences are largely a matter of terminology.

Advantages of guardianship: donor gamete conception

7.58 The spouse or partner of the genetic parent has the same rights and responsibilities of parenthood without creating a legal fiction of being a genetic parent. If guardianship was deemed on the basis of relationship to the mother it would be a straightforward exercise and would provide certainty.

Disadvantages of guardianship: donor gamete conception

7.59 Guardianship places the genetic and non-genetic parent on an unequal footing in relation to their child. This could be seen as undesirable if they are creating a new family unit together with the intention of having equal parental status. It does not establish a permanent parent–child relationship and so does not recognise or create the framework for a life-long commitment to the child. Succession rights do not flow from guardianship as they do from parenthood and adoption. In these ways, guardianship can be said to lessen the security for the child and support for the new family unit.

Advantages of guardianship: surrogacy

7.60 Under current adoption law, a genetic commissioning father faces the unpalatable choice of losing his legal status as a parent if he and his spouse/partner pursue adoption, or retaining his legal status but preventing his spouse/partner from becoming a legal parent. Guardianship would allow the commissioning mother to have rights and responsibilities to raise the child without the genetic commissioning father losing his parental status in law.

Disadvantages of guardianship: surrogacy

7.61 There are disadvantages in using guardianship orders to reallocate parental responsibilities. The surrogate mother retains her parental status and she is automatically a guardian of the child. She is under no obligation to hand over the child or, if having done this, may reclaim the child. If guardianship orders are made in favour of the commissioning parents the surrogate mother will retain equal guardianship rights that can only be removed for unfitness or failure to exercise those rights. While changes of mind are rare they do precipitate a crisis for all parties and can destabilise the care arrangements for the child. This disadvantage could be rectified by making an application for removal of a guardian (the birth mother) at the same time as making an application for guardianship for the commissioning parents.

7.62 Another disadvantage is that, under current law, the child's birth certificate will not show the non-genetic commissioning parents as the child's parents if guardianship was granted.

Option 5: Reallocating parenthood/parental responsibilities by an agreement – enforceable parenting plans

What is an enforceable parenting plan?

7.63 Interested parties could make their own agreement about what parental status, responsibilities and rights each of them would have. The law could deem such agreements enforceable unless the Family Court concludes that the agreement

is not in the child's best interests. Agreements could be tendered as evidence of the parties' intentions and wishes where applications for guardianship, parental status or adoption orders were sought.

Features of enforceable parenting plans

7.64 The parties (the surrogate mother, her partner, the commissioning parents in a surrogacy arrangement; and donors and recipient couples in donor gamete conceptions) would be encouraged, preferably prior to conception or birth, to agree on a parenting plan for the child that would set out who would have guardianship responsibilities for the child and who would have contact with the child. The plan could, with the consent of all parties, be registered in the Family Court and enforced in the same way as a court order, providing the Court was satisfied that the agreement would promote the child's welfare and best interests. This option is discussed in greater detail in chapter 6 Agreements.

Advantages of enforceable parenting plans: donor gamete conception

7.65 This option assumes that the donor(s), the gestational mother and her partner know each other and can reach agreement. It has the advantage that involvement of the gamete donors, and members of their family, could be agreed prior to the conception of the child. The arrangements could be tailored to meet the wishes and circumstances of those concerned. This option would allow for greater flexibility and would meet some of the concerns raised by the High Court in *P v K*.[341] A sperm or ovum donor who wanted no involvement in the child's life could opt out of all parental responsibilities, while a donor who wanted ongoing information about the child or contact with the child could acquire enforceable rights and responsibilities by registering the agreement in the Family Court.

Advantages of enforceable plans: surrogacy

7.66 Private ordering has the advantage that arrangements could be tailored to meet the wishes and circumstances of those concerned. A surrogate mother who wanted no involvement in the child's life could divest herself of all parental responsibilities, while one who wanted ongoing information about the child or contact with the child could negotiate an agreement that gave her enforceable rights.

Disadvantages of reallocating parenthood or parental responsibilities by agreement

7.67 No agreement can deal with all future contingencies. There are likely to be a number of changes affecting the lives of the parties and the child during the 18 years from birth to adulthood. Arrangements that may suit the parties and the child when he or she is a pre-schooler, may be inappropriate or unworkable when the child starts school or becomes a teenager. Separation, divorce, repartnering and the arrival of half-siblings or step-siblings will all have an effect on the child and the adults. The Court would always need to have the power to vary agreements by consent or after making a judgment about the welfare of the child.

---

[341] Above n 7.

7.68 Another downside of enforceable agreements is that where the various parties are not known to each other negotiations may be difficult and stressful. A sperm donor may have no desire to meet the mother and her partner. Having met them he may be unimpressed and refuse to proceed. While those involved in surrogacy arrangements are likely to have a trusting relationship, there is perhaps an increased danger that there will be an imbalance of power. The commissioning parents may be better educated and more persuasive or very anxious that the surrogate mother assist them in giving birth to a child.

QUESTIONS: REALLOCATING PARENTHOOD AND PARENTAL RIGHTS AND RESPONSIBILITIES

7.69 Your comments and preferences are sought on each of the options discussed above as a means of reallocating parenthood or parental responsibilities for children born through donor gamete conception or surrogacy.

Option 1: Deeming provisions

Donor gamete conception

7.70 The law deems the spouse or partner of the mother (so long as that person consented) to be the child's parent for all purposes, and deems the gamete donor not to be a parent.

Questions

Q22 Are the deeming provisions under the Status of Children Amendment Act, which confer parental rights and responsibilities on the non-genetic social parent, the best model for reallocating parenthood?

Q23 Should the genetic parent's spouse or partner (the non-genetic parent) be deemed the full legal parent automatically upon birth of the child by operation of the law, or should that person have to take some legal steps to obtain parental status?

7.71 Currently, where the mother has a spouse or opposite sex-partner, the deeming provision transfers the genetic parentage of the child to the spouse or opposite-sex partner and extinguishes the genetic parentage of the donor parent. The Care of Children Bill will also extinguish the genetic parentage of the sperm donor where the mother is single or has a same-sex partner.

Question

Q24 Should the deeming mechanism operate so as to extinguish the genetic parenthood of the donor in law, as well as the rights and liabilities of parenthood? (In doing so, it will result in children born to single women having only one parent in law.)

7.72 Currently, the deeming laws come into play where conception is achieved via artificial insemination.

Question

Q25 Should the law that allocates parental responsibilities and rights in donor gamete conception be based upon the method of conception (for example, artificial insemination) or on the intention of the parties as to whether the donor's legal parenthood is to be extinguished?

Deeming provisions: surrogacy

7.73 Currently, the surrogate mother and her husband or partner are generally deemed to be the parents of a child conceived by her through artificial insemination, even though neither intends to raise the child and the husband or partner will often have no genetic connection to the child. This protects the surrogate mother should she wish to change her mind and keep the child.

Question

Q26 Should the law be amended to deem the commissioning parents to be the child's parents for all purposes and the gestational mother and her partner not to be the parents? If so, what protections should be put in place for the birth mother?

Option 2: Parental status orders

7.74 If the current deeming provisions were repealed, they could be replaced by parental status orders. The Family Court would be able to make orders in respect of any person who wishes to acquire parental status. That person would apply to the Court, with the genetic parent's consent, and could do this from, say, three months before birth to one month after birth. The order might follow as of right upon the consent of the genetic parent. Alternatively, the order could have conditions attached regarding, for example, the duration of relationship to genetic parent or the suitability of the non-genetic parent.

7.75 Where the applicant was a genetic parent, such as an egg donor who is not a parent under current law (for example, IVF surrogacy), the order might be granted automatically upon proof of this status. Where the applicant was a non-genetic social parent, the law might require proof of a relationship with the genetic parent and possibly a time period before qualification, for example, that the relationship had lasted a specified time such as two or three years.

7.76 Alternatively, the Court could be required to be satisfied that the applicant is likely to advance the welfare of the child. The non-genetic parent might be screened by a social worker for suitability to parent.

7.77 The effect of the order would be to transfer to the non-genetic parent all the responsibilities and rights of parenthood but not the fact of genetic parenthood itself. The person would still be called a "parent" in law, unlike guardianship where they would remain a guardian. There would be no legal fiction that the spouse or partner contributed the gametes from which the child was conceived.

7.78 The order might also extinguish the parental responsibilities and rights of the genetic parent. An example of when the Court would extinguish these rights is where it had proof from a fertility clinic that the genetic parent was a clinic recruited donor who waived all responsibilities and rights upon donation. Where the gamete donor was personally recruited, the Court would require an affidavit specifically waiving such responsibilities and rights. In the absence of an affidavit from the clinic or personally recruited donor, the parental status order would be granted without extinction of rights of the genetic parent. This would make the parent liable for child support. The genetic parent/donor may, in fact, also make an application for a parental status order.

7.79 If the order was made prior to the birth it would take effect from birth. If after birth it would become effective immediately.

Questions

Q27 Is it better that non-genetic parents apply to the Court to obtain status as parents, rather than simply being "deemed" parents?

Q28 Should the parental status order be made automatically upon proof of a relationship to the genetic parent and the genetic parent's consent, or should there be a duration of relationship requirement? If so, what should be the minimum duration?

Q29 Should there also be a condition that the non-genetic applicant be screened by a social worker and be approved by the Court as a suitable parent?

Q30 Should the parental status order be made only in respect of the spouse or partner of the genetic mother so that a child has a maximum of two social parents, or should other intending social parents be able to acquire this status?

Q31 If so, should it be granted automatically to the other genetic parent if they apply? For example, to a donor father who provides sperm for a lesbian couple?

Parental status orders: surrogacy

Q32 If a parental status order was made prior to birth, what should be the period of time after birth in which a birth mother has a right to apply to have the order stopped? For example, should there be an automatic right of revocation within 28 days after birth?

Q33 If the birth mother is only the gestational, and not the genetic, mother should she still have the right to refuse to give up the child to the genetic parents?

Q34 Where both commissioning parents are genetic parents of the child should they qualify for a parental status order automatically?

Q35 Should the Court grant a parental status order only if certain conditions are met, such as the commissioning parents being of specified ages or marital status? What other conditions, if any, should be set?

Q36 Where one commissioning parent is a genetic parent should the other gain parental status as of right? If not, what requirements should there be? Should there be, for example, a duration of relationship requirement or a suitability assessment?

Q37 Where neither parent is a genetic parent, should the parents have access to a parental status order, or should they have to adopt the child and be subject to the standard adoption checks as to suitability as parents?

Option 3: Adoption orders

Donor gamete conception

7.80 The Adoption Act 1955 could be amended so that only the non-genetic parent would have to adopt the child to obtain parental status. Further, it could include persons in opposite- and same-sex de facto relationships. The Act could be amended so it did not purport to extinguish genetic parentage, though did extinguish parental responsibilities and rights of genetic parents. Also, the requirement for an assessment to consider whether the parent is suitable could be retained or removed.

Question

Q38 Is an amended form of adoption a better way to reallocate parental responsibilities? What changes to the Adoption Act 1955 would be necessary to reallocate parenthood in donor gamete conceptions?

Adoption orders: surrogacy

7.81 Under current law the only way in which commissioning parents can acquire legal parenthood of the child is by obtaining an adoption order. To obtain such an order the Court must determine whether they are suitable parents for the child and that making an adoption order will promote the child's welfare and interests. It is unlawful for the commissioning parents to have the child in their home with the intention to adopt, or for them to advertise for a surrogacy arrangement.

Questions

Q39 Where both parents are the genetic parents of the child, should adoption be automatic and fast tracked? Where one is a genetic parent should adoption be automatic and fast tracked?

Q40 Should unmarried commissioning parents (including same-sex couples) be able to adopt the child?

Q41 What changes should there be to adoption law in surrogacy arrangements? For example, should there be any change to the law allowing the child to be cared for by the commissioning parents prior to the adoption and should commissioning parents be able to advertise for a surrogate mother?

Q42 What should be the time period before which the birth mother can give her consent to the adoption?

Option 4: Guardianship orders – donor gamete conception and surrogacy

7.82 Guardianship orders confer legal responsibilities and rights upon a person (the guardian) for the care and upbringing of a child, but the person is a guardian rather than a parent. They do not extinguish natural parentage or the legal parental rights and responsibilities of other persons. Guardianship can be revoked under the Guardianship Act 1968. The Act could be amended to provide for "enduring guardianship", to be defined as a legal relationship that continued for life and allowed for the possibility of the child inheriting from the guardian as recommended by the Law Commission.[342]

Questions

Q43 What are the advantages of the model of "enduring guardianship"? Is the role of the non-genetic parent recognised adequately by a guardianship order?

Q44 Are commissioning parents of a child born into a surrogacy arrangement recognised adequately through the granting of a guardianship order?

Option 5: Reallocation of parenthood by an agreement – donor gamete conception and surrogacy

7.83 Agreements could be registered in Court to give them extra weight. There might be pre-conditions, such as the parties having to have counselling and independent legal advice. They would still be required to be subject to the best interests of the child. This could be assessed by the Court prior to registration or when a party was relying on an agreement to seek a court order, such as guardianship access and so on.

Questions

Q45 Should agreements as to the allocation of parental rights and responsibilities among involved adults be able to be registered in the Family Court with a presumption that they be enforced according to their terms? Should the presumption be rebutted if it was shown that the terms would not accord with the child's best interests? Would there be any other basis for a rebuttal to be established?

---

[342] Law Commission, above n 34.

Q46 Alternatively, should the Court be required to determine, as it is now, whether the proposals contained in the parental rights and responsibilities agreement are in the child's best interests before they are enforced?

Q47 If parental agreements are to be registered, should it be a requirement of registration that the parties have had independent legal advice and separate and joint counselling?

Q48 Could or should these parental agreements be tendered as evidence when parties apply for a guardianship, adoption or parental status order?

8

Proving and disproving parenthood

8.1 People can have varied reasons for wanting or needing to prove or disprove legal parenthood. A number of legal entitlements and obligations flow from the parent–child relationship, regardless of whether the parent is the child's legal guardian. These include claims for inheritance, citizenship and immigration entitlements, and child support.

8.2 Defined legal parenthood can also have a number of personal or non-legal benefits. It can resolve uncertainty about a questioned parent–child relationship and can assist children in gaining access to information about their genetic identities. Where a man suspects he is the father of a child and wishes to play a role in that child's life, proof of paternity will be critical in helping him found a case for custody, access or guardianship.

8.3 The law recognises a woman as a mother if she gives birth to a child and a man as a father if he is the child's genetic parent.[343] A statutory presumption also operates to presume a women's husband or former husband to be the father of her child, if the child was born within the marriage or within 10 months of the marriage being dissolved.[344] The presumption may be rebutted in cases where there is evidence that another man is the child's genetic parent.

PART A: PROCESSES

Establishing paternity in law

8.4 Where the presumption of paternity does not apply, either because it is rebutted or the child is born outside marriage, there are currently two processes for establishing legal paternity. These are:

- declarations of paternity that may be made by the High Court[345] where it is established on the balance of probabilities that a man is the child's father; and
- paternity orders that are made by the Family Court where it is satisfied that a named man is the child's father.

[343] Except in cases of adoption or donor gamete conception where parenthood is conferred by operation of law.

[344] Section 5(1) Status of Children Act 1969.

[345] The forthcoming Care of Children Bill 2003 contains provision for the Family Court to make declarations of paternity also.

8.5 Declarations of paternity are deemed conclusive proof of paternity for all purposes, and are the only means of establishing parenthood in cases of inheritance. Paternity orders, by contrast, are only *prima facie* evidence of paternity, and can be set aside where there is evidence that another man is the child's genetic parent.[346] They are less frequent today because of the availability of the Domestic Purposes Benefit, but were common up until the 1980s when they were the chief means by which unmarried women could obtain financial support from their children's fathers.

Establishing maternity in law

8.6 There are currently no processes for establishing maternity in law. This is largely because women in the past were invariably the genetic parents of children to whom they gave birth. Maternity was seldom an issue except in rare cases where infants were inadvertently swapped at birth.

8.7 With the development of assisted human reproductive technologies it is now possible for a child to be conceived with the egg of one woman and gestated by another. Because two women can claim to be the mother of a child, there may need to be a process for proving genetic and gestational motherhood. This raises the question of who should be recognised as the mother in law: the genetic mother, the gestational mother or both?

Questions

Q49 Should the law recognise both the genetic mother and the gestational mother as parents? If not, who should be recognised in law as the mother?

Q50 Should there be a process for the establishment and disestablishment of maternity in law?

Registering parents on the birth certificate

Getting registered

8.8 Births are registered in New Zealand pursuant to the Births, Deaths, and Marriages Registration Act 1995. The sole guardian or guardians are required to register the birth as soon as is reasonably practicable after the child is born.

8.9 Birth certificates have one box for the name of the child's father and another for the name of the child's mother. It follows that only one mother and one father can be shown on a child's birth certificate. The mother's name is always shown.

8.10 If a man is married to the child's mother his name can simply be notified in the child's birth particulars as the father because paternity is presumed.[347] In all other cases, including those in which the child's father is a in a de facto relationship

---

[346] Section 8(3) Status of Children Act 1969, see also s 51(2) Family Proceedings Act 1980, s 15(3)(b)(v) Births, Deaths, and Marriages Registration Act 1995; s 7(1)(f) Child Support Act 1991.

[347] This is in accordance with the presumption of paternity: s 5(1) Status of Children Act 1969.

[348] Sections 15(2)(b)(i), 15(2)(b)(ii), 15(2)(c), 15(3)(a)(i), 15(3)(a)(ii) and 15(3)(b)(i) Births, Deaths, and Marriages Registration Act 1995.

with the child's mother, the consent of both parties is usually required for the father to be registered.[348]

8.11 A man may only be registered without the mother's consent if she is "unavailable"[349] (for example, dead, missing or of unsound mind) or where the man can satisfy the Registrar-General that:

- he is the child's father;[350] or
- he has been appointed or declared a guardian pursuant to section 6 or 6A of the Guardianship Act 1968;[351] or
- a declaration of paternity or a paternity order has been made showing him as the father.[352]

8.12 Similarly, a child's mother may only notify a man as her child's father without his consent if he is "unavailable".[353]

8.13 The consequences of these requirements in cases of donor gamete conception or surrogacy are that:

- The birth mother's husband or partner will be registered as the father if she conceives a child through the use of donor sperm, as her husband or partner is deemed to be the child's legal father, provided he consented to the procedure.[354]
- A sperm donor may only be registered as the child's father if he is a father in law (that is, the mother is single or has undergone the procedure without the consent of her husband or partner) and either:
  - both he and the mother consent to his name being registered; or
  - he provides proof to the Registrar-General that he is the child's genetic parent.
- Where the child is conceived via egg donation, the birth mother will be registered as the legal parent even though she is not genetically related to the child.[355]

Correction of information

8.14 Under section 84(2) of the Births, Deaths, and Marriages Registration Act 1995, the Registrar-General has the discretion to add, remove or amend information entered on the birth register. There have been situations, both here and overseas, where a registered parent (most commonly a father) has asserted that he is not

---

[349] Section 15(3)(a)(iii) Births, Deaths, and Marriages Registration Act 1995. Registrars attempt to involve the family of the mother in the registration process if she is unavailable. Source: Ravi Casinader: Legal Adviser, Births, Deaths and Marriages, Department of Internal Affairs.

[350] Section 15(3)(b)(ii) Births, Deaths, and Marriages Registration Act 1995.

[351] Section 15(3)(b)(vi) Births, Deaths, and Marriages Registration Act 1995.

[352] Section 15(3)(b) (iv) and (v) Births, Deaths and Marriages Registration Act 1995.

[353] Section 15(3)(b)(iii) Births, Deaths, and Marriages Registration Act 1995.

[354] As under ss 7(1)(a), 9(1)(a), 11(1)(a), 13(1)(a), 15(1)(a), Status of Children Amendment Act 1987 he is deemed to be the father of the child if he gave consent to the donor gamete conception procedure.

[355] By reason of ss 9(3)(a), 13(3)(a) Status of Children Amendment Act 1987, the status of the genetic mother is extinguished in favour of the gestational mother, unless the genetic mother later adopts the child.

the genetic parent of the child. In such cases, the Registrar-General requires statutory declarations from the parent outlining the facts of the case and any corroborative evidence that is available, such as DNA evidence.

8.15 The Births, Deaths and Marriages Office has informed the Commission that, in some cases, a father's details have been removed on the basis solely of DNA test evidence. However, where a father wants to be removed, but the mother has refused to cooperate, the Registrar-General will only remove his details once the mother has been given the opportunity to respond and the evidence sufficiently establishes that the information is incorrect.

8.16 Where a child is adopted a new birth certificate recording his or her parents as the adopted parents is issued. The certificate can be annotated with the fact the child is adopted if the adoptive parents so choose.[356]

PART B: EVIDENCE

DNA parentage tests

8.17 Over the past 15 years DNA parentage testing has become the prime means of establishing genetic parenthood. It can now be carried out on a wide range of bodily samples, including blood, hair and mouth (buccal) swabs, and is being used increasingly by individuals to prove or disprove paternity.

8.18 Up until the mid-1980s, parentage testing was conducted by way of serological (or blood) tests. Blood samples of the mother, father and child were analysed to identify their blood groups and, from this data, it was possible to exclude a person conclusively as a parent or to assess the degree of probability that a person was a parent. Because the results attributing parentage were rarely conclusive, however, people were usually required to rely on other types of evidence and legal inference in establishing parenthood.

8.19 The advent of DNA parentage testing has meant that scientists are now able to not only conclusively exclude people as parents, but also calculate the probability of genetic parenthood with close to absolute certainty. As a consequence, the courts have appeared willing to place considerable weight on DNA test evidence in cases of disputed paternity. Although cases are still not decided solely on the basis of parentage testing,[357] the results can provide strong evidence where the rates of probability are high and the findings are consistent with other relevant evidence.[358]

---

[356] See Form A3 Family Courts Rules 2002 and s 24(3) Births, Deaths, and Marriages Registration Act 1995. Very few parents exercise this option, however, an adoptee who has attained the age of 18 years, or has earlier married, can ask the Registrar-General to include this information in his or her birth certificate.

[357] In *Loveridge v Adlam* [1991] NZFLR 267 an application for a paternity order was refused despite blood test results showing a 99.9 per cent probability and DNA analysis showing a 99.46 per cent probability that the respondent was the genetic father. While the Court held the respondent could be the father, it held that proof was not established on the balance of probabilities because the applicant lacked credibility and had had sexual relations with three other men during the three months surrounding conception.

[358] See, for example, *Gattsche v Miller* [1995] NZFLR 449 where Judge Inglis QC granted a paternity order in part because the blood and tissue test showed a statistical probability of over 99.99 per cent.

How it works

8.20 DNA parentage testing works on the principle that a child inherits two sets of DNA markers, one from each parent. In cases where all parties are tested (the mother, child and putative father), scientists are able to analyse the mother and child's samples to identify what genetic material must have been inherited from the genetic father. If a blood sample from a putative parent is analysed and found to contain markers that do not match with those of the child, he or she may be excluded conclusively as a parent. If the markers do match, scientists then calculate the paternity index value with reference to national population data for the markers. The paternity index is the ratio of two alternative probabilities for the evidence: the probability of paternity versus the probability of non-paternity.

Issues arising out of parentage testing

8.21 Although DNA parentage testing has the potential to answer many questions relating to unknown or disputed parentage, it also raises a number of ethical, social and legal issues. Whether by helping to found new social relationships on the basis of genetic linkage, or by potentially disrupting established family relationships, DNA parentage testing can have a lasting impact on parents, children and their wider families and needs to be carefully managed.

Who is conducting the tests?

8.22 At present, there are no clear New Zealand guidelines covering who may and may not conduct DNA tests for the purposes of establishing parenthood. Under section 54 of the Family Proceedings Act 1980, the Court has the power to recommend that blood tests be carried out in any proceeding where parentage is at issue, but the Act merely states that the person conducting the test must be "suitably qualified" without giving any indication of what qualifications are required.

8.23 Given that the Family Court is not bound by the usual laws of evidence, but may receive "any evidence that it thinks fit",[359] parentage tests commissioned privately by individuals would be admissible in court provided their reliability was established.

8.24 However, parentage testing, like genetic testing generally, has real scope for fraud, error and improper practice. Reviews of parentage testing practices overseas have highlighted the dangers of testing if collection practices are not tightly regulated. It can be possible for parties to provide false samples, submit samples of third parties without their consent, or to submit samples from children without the consent of their parent or guardian.

8.25 In Australia and the United Kingdom, the increasing availability of direct-to-consumer tests via mail order and the Internet has also provoked calls for stricter regulation. Although many providers have their own internal protocols governing areas such as procedure and consent, practices vary. Some advertise so-called "motherless tests" that are capable of establishing the likelihood of paternity from a man and child's sample alone (thus circumventing the need for a woman's consent) while other bodies require the consent of all affected parties.

---

[359] Section 164 Family Proceedings Act 1980.

8.26 In New Zealand, the presence of one main provider means that the need for regulation may not be as pressing here as it has been overseas. DNA Diagnostics, based in Auckland, is the main provider of DNA parentage testing, for which it has accreditation through International Accreditation New Zealand (IANZ). Samples are collected from collection sites around the country, and the company requires identification and evidence of consent from all parties before samples are tested.[360]

8.27 Notwithstanding this, there may still be a need for regulation along the lines adopted in the United Kingdom and Australia in the future. The Law Commission is aware of at least one company that is directly marketing parentage tests to New Zealanders over the Internet. DNA Solutions,[361] based in Australia, offers two types of tests to consumers in New Zealand: court admissible tests that are conducted in accordance with Australian accreditation guidelines, and other less formal tests that are supplied through the use of home-testing kits. These tests involve people sending samples they have collected themselves to the laboratory in Australia. The laboratory has no means of confirming the identity of the sampler or that consent has been obtained. The laboratory also carries out tests on the basis of genetic material from the child and father only ("motherless testing").

8.28 There are some options for regulating who is conducting tests within New Zealand. One would be to adopt a model, as in the United Kingdom, where the Department of Health has instituted a voluntary Code of Practice to apply to all organisations advertising and providing DNA parentage testing services direct to the public. The Code[362] governs such areas as the types and forms of consent that are required, quality assurance and requirements of confidentiality.

8.29 Another option would be to certify certain persons or bodies to conduct tests in New Zealand in accordance with accreditation guidelines. This was the option favoured by the Australian Law Reform Commission (ALRC), which released a report on the Protection of Human Genetic Information in March 2003.[363] The ALRC recommended that legislation be enacted to limit parentage testing to laboratories accredited by the National Association of Testing Authorities (NATA) in accordance with NATA guidelines. This would not affect the status of independent tests obtained by laboratories overseas, but would control, to some extent, testing that is carried out in New Zealand.

8.30 A third option would be for courts to recognise only those test results that have been conducted with prior-approval of the Court. This would regulate the method by which tests are obtained rather than the bodies conducting the tests. It may have the disadvantage of increasing cost and delay for the parties involved. It would be difficult to prevent people from sending self-collected samples to Australian laboratories, although it would be possible to declare that the results of such tests would not be admissible in evidence.

---

[360] The company conducts motherless testing but requires that the mother provide an affidavit giving consent for the child to be tested.

[361] See: <http://www.dnanow.com> (last accessed 27 February 2004).

[362] As recommended by the Human Genetics Commission in its 2002 report *Inside Information: Balancing Interests in the Use of Personal Genetic Data* (London, 2002) 166. See <http://www.hgc.gov.uk/insideinformation> (last accessed 26 February 2004).

[363] Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96, Sydney, March 2003) paras [35.85] <http://www.austlii.edu.au/au/other/ alrc/publications/reports/96> (last accessed 2 February 2004).

Questions

Q51 Is there a need to regulate the bodies or persons who conduct DNA parentage testing?

Q52 If so, should regulation be by way of accreditation, a voluntary Code of Practice or court supervision?

What should be tested?

8.31 Another issue relates to the type of tests that should be conducted. Under section 54 of the Family Proceedings Act 1980, the courts may only recommend that blood tests be carried out in proceedings where parentage is at issue. Although it has been ruled that DNA analysis of a blood sample qualifies as a "blood test"[364] the Act contains no provision for testing of other human tissues.

8.32 The development of new technologies has meant that it is now possible to conduct reliable DNA analysis on a wide range of samples including hair follicles, fingernails and buccal (mouth) swabs. Buccal samples are usually obtained by taking a swab from the area between the lips and the gums. The procedure typically takes about 10–20 seconds and is generally considered less invasive and cheaper than traditional blood sampling.[365] The Police's powers to obtain DNA evidence during the investigation of criminal offences have recently been extended to cover the taking of these swabs.[366] This is discussed further in paragraphs 8.46–8.47.

8.33 In the United Kingdom and Australia, blood sampling has been criticised as being unnecessarily intrusive.[367] It conflicts with the individual's right to be protected against assault, and can be inappropriate where a person has an aversion to blood or needles, or is unwilling to participate for religious or cultural reasons.[368] The use of buccal swabs, if available, could alleviate some of these issues.

Question

Q53 Should the Family Proceedings Act 1980 be amended to provide for other forms of DNA parentage testing?

The power to direct tests

8.34 At present, courts only have the power to recommend that tests be conducted. They cannot compel parties to submit to tests, although, where parties refuse to comply with a recommendation of the Court, the Court does have the power to draw such inferences as appear "proper in the circumstances".[369]

---

[364] "Blood test" is defined in s 2 of the Family Proceedings Act 1980 as""tests carried out for the purpose of ascertaining the inheritable characteristics of blood".

[365] Law and Order Committee, Commentary to the Criminal Investigations (Bodily Samples) Amendment Bill (Wellington, 2003) 2.

[366] See: Criminal Investigations (Bodily Samples) Amendment Act 2003.

[367] For comment on the practise of blood sampling in the United Kingdom see: David Sharp "Paternity Testing – Time to Update the Law?" (Aug 2000) Fam Law, 560, 562.

[368] In one recent case, a Māori respondent refused testing on the basis that sampling would breach the tapu nature of human blood. Despite this, the Court drew an inference of paternity from the refusal on the basis of the importance of whakapapa to the child and the fact that tapu could be dealt with appropriately through the use of karakia. See: *B v T* (1997) 16 FRNZ 1975.

[369] Section 57(2) Family Proceedings Act 1980.

8.35 It is a matter of judgment for the Court what inferences, if any, will be drawn from a person's refusal to consent to a blood test.[370] While the inferences will almost always be adverse, they will depend on the evidence and on the parties' credibility.

8.36 In *Matthews v Smith* Judge Inglis QC held that there are two bases for the common law rule that the law does not permit a sample of blood or tissue to be taken from an adult without his or her consent. These were that:

- the courts have no legal right to compel a person to incriminate himself or herself; and
- that the taking of a blood sample without consent amounts to an unlawful assault or battery.[371]

8.37 The law places significant value on the dignity and bodily integrity of the human person. This is reflected in sections 11 and 21 of the New Zealand Bill of Rights Act 1990, which affirm the right of every person to refuse to undergo medical treatment and be protected against unreasonable search and seizure. While DNA parentage testing may fall outside the definition of medical *treatment* and personal *seizure*, the values underpinning these rights may still be relevant in this context.

8.38 However, it may be asked whether these rights should be balanced against the rights and interests of other parties in a case. The child's right to know his or her parents is an important (and some would say the paramount) consideration. The decision to refuse tests stands in direct conflict with the child's right to know his or her identity as assured by Article 8 of the United Nations Convention on the Rights of the Child. It may compromise a child's emotional or psychological well-being, or prevent genetic information from being obtained for medical or financial purposes.

8.39 The decision to refuse tests may also be inconsistent with the right to privacy affirmed in Article 17 of the International Covenant on Civil and Political Rights, to which New Zealand is a signatory. The European Court of Human Rights has held that the right to "respect for one's private life", embodied in Article 8 of the European Convention on Human Rights, includes the right to a determination of the legal relationship between an ex-nuptial child and his or her natural father.[372] The case of *Gaskin v UK*[373] is also authority that the right to respect for private life requires that everyone should be able to establish details of their identity, and that such information has important implications for the formation of personality.

8.40 From a public policy perspective there may be social benefits in harnessing genetic testing to establish parenthood. DNA parentage testing currently presents the most reliable means of proving or disproving parenthood. Although not conclusive, it has the potential to settle uncertainty where parentage is determined via inference or circumstantial evidence. Where it is sufficiently reliable, it has advantages over evidence offered by the parties about the nature and duration of their sexual relationship. Human memory is fallible and the embarrassment most people feel at disclosing intimate matters can add to the unreliability of the evidence.

---

[370] *Ingley v Smith* [1996] NZFLR 600, 604 per Carruthers J.

[371] *Matthews v Smith* [1990] NZFLR 73, 77.

[372] *Mikulic v Croatia* [2002] ECHR 53176/99, para 53.

[373] [1989] ECHR 10454/83, judgment of 7 July 1989, Series A no. 159, para 39.

8.41 Where it is used by the State to establish parentage for child support purposes, it can also have a public financial benefit of reducing the cost of income support.

Other jurisdictions

8.42 In the United Kingdom and Australia, the courts have the power to *direct* tests where:

- there is a reasonable and bona fide application for testing (United Kingdom);[374]
- where the Court is of the opinion that the information that could be obtained might assist in determining the parentage of the child (Australia).[375]

8.43 Like New Zealand, however, courts in these jurisdictions do not have the authority to enforce their directions. They may draw inferences from a refusal to comply with a direction, but do not have the power to compel people to submit to testing.

8.44 In Europe, States Parties to the European Convention on Human Rights have adopted different approaches to resolving this issue. While some create a presumption of paternity, others fine or imprison those who refuse to submit to testing without reasonable excuse, or deem non-compliance to be a contempt of court (which can attract criminal prosecution).[376]

The Court's powers to order tests

8.45 The right to refuse testing is not absolute in other areas of the law. In the criminal jurisdiction for example, the Police have the power to request a blood sample in traffic cases where they have reasonable cause to suspect a person of driving with excess blood-alcohol. It is an offence to refuse to provide a blood sample.

8.46 Under the Criminal Investigations (Blood Samples Act) 1995[377] the Police also have the power to request blood (or bodily) samples to assist in the investigation of indictable offences. If consent to the taking of a sample is withheld, the Police may apply for a suspect compulsion order from the High Court. An order can be made where the Judge is satisfied:

(a) there is good cause to suspect that the respondent has committed the offence;
(b) material reasonably presumed to be from the person who committed the offence has been found;
(c) there are reasonable grounds to believe that analysis of the blood (or bodily) sample would tend to confirm or disprove the respondent's involvement in the commission of the offence; and
(d) it is reasonable in all the circumstances to make an order.[378]

---

[374] Section 20 of the Family Law Reform Act 1969 (UK). Note, however, that a direction from the Court is only available when the Court has to resolve a dispute about paternity during the course of an existing civil proceeding. A freestanding application cannot be made under s 20.

[375] Section 69W of the Family Law Act 1975 (Cth) and s 195 of the Family Court Act 1997 (WA).

[376] *Mikulic v Croatia*, above n 372, para 64.

[377] The Criminal Investigations (Bodily Samples) Amendment Act was passed on 30 October 2003 amending the principal Act and extending it to the taking of bodily samples. The majority of the Act is expected to come into force by Order of Council early in 2004.

[378] Section 16 Criminal Investigations (Blood Samples) Act 1995.

8.47 Under section 40 of the Act, the District, Youth and High Courts also have the power to order that a blood (or bodily) sample be taken from a person convicted of an offence for the purposes of the Police DNA profile databank.

8.48 In the criminal context, countervailing public policy interests such as public safety and justice have been the justification for overriding the need for consent and the preservation of personal autonomy. Where the commission of an offence is serious (as is the case with indictable offences) and there is reasonable cause to suspect a person's involvement in the crime, public policy interests dictate that the rights to consent and to preserve personal autonomy must give way.

8.49 Are there similar countervailing public policy interests in disputed parentage cases? Recognition of the needs and rights of children to know their genetic identity, and the practical and financial benefits that can flow from determined parentage, may justify some limits being placed on the right to refuse testing. If testing is possible through less invasive forms, such as buccal swabs, should adults be compelled to have tests unless they can provide good reason for their refusal?

Questions

Q54 Should the courts have the power to order people to provide a sample obtained from a mouth swab for DNA testing for the purposes of establishing parentage?

Q55 Should the Court take into account the rights of the child when deciding whether to recommend or order a test?

Q56 Should these rights be an important or paramount consideration in the exercise of the Court's discretion?

Q57 What sanctions, if any, should be placed on those who refuse to submit to tests that are recommended or ordered by the Court? Should it be a criminal offence to refuse to be tested if that has been ordered?

Consent for the child to be tested

8.50 Where parties cannot agree about testing, issues of consent are always controversial. The most difficult cases arise where the party who has guardianship rights and responsibilities for a child under 16 withholds consent to the child being tested.[379]

8.51 While these situations will usually involve a mother withholding consent, there can be situations where it is the father who refuses consent to a sample being taken from the child. Where two parents with shared guardianship rights and responsibilities cannot agree on testing, they can refer the matter to the Court[380] for a decision to be made in accordance with the best interests of the child.[381]

8.52 There may be many reasons why a person might withhold consent on behalf of a child. He or she may oppose testing on cultural or religious grounds, or be fearful

[379] It is unclear whether a child of sufficient maturity and understanding could give consent to testing if they are below the age of 16. This is discussed further in paras 8.58–8.66.

[380] Section 19 Guardianship Act 1968.

[381] Section 23 Guardianship Act 1968.

of upsetting the existing family network. This can be particularly significant in cases where the mother has doubts about paternity but is in a relationship with a husband or partner who presumes he is the child's father.

8.53 Parents may also withhold consent if they believe that the welfare of their child may be compromised if a third party establishes parentage and uses this as a basis for applying for guardianship, custody or access.

8.54 In the past, courts have taken a mixed approach to resolving these issues. In some instances, they have drawn inferences as to paternity where a mother has withheld consent,[382] or a putative father has refused to comply with a court recommendation for testing.[383]

Wardship for the purposes of consent

8.55 In a recent case,[384] the High Court circumvented the need for parental consent by making a child a ward of the Court, which enabled the Court to give consent on the child's behalf to a buccal swab. While acknowledging that it must be cautious when overriding parental consent by the use of wardship powers, O'Regan J took the view that the mother's refusal presented a barrier to the child being properly informed and forming a relationship with the man who might be her father. The mother had not refused consent for religious or cultural reasons and there did not appear to be any risk of harm to the child in establishing the identity of her father.

8.56 The decision was novel insofar as it removed the mother's guardianship rights for the limited purposes of consent for the collection of genetic material. Under section 10(2) of the Guardianship Act 1968 the Court must not deprive a parent of his or her guardianship responsibilities unless it can be shown that for some "grave reason" the parent is unfit or has proved unwilling to exercise guardianship responsibilities.

8.57 The United Kingdom courts have been unwilling to use wardship in such situations on the basis that it is inconsistent with the purposes of the UK Family Law Reform Act 1969. In *Re O and J (Paternity: Blood Tests)* Wall J refused to follow an earlier decision that had placed a child under the care and control of the Official Solicitor to enable DNA parentage testing.[385] Although the Judge considered the law was in need of reform (and indeed might not be compliant with the UK Human Rights Act 1998) he held that wardship purely for the purposes of consent to testing was "a device designed to circumvent the plain provisions of [the Family Law Reform Act]". This decision was consistent with the historical view of the courts that a refusal of consent by a person with care and control of a child is an absolute obstacle to a blood test being carried out.[386]

---

[382] See, for example, *H v B* 24/8/94, Heron J, HC Wellington CP 324/93, CP343/93, CP369/93; *K v C* 23/89/93, Judge Inglis QC, FC Hastings FP020/054/93.

[383] Under s 57(2) Family Proceedings Act 1980 the Court may draw such inferences from a refusal to comply with a recommendation for testing as it deems proper in the circumstances.

[384] *S v T* [2003] NZFLR 223.

[385] *Re O and J (Paternity: Blood Tests)* [2000] 1 FLR 418 Wall J.

[386] See, for example: *Re F (A Minor) (Blood tests: Paternity Rights)* [1993] Fam 314; *Re H (Paternity: Blood Test)* [1996] 2 FLR 65 and *Re CB (A Minor) (Blood Tests)* [1994] 2 FLR 762. Caroline Bridges "Paternity" (May 2000) Fam Law, 324, 324.

Question

Q58 Should the law enable the Court to give consent to DNA parentage testing on behalf of the child?

Children's consent to testing

8.58 New Zealand law is uncertain as to when children can consent to providing a blood or bodily sample for parentage testing. Children and young persons aged 16 years and over can consent to any medical or dental procedure as if they were adults.[387] It is less clear whether volunteering a buccal swab can be characterised as a medical procedure. Older children would be able to provide a swab or hair follicle without medical assistance, which raises the issue of whether giving a mouth or hair sample for parentage testing is indeed a "medical procedure". Furthermore, section 25 of the Guardianship Act 1968 does not prevent under-16 year olds from consenting to a medical or dental procedure, and it is generally accepted that when children have the maturity and understanding to weigh the implications of any procedure they can give valid consent.[388]

8.59 Article 12(1) of the UN Convention on the Rights of the Child states that:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

8.60 Implicit in the Article is the recognition that children develop differently and at different times. While some may acquire a level of understanding and maturity at an early age, others may be slower to mature. Where children are aware of the issues, and are able to form their own views, this must be taken into account.

8.61 Traditionally, it has been considered much easier to designate an age at which maturity is presumed. If a child is considered to have insufficient capacity at that age, an application may be made to the Court to have the decision-making powers of the guardians extended.

8.62 However, this approach can deny mature minors the enjoyment of their rights under Article 12 of the UN Convention. For this reason, the common law has adopted a more developmental approach with regard to children's consent to medical treatment. Where a child is under the age of 16 but is of sufficient understanding and intellectual capacity to comprehend the nature and purposes of the treatment, he or she may give or withhold consent irrespective of the wishes of his or her parents.[389]

8.63 This approach is less rigid but can be difficult to apply in practice. To be practicable, a system needs to be in place to determine at what age each child is sufficiently mature. Such a system must contain protections that ensure children have:

- an appropriate and full understanding of the issues involved;
- the emotional maturity to make an informed and safe decision; and

---

387 Section 25(1) Guardianship Act 1968.

388 *Gillick v West Norfolk and Wisbech Area Health Authority and the Department of Health and Social Security* [1986] AC 112.

389 *Gillick v West Norfolk and Wisbech Area Health Authority and the Department of Health and Social Security* above n 388.

- the voluntariness to make decisions free from the influence or emotional pressure of their parents or third parties.

8.64 One option would be to leave it to the Court to assess a child's competence in cases of disputed consent. Where parties (including the child) cannot agree on testing, the parties could apply to the Court to determine the matter with the assistance of a psychologist, social worker or counsel for the child. If the Court found the child to be sufficiently mature and to have an appropriate understanding of the issues involved, it could take the child's views into account when determining the matter.

8.65 Another option would be to adopt the model recommended by the Australian Law Reform Commission (ALRC) in their report on human genetic information.[390] The ALRC took the view that young persons aged 12–18 years should be able to give or withhold consent, provided they have sufficient competence and maturity to make their own decision. It recommended:

- that children be assessed by an independent professional (being a family and child counsellor, social worker or psychologist) for their capacity to give free and informed consent; but that
- children under the age of 12, and young persons aged 12–18 who are found not to have the requisite maturity or voluntariness, should be subject to parental consent on their behalf.[391]

8.66 In addition, the ALRC report recommended that parties should be able to apply to the Court to have the matter determined where persons sharing parental responsibility cannot agree, or where a child withholds consent to testing unreasonably.

Questions

Q59 Should children under the age of 16 be able to give or refuse consent to DNA parentage testing in cases where they are sufficiently mature and capable of making a free and informed decision?

Q60 Would the recommendations of the Australian Law Reform Commission be an appropriate model for determining the capacity of a child to give or withhold consent? If not, what other model would you favour?

Is testing always appropriate?

8.67 DNA parentage testing can be contentious when it is used either to disestablish parenthood, or establish parenthood in cases where the child already has an existing parental figure. Typical cases involve those where a father finds out he is not the genetic parent of a child he has presumed his own, or where third parties have sought parentage testing as proof that the child is theirs and not the social father's.

---

[390] Australian Law Reform Commission, above n 363, recommendations 35.7 and 35.9. <See: http://www.austlii.edu.au/au/other/alrc/publications/reports/96> (last accessed 2 February 2004).

[391] The ALRC also recommended the Family Law Act 1975 (Cth) be amended to require that all persons with parental responsibility for the child be required to provide written consent before testing is carried out.

8.68 Overseas, there has been significant discussion about the incidence of mis-attributed paternity and so-called "paternity fraud".[392] In the United States, in particular, strong calls have been made to reform State parentage laws to enable men to disestablish paternity more easily where there is proof of non-paternity.[393] While there are no doubt a number of reasons (including personal) why a person might want to be removed as a parent in these situations, a strong theme relates to the need to absolve people from future child support payments and reimburse them for contributions made in the past.

8.69 However, children may be in danger of emotional upheaval if they find out suddenly via DNA testing that the person they have always treated as a parent is not in fact their genetic father. Disestablishing paternity in these circumstances may risk destabilising the child's family unit and deprive the child of existing emotional, financial and other forms of support.

8.70 As has been argued by Oliver Curry, a social scientist at the London School of Economics, the availability of parentage testing may also have an impact on the rate of family breakdown or instability. He believes that the technology has the potential to alter men's behaviour by prompting them to leave their partners or become less committed to their children where mis-attributed paternity is proven. Studies show that men invest more time and money in children where confidence in paternity is high, and are less likely to invest in other men's children.[394]

8.71 While the availability of private testing outside the Court system may make it inevitable that tests will be carried out where they are contrary to the child's interests, there may be some role for courts in limiting their impact. One option would be for courts to elect not to recommend or order tests in cases where harm could result to the child. This has been the approach in the United Kingdom where courts have, at times, refused to direct tests that have been held not to be in the child's best interests.[395] Given what is now known of children and the need to know genetic identity, this approach would need to include this as a factor in any given case.

---

[392] Paula Roberts JD from the Center for Law and Social Policy in Washington, DC writes that a web search conducted on 8 January 2003 identified 1 910 sites discussing "paternity fraud", in which men who believe they have been defrauded have campaigned for State legislative reform. Paula Roberts JD "Truth and Consequences: Part 1, Disestablishing the Paternity of Non-marital Children" (in *Conference Papers – Genetic Bonds and Family Law: The Challenge of DNA Parentage Testing,* American Society of Law, Medicine and Ethics, New Orleans, 27–28 March 2003).

[393] There is no reliable evidence concerning the extent of mis-attributed paternity in the United States. However, Mary Anderlik and Mark Rothstein record that physicians doing tissue typing for organ donation have given estimates ranging from between 5–20 per cent as to the number of donors who are unrelated to the men believed to be their genetic fathers. See: Mary R Anderlik and Mark A Rothstein "DNA-Based Identity Testing and the Future of the Family: A Research Agenda" (2002) 28 American Journal of Law & Medicine"215, 221.

[394] Emily Laurence Baker "Who's the Daddy?" *She* Magazine, New Zealand (April 2003) 64.

[395] In *Re F (A Minor) (Blood tests: Parental Rights)* [1993] Fam 314, [1993] 3 All ER 596 CA the Court refused to give a direction for tests on the application of a third party who had had a sexual relationship with the child's mother during her marriage, on the basis that it would be contrary to the best interests of the child to disrupt the existing family unit. In the past, it was not considered in the child's best interests to order tests where there was a danger that they might render a child "illegitimate" who had previously enjoyed "legitimate" status. See: *S v S, W v Official Solicitor* [1972] AC 24, 47–48; [1970] 3 All ER 107, 115, HL per Lord MacDermott.

8.72 Another option would be to have less strict regulation of testing, but to adopt an approach to legal parentage that is not based solely on genetic linkage. Thus, tests proving a genetic relationship would not necessarily be determinative of legal parentage. The courts would have the discretion to assess whether the child's existing caregiver should continue to be a legal parent, notwithstanding evidence that he is not the genetic father.

8.73 As one commentator has argued, the issue will be determined on the weight that is to be accorded to the child's link with his or her genetic parent vis-a-vis other types of parental care relationships.[396] If "parenthood" is to be defined solely by genetic lineage, then a child's right to have accurate information as to the identity of his or her genetic parents may be of paramount importance. However, if parenthood is defined more broadly to encompass other types of social and emotional ties, parentage testing may not be appropriate in cases where it is used to displace existing relationships.

Questions

Q61 Should the courts have the discretion to refuse to recommend (or order) DNA parentage tests where such testing may not be in the child's best interests? As, for example, in cases where the child already has a stable family unit, or where an existing parental figure seeks to disestablish parenthood?

Q62 Should persons who have contributed financially and emotionally to the child's care on the understanding that they are a parent, be able to seek removal of parental responsibilities later on the basis of a test proving that they have no genetic connection to the child?

Use of blood samples from newborn babies for parentage testing

8.74 Another important issue relates to the consent needed for disclosure of babies' genetic information that is routinely collected shortly after birth and retained indefinitely. Since the mid-1960s, blood samples have been taken from newborn babies for screening for genetic diseases such as Phenylketonuria (PKU) and cystic fibrosis. The tests, known as "Guthrie tests", involve the removal of spots of blood through a heel prick between three and 10 days after the birth. The samples are held in a national testing centre in Auckland.

8.75 The samples are stored indefinitely for the purposes of a programme audit, unless a parent or guardian asks for them or the parent's consent is obtained for their disclosure. Disclosure may also be made pursuant to a police search warrant and the approval of the Clinical/Technical Head of the Screening Programme, the Advisory Committee and the Legal Advisor, Auckland Healthcare. The Auckland District Health Board's Administration Manual states "without these approvals, the Clinical/Technical Head of the screening program should consult widely before determining a course of action".

---

[396] Elizabeth Batholet "Guiding Principles for Picking Parents" (in *Conference Papers – Genetic Bonds and Family Law: The Challenge of DNA Parentage Testing*, American Society of Law, Medicine and Ethics, New Orleans, 27–28 March 2003).

8.76 Although the tests are voluntary,[397] it is estimated that nearly all babies born in New Zealand (amounting to some 55 000 annually) are tested through this programme.[398]

8.77 The programme sparked debate in May 1999 when an application was made to the High Court to release a sample to a third party to enable parentage testing in a paternity case.[399] The Court directed that the sample be released for testing, contrary to the wishes of the child's mother, to a man who claimed to be the genetic father. The decision was controversial because it authorised disclosure of the child's health information to a third party as an exception to the Health Information Privacy Code. Usually, information may only be released where there is consent to disclosure or where disclosure is consistent with the purposes for which the information was collected – in this case, screening for medical disorders.

8.78 The case prompted the Privacy Commissioner to review the programme and release a report in September 2003. He recommended that the Ministry of Health appoint a body with "clear responsibility and authority" for the programme to develop rules for the retention and further use of, or third party access to, stored samples. He further recommended that these rules be incorporated in legislation to give them clear and binding effect, although the report did not outline what these rules would involve.

Questions

Q63 Should the blood samples taken from newborn babies for genetic defect screening be released to third parties for the purposes of DNA analysis to establish parenthood contrary to the wishes of the guardian?

Q64 Does the child have any rights in relation to the use of these blood samples for DNA parentage testing?

---

[397] A "lead maternity carer" (who may be a midwife or a doctor) is required to offer the screening service to the child's mother and obtain her informed consent. Bruce Slane *Guthrie Tests* (Office of the Privacy Commissioner, Auckland, 25 September 2003) 3.

[398] Slane, above n 397, para 3.10.

[399] *H v G* (14 May 1999) High Court Auckland M 1868/98, Salmon J.

Summary of questions

CHAPTER 2: PARENTHOOD, GUARDIANSHIP AND PATERNITY

Statutory presumption of paternity

Q1 Should the presumption of paternity be retained as part of New Zealand law?

Q2 If retained, should the presumption of paternity be extended to a de facto partner of the child's mother?

Q3 If the presumption of paternity was extended to men in de facto relationships should it be based on cohabitation at any time between 44 and 20 weeks before the birth of the child (as in some Australian States) or on some other basis?

CHAPTER 5: CHILDREN AND IDENTITY

Registers

Q4 Should children conceived of donor gametes be able to obtain full donor background information from a database held by the Registrar-General of Births, Deaths and Marriages as well as from the clinic that provided the treatment?

Q5 Should the law be extended to allow donor-conceived children under the age of 18 to have access to information on the register about their genetic parents? If so, should there be a lower age or no age restriction?

Q6 If the Supplementary Order Paper to the Human Assisted Reproductive Technology Bill becomes law should steps be taken to assist children conceived prior to its enactment in having access to information about their genetic parents?

Q7 Should children conceived in surrogacy arrangements or private donor gamete conception also be able to obtain information from the Registrar-General's database?

Q8 What cultural information should be recorded on the Registrar-General's database? For example, should Māori donors be required to provide information about their hapu and iwi (tribal affiliations), if they know them?

Birth certificates

Q9 Instead of the register, should children born as a result of donor gamete conception or surrogacy have, in addition to the publicly available birth certificate, a private certificate that records the name, town or city of residence and occupation of all persons involved in their conception and birth including both genetic parents, the gestational mother and social parents?

Q10 Should the official, publicly available birth certificate of a child born as a result of donor gamete conception or surrogacy be annotated to indicate that a person named on it is not the genetic or gestational parent? For example, "by donor", "by surrogacy" or "by section 4 Status of Children Amendment Act 1987"?

a) If so, what should such annotation say?

b) Should such a notation be optional and made at the discretion of the social parents?

Duties of clinics and parents

Q11 Instead of annotations:

a) should there be a legal obligation imposed on parents to inform their children of the true facts about their conception and birth?;

or

b) should disclosure of such information be left to the discretion of the parents?

Q12 Should clinics be required by law to provide counselling and education and encouragement to recipients to tell their children of their genetic origins? If so, should it be state funded?

Options for achieving higher rates of identified fathers

Q13 Should efforts be made to increase the number of fathers named on birth certificates?

Q14 Should the government be required to make inquiries into the paternity of every child whose name is not shown on the child's birth certificate, as is done in Sweden?

Q15 Is there merit in any of the approaches adopted in the United States in ensuring that a greater percentage of unmarried fathers are identified in law?

Q16 What other means could be adopted to increase the number of named fathers on birth certificates?

Q17 Are there situations where the father's details should not appear on the birth certificate?

Children conceived after the death of their father

Q18 Should the name of a deceased father be included on the child's birth certificate?

Q19 Should the father's name appear on a birth certificate even if conception takes place years after his death using his frozen, stored sperm?

Q20 Should his name only be included in the child's birth certificate where he has given written consent during his lifetime for the use of his sperm to achieve conception posthumously?

Q21 Should an intending non-genetic father be able to be registered on the birth certificate of a child conceived through the use of donor sperm, if he knew of and consented to the procedure, but died before the conception and birth of the child?

CHAPTER 7: OPTIONS (AS DISCUSSED IN CHAPTERS 3, 4 AND 7)

Option 1: Deeming provisions

Donor gamete conception

Q22 Are the deeming provisions under the Status of Children Amendment Act, which confer parental rights and responsibilities on the non-genetic social parent, the best model for reallocating parenthood?

Q23 Should the genetic parent's spouse or partner (the non-genetic parent) be deemed the full legal parent automatically upon birth of the child by operation of the law, or should that person have to take some legal steps to obtain parental status?

Q24 Should the deeming mechanism operate so as to extinguish the genetic parenthood of the donor in law, as well as the rights and liabilities of parenthood? (In doing so it will result in children born to single women having only one parent in law.)

Q25 Should the law that allocates parental responsibilities and rights in donor gamete conception be based upon the method of conception (for example, artificial insemination) or on the intention of the parties as to whether the donor's legal parenthood is to be extinguished?

Deeming provision: surrogacy

Q26 Should the law be amended to deem the commissioning parents to be the child's parents for all purposes and the gestational mother and her partner not to be the parents? If so, what protections should be put in place for the birth mother?

Option 2: Parental status orders

Q27 Is it better that non-genetic parents apply to the Court to obtain status as parents, rather than simply being "deemed" parents?

Q28 Should the parental status order be made automatically upon proof of a relationship to the genetic parent and the genetic parent's consent, or should there be a duration of relationship requirement? If so, what should be the minimum duration?

Q29 Should there also be a condition that the non-genetic applicant be screened by a social worker and be approved by the Court as a suitable parent?

Q30 Should the parental status order be made only in respect of the spouse or partner of the genetic mother so that a child has a maximum of two social parents, or should other intending social parents be able to acquire this status?

Q31 If so, should it be granted automatically to the other genetic parent if they apply? For example, to a donor father who provides sperm for a lesbian couple?

Parental status orders: surrogacy

Q32 If a parental status order was made prior to birth, what should be the period of time after birth in which a birth mother has a right to apply to have the order stopped? For example, should there be an automatic right of revocation within 28 days after birth?

Q33 If the birth mother is only the gestational, and not the genetic, mother should she still have the right to refuse to give up the child to the genetic parents?

Q34 Where both commissioning parents are genetic parents of the child should they qualify for a parental status order automatically?

Q35 Should the Court grant a parental status order only if certain conditions are met, such as the commissioning parents being of specified ages or marital status? What other conditions, if any, should be set?

Q36 Where one commissioning parent is a genetic parent should the other gain parental status as of right? If not, what requirements should there be? Should there be, for example, a duration of relationship requirement or a suitability assessment?

Q37 Where neither parent is a genetic parent, should the parents have access to a parental status order, or should they have to adopt the child and be subject to the standard adoption checks as to suitability as parents?

Option 3: Adoption orders

Donor gamete conception

Q38 Is an amended form of adoption a better way to reallocate parental responsibilities? What changes to the Adoption Act 1955 would be necessary to reallocate parenthood in donor gamete conceptions?

Adoption orders: surrogacy

Q39 Where both parents are the genetic parents of the child, should adoption be automatic and fast tracked? Where one is a genetic parent should adoption be automatic and fast tracked?

Q40 Should unmarried commissioning parents (including same-sex couples) be able to adopt the child?

Q41 What changes should there be to adoption law in surrogacy arrangements? For example, should there be any change to the law allowing the child to be cared for by the commissioning parents prior to the adoption and should commissioning parents be able to advertise for a surrogate mother?

Q42 What should be the time period before which the birth mother can give her consent to the adoption?

Option 4: Guardianship orders – donor gamete conception and surrogacy

Q43 What are the advantages of the model of "enduring guardianship"? Is the role of the non-genetic parent recognised adequately by a guardianship order?

Q44 Are commissioning parents of a child born into a surrogacy arrangement recognised adequately through the granting of a guardianship order?

Option 5: Reallocation of parenthood by an agreement – donor gamete conception and surrogacy

Q45 Should agreements as to the allocation of parental rights and responsibilities among involved adults be able to be registered in the Family Court with a presumption that they be enforced according to their terms? Should the presumption be rebutted if it was shown the

terms would not accord with the child's best interests? Would there be any other basis for a rebuttal to be established?

Q46 Alternatively, should the Court be required to determine, as it is now, whether the proposals contained in the parental rights and responsibilities agreement are in the child's best interests before they are enforced?

Q47 If parental agreements are to be registered, should it be a requirement of registration that the parties have independent legal advice and separate and joint counselling?

Q48 Could or should these parental agreements be tendered as evidence when parties apply for a guardianship, adoption or parental status order?

CHAPTER 8: PROVING AND DISPROVING PARENTHOOD

Establishing maternity

Q49 Should the law recognise both the genetic mother and the gestational mother as parents? If not, who should be recognised in law as the mother?

Q50 Should there be a process for the establishment and disestablishment of maternity in law?

Parentage tests

Who is conducting the tests?

Q51 Is there a need to regulate the bodies or persons who conduct DNA parentage testing?

Q52 If so, should regulation be by way of accreditation, a voluntary Code of Practice or court supervision?

What should be tested?

Q53 Should the Family Proceedings Act 1980 be amended to provide for other forms of DNA parentage testing?

The Court's powers to order tests

Q54 Should the courts have the power to order people to provide a sample obtained from a mouth swab for DNA testing for the purposes of establishing parentage?

Q55 Should the Court take into account the rights of the child when deciding whether to recommend or order a test?

Q56 Should these rights be an important or paramount consideration in the exercise of the Court's discretion?

Q57 What sanctions, if any, should be placed on those who refuse to submit to tests that are recommended or ordered by the Court? Should it be a criminal offence to refuse to be tested if that has been ordered?

Wardship for the purposes of consent

Q58 Should the law enable the Court to give consent to DNA parentage testing on behalf of the child?

Children's consent to testing

Q59 Should children under the age of 16 be able to give or refuse consent to DNA parentage testing in cases where they are sufficiently mature and capable of making a free and informed decision?

Q60 Would the recommendations of the Australian Law Reform Commission be an appropriate model for determining the capacity of a child to give or withhold consent? If not, what other model would you favour?

Is testing always appropriate?

Q61 Should the courts have the discretion to refuse to recommend (or order) DNA parentage tests where such testing may not be in the child's best interests? As, for example, in cases where the child already has a stable family unit, or where an existing parental figure seeks to disestablish parenthood?

Q62 Should persons who have contributed financially and emotionally to the child's care on the understanding that they are a parent, be able to seek removal of parental responsibilities later on the basis of a test proving that they have no genetic connection to the child?

Use of blood samples from newborn babies for parentage testing

Q63 Should the blood samples taken from newborn babies for genetic defect screening be released to third parties for the purposes of DNA analysis to establish parenthood contrary to the wishes of the guardian?

Q64 Does the child have any rights in relation to the use of these blood samples for DNA parentage testing?

APPENDIX I

United Nations Convention on the Rights of the Child

ADOPTED AND OPENED FOR SIGNATURE, RATIFICATION AND ACCESSION BY

GENERAL ASSEMBLY RESOLUTION 44/25 OF 20 NOVEMBER 1989

Entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to

judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and

mental health. To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of dropout rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

General comment on its implementation

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous

shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or

degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings. 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems. (amendment)

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall

within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon

communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

APPENDIX 2

Excerpt from the Status of Children Act 1969

5 Presumptions as to parenthood

(1) A child born to a woman during her marriage, or within 10 months after the marriage has been dissolved by death or otherwise, shall, in the absence of evidence to the contrary, be presumed to be the child of its mother and he husband, or former husband, as the case may be.

[(2) Every question of fact that arises in applying subsection (1) of this section shall be decided on a balance of probabilities.

(3) This section shall apply in respect of every child, whether born before or after the commencement of this Act, and whether born in New Zealand or not, and whether or not his father or mother has ever been domiciled in New Zealand.**]**

APPENDIX 3

The Status of Children Amendment Act 1987

Public Act 1987 No 185

An Act to amend the Status of Children Act 1969 in relation to the status of persons conceived as a result of certain medical procedures

BE IT ENACTED by the Parliament of New Zealand as follows:

1 Short Title

This Act may be cited as the Status of Children Amendment Act 1987, and shall be read together with and deemed part of the Status of Children Act 1969 (hereinafter referred to as the principal Act).

2 Interpretation

For the purposes of this Act,—

(a) A reference to a married woman includes a reference to a woman who is living with a man as his wife in a relationship in the nature of a marriage, although not legally married to him; and

(b) A reference, however expressed, to the husband or wife of a person—

(i) Is, in the case where the person is living with another person of the opposite sex as his or her spouse in a relationship in the nature of a marriage although not legally married to the other person, a reference to that other person; and

(ii) Does not, in that case, include a reference to the spouse (if any) to whom the person is legally married.

3 Application of Act

(1) This Act applies—

(a) In respect of a pregnancy referred to in section 5 or section 7 or section 9 or section 11 or section 13 or section 15 of this Act, whether the pregnancy occurred before or after the commencement of this Act; and whether or not it resulted from a procedure carried out in New Zealand; and

(b) In respect of any child born of a pregnancy referred to in section 5 or section 7 or section 9 or section 11 or section 13 or section 15 of this Act, whether the child was born before or after the commencement of this Act, and whether or not the child was born in New Zealand.

(2) Nothing in this Act affects the vesting in possession or in interest of any property that occurred before the commencement of this Act.

Status of Children Conceived By Artificial Insemination By Donor

4 Artificial insemination by donor

A reference in section 5 or section 17 of this Act to artificial insemination is a reference to the artificial insemination of a woman where the semen used for the artificial insemination—

(a) Is produced by a man other than her husband; or

(b) Is a mixture of semen part of which is produced by a man other than her husband and part of which is produced by her husband.

5 Status of child

(1) Where a married woman becomes pregnant as a result of artificial insemination and she has undergone the procedure with the consent of her husband,—

(a) The husband shall, for all purposes, be the father of any child of the pregnancy, whether born or unborn; and

(b) Any man, not being her husband, who produced semen used for the procedure shall, for all purposes, not be the father of any child of the pregnancy, whether born or unborn.

(2) Where a woman becomes pregnant as a result of artificial insemination and that woman is either a woman who is not a married woman or a married woman who has undergone the procedure without the consent of her husband,—

(a) Any child of the pregnancy, whether born or unborn, shall not have, in relation to the man who produced the semen used in the procedure, the rights and liabilities of a child of that man unless at any time that man becomes the husband of the woman; and

(b) The man who produced the semen used in the procedure shall not have the rights and liabilities of a father of any child of the pregnancy, whether born or unborn, unless at any time that man becomes the husband of the woman.

Status of Children Conceived By Use Of Donor Semen In An Implantation Procedure

6 Donor semen implantation procedure

A reference in section 7 or section 17 of this Act to a donor semen implantation procedure is a reference to the procedure of implanting in the womb of a woman an embryo derived from an ovum produced by her and fertilised outside her body by the use of semen produced by a man other than her husband.

7 Status of child

(1) Where a married woman becomes pregnant as a result of a donor semen implantation procedure and she has undergone the procedure with the consent of her husband,—

(a) The husband shall, for all purposes, be the father of any child of the pregnancy, whether born or unborn; and

(b) The man who produced the semen used for the fertilisation of the ovum used in the procedure shall, for all purposes, not be the father of any child of the pregnancy, whether born or unborn.

(2) Where a woman becomes pregnant as a result of a donor semen implantation procedure and that woman is either a woman who is not a married woman or a married woman who has undergone the procedure without the consent of her husband,—

(a) Any child of the pregnancy, whether born or unborn, shall not have, in relation to the man who produced the semen used in the procedure, the rights and liabilities of a child of that man unless at any time that man becomes the husband of the woman; and

(b) The man who produced the semen used in the procedure shall not have the rights and liabilities of a father of any child of the pregnancy, unless at any time that man becomes the husband of the woman.

Status of Children Conceived By Use Of Donor Ovum Or Donor Embryo In An Implantation Procedure

8 Donor ovum or donor embryo implantation procedure

A reference in section 9 or section 17 of this Act to a donor ovum or donor embryo implantation procedure is a reference to the procedure of implanting in the womb of a woman an embryo derived from an ovum produced by another woman, being an ovum that has been fertilised by the use of—

(a) Semen produced by the husband of the woman in whose womb the embryo is implanted; or

(b) Semen produced by a man other than the husband of the woman in whose womb the embryo is implanted.

9 Status of child

(1) Where a married woman becomes pregnant as a result of a donor ovum or donor embryo implantation procedure in which the semen used for the fertilisation of the ovum is produced by a man other than the husband of the married woman and she has undergone the procedure with the consent of her husband,—

(a) The husband shall, for all purposes, be the father of any child of the pregnancy, whether born or unborn; and

(b) The man who produced the semen shall, for all purposes, not be the father of any child of the pregnancy, whether born or unborn.

(2) Where a woman becomes pregnant as a result of a donor ovum or donor embryo implantation procedure and that woman is either a woman who is not a married woman or a married woman who has undergone the procedure without the consent of her husband,—

(a) Any child of the pregnancy, whether born or unborn, shall not have, in relation to the man who produced the semen used in the procedure, the rights and liabilities of a child of that man unless that man is, or at any time becomes, the husband of the woman; and

(b) The man who produced the semen used in the procedure shall not have the rights and liabilities of a father of any child of the pregnancy, unless that man is, or at any time becomes, the husband of the woman.

(3) Where a woman becomes pregnant as a result of a donor ovum or donor embryo implantation procedure,—

(a) The woman shall, for all purposes, be the mother of any child of the pregnancy, whether born or unborn; and
(b) The woman who produced the ovum from which the embryo used in the procedure was derived shall, for all purposes, not be the mother of any child of the pregnancy, whether born or unborn.

Status of Children Conceived By Use Of Donor Semen In An Intra-Fallopian Transfer Procedure

10 Donor semen intra-fallopian transfer procedure

A reference in section 11 or section 17 of this Act to a donor semen intra-fallopian transfer procedure is a reference to the procedure of transferring into the fallopian tubes of a woman an ovum produced by her together with semen produced by a man other than her husband.

11 Status of child

(1) Where a married woman becomes pregnant as a result of a donor semen intra-fallopian transfer procedure and she has undergone the procedure with the consent of her husband,—
(a) The husband shall, for all purposes, be the father of any child of the pregnancy, whether born or unborn; and
(b) The man who produced the semen transferred into the fallopian tubes in the procedure shall, for all purposes, not be the father of any child of the pregnancy, whether born or unborn.

(2) Where a woman becomes pregnant as a result of a donor semen intra-fallopian transfer procedure and that woman is either a woman who is not a married woman or a married woman who has undergone the procedure without the consent of her husband,—
(a) Any child of the pregnancy, whether born or unborn, shall not have, in relation to the man who produced the semen transferred into the fallopian tubes in the procedure, the rights and liabilities of a child of that man unless at any time that man becomes the husband of the woman; and
(b) The man who produced the semen transferred into the fallopian tubes in the procedure shall not have the rights and liabilities of a father of any child of the pregnancy, whether born or unborn, unless at any time that man becomes the husband of the woman.

Status of Children Conceived By Use Of Donor Ovum In An Intra-Fallopian Transfer Procedure

12 Donor ovum intra-fallopian transfer procedure

A reference in section 13 or section 17 of this Act to a donor ovum intra-fallopian transfer procedure is a reference to the procedure of transferring into the fallopian tubes of a woman an ovum produced by another woman together with—
(a) Semen produced by the husband of the woman into whose fallopian tubes an ovum is transferred; or

(b) Semen produced by a man other than the husband of the woman into whose fallopian tubes an ovum is transferred.

13 Status of child

(1) Where a married woman becomes pregnant as a result of a donor ovum intra-fallopian transfer procedure in which the semen transferred into the fallopian tubes is produced by a man other than the husband of the married woman and she has undergone the procedure with the consent of her husband,—

(a) The husband shall, for all purposes, be the father of any child of the pregnancy, whether born or unborn; and

(b) The man who produced the semen shall, for all purposes, not be the father of any child of the pregnancy, whether born or unborn.

(2) Where a woman becomes pregnant as a result of a donor ovum intra-fallopian transfer procedure and that woman is either a woman who is not a married woman or a married woman who has undergone the procedure without the consent of her husband,—

(a) Any child of the pregnancy, whether born or unborn, shall not have, in relation to the man who produced the semen used in the procedure, the rights and liabilities of a child of that man unless at any time that man is, or at any time becomes, the husband of the woman; and

(b) The man who produced the semen used in the procedure shall not have the rights and liabilities of a father of any child of the pregnancy, unless that man is, or at any time becomes, the husband of the woman.

(3) Where a woman becomes pregnant as a result of a donor ovum intra-fallopian transfer procedure,—

(a) The woman shall, for all purposes, be the mother of any child of the pregnancy, whether born or unborn; and

(b) The woman who produced the ovum which was transferred into the fallopian tubes in the procedure shall, for all purposes, not be the mother of any child of the pregnancy, whether born or unborn.

Status of Children Conceived By Use Of Embryos In An Intra-Fallopian Transfer Procedure

14 Embryo intra-fallopian transfer procedure

(1) A reference in section 15 or section 17 of this Act to a donor embryo intra-fallopian transfer procedure is a reference to the procedure of transferring into the fallopian tubes of a woman an embryo derived from an ovum produced by another woman, being an ovum that has been fertilised by the use of semen produced by a man other than the husband of the woman into whose fallopian tubes the embryo is transferred.

(2) A reference in section 15 or section 17 of this Act to an embryo (donor semen) intra-fallopian transfer procedure is a reference to the procedure of transferring into the fallopian tubes of a woman an embryo derived from an ovum produced by the woman, being an ovum that has been fertilised by the use of semen produced by a man other than the husband of the woman into whose fallopian tubes the embryo is transferred.

(3) A reference in section 15 or section 17 of this Act to an embryo (donor ovum) intra-fallopian transfer procedure is a reference to the procedure of transferring into the fallopian tubes of a woman an embryo derived from an ovum produced by a woman

other than the woman into whose fallopian tubes the embryo is transferred, being an ovum that has been fertilised by the use of semen produced by the husband of the woman into whose fallopian tubes the embryo is transferred.

15 Status of child

(1) Where a married woman becomes pregnant as a result of a donor embryo intra-fallopian transfer procedure or an embryo (donor semen) intra-fallopian transfer procedure and she has undergone the procedure with the consent of her husband,—

(a) The husband shall, for all purposes, be the father of any child of the pregnancy, whether born or unborn; and

(b) The man who produced the semen shall, for all purposes, not be the father of any child of the pregnancy, whether born or unborn.

(2) Where a woman becomes pregnant as a result of a donor embryo intra-fallopian transfer procedure or an embryo (donor semen) intra-fallopian transfer procedure and that woman is either a woman who is not a married woman or a married woman who has undergone the procedure without the consent of her husband,—

(a) Any child of the pregnancy, whether born or unborn, shall not have, in relation to the man who produced the semen used in the procedure, the rights and liabilities of a child of that man unless at any time that man becomes the husband of the woman; and

(b) The man who produced the semen used in the procedure shall not have the rights and liabilities of a father of any child of the pregnancy, unless at any time that man becomes the husband of the woman.

(3) Where a woman becomes pregnant as a result of a donor embryo intra-fallopian transfer procedure or an embryo (donor ovum) intra-fallopian transfer procedure,—

(a) The woman shall, for all purposes, be the mother of any child of the pregnancy, whether born or unborn; and

(b) The woman who produced the ovum from which the embryo used in the procedure was derived shall, for all purposes, not be the mother of any child of the pregnancy, whether born or unborn.

General Provisions

16 Conflicting evidence of paternity

Sections 5, 7, 9, 11, 13, and 15 of this Act shall have effect notwithstanding—

(a) Any conflicting evidence under section 8 of the principal Act that the man who produced the semen was the father of the child of the pregnancy; and

(b) Any conflicting declaration of paternity made under section 10 of the principal Act that the man who produced the semen was the father of the child of the pregnancy; and

(c) Any other evidence that the man who produced the semen was the father of the child of the pregnancy.

17 Presumption concerning husband's consent

(1) In any proceedings in which the operation of section 5 or section 7 or section 9 or section 11 or section 13 or section 15 of this Act is relevant, a husband's consent to the carrying out of—

(a) Artificial insemination by donor; or

(b) A donor semen implantation procedure; or

(c) A donor ovum or donor embryo implantation procedure in which the semen used for the fertilisation of the ovum is produced by a man other than the husband; or

(d) A donor semen intra-fallopian transfer procedure; or

(e) A donor ovum intra-fallopian transfer procedure in which the semen transferred into the fallopian tubes is produced by a man other than the husband; or

(f) An embryo intra-fallopian transfer procedure in which the semen used for the fertilisation of the ovum is produced by a man other than the husband,—in respect of his wife shall be presumed in the absence of evidence to the contrary.

(2) Every question of fact that arises in applying subsection (1) of this section shall be decided on a balance of probabilities.

18 Rights and liabilities of child and donor where donor marries mother of child

Where, in any case to which section 5(2) or section 7(2) or section 9(2) or section 11(2) or section 13(2) or section 15(2) of this Act applies, the man who produced the semen used in the procedure that resulted in the pregnancy becomes the husband of the woman who became pregnant,—

(a) Any child of the pregnancy shall have, in relation to that man, the rights and liabilities of a child of that man, but, in the absence of agreement to the contrary, those liabilities shall not include liabilities incurred before the man becomes the husband of the woman; and

(b) That man shall have, in relation to any child of the pregnancy, the rights and liabilities of a father of a child but, in the absence of agreement to the contrary, those liabilities shall not include liabilities incurred before the man becomes the husband of the woman.

APPENDIX 4

Excerpts from the Guardianship Act 1968

Natural Guardianship

6 Guardianship of children

(1) Subject to the provisions of this Act, the father and the mother of a child shall each be a guardian of the child.

(2) Subject to the provisions of this Act, the mother of a child shall be the sole guardian of the child if—

(a) She is not married to the father of the child, and either:

(i) Has never been married to the father; or

(ii) Her marriage to the father of the child was dissolved before the child was conceived; and

(b) She and the father of the child were not living together as husband and wife at the time the child was born.

(3) Where the mother of a child is, or was at the time of her death, its sole guardian by virtue of subsection (2) of this section the father of the child may apply to the Court to be appointed as guardian of the child, either in addition to or instead of the mother or any guardian appointed by her, and the Court may in its discretion make such order on the application as it thinks proper.

(4) On the death of the father or the mother the surviving parent, if he or she was then a guardian of the child, shall, subject to the provisions of this Act, be the sole guardian of the child.

6A Declaration as to guardianship of father

(1) Any man who alleges that he is a guardian of a child by virtue of the provisions of section 6 of this Act (other than by virtue of an order under subsection (3) of that section) may apply to the Court for an order declaring that he is a guardian of the child, and, if it is proved to the satisfaction of the Court that the allegation is true and that the man has not been deprived of his guardianship, the Court may make the order.

(2) The provisions of the Declaratory Judgments Act 1908 shall extend and apply to every application under subsection (1) of this section with all necessary modifications.

Appointment And Removal Of Guardians

8 Court-appointed guardians

(1) Subject to the provisions of this section, the Court may at any time, on application made for the purpose or on the making of an order under section 10 of this Act,

appoint a guardian of a child either as sole guardian or in addition to any other guardian, and either generally or for any particular purpose, and either until the child attains the age of 20 years or sooner marries, or for any shorter period.

(2) The High Court shall have exclusive jurisdiction to appoint and remove a guardian ad litem in respect of any proceedings before that or any higher Court, and may appoint or remove a guardian ad litem in respect of any proceedings before any other Court.

10 Removal of guardian

(1) The Court may at any time on application by the other parent or by a guardian or near relative or, with the leave of the Court, by any other person deprive a parent of the guardianship of his child or remove from his office any testamentary guardian or any guardian appointed by the Court.

(2) No parent shall be deprived of the guardianship of his child pursuant to subsection (1) of this section unless the Court is satisfied that the parent is for some grave reason unfit to be a guardian of the child or is unwilling to exercise the responsibilities of a guardian.

Custody Orders And Orders In Other Proceedings

11 Custody orders

(1) Subject to section 24 of this Act, the Court may from time to time,—

(a) On application by the father or mother, or a step-parent, or a guardian, of a child; or

(b) With the leave of the Court, on application by any other person,—make such interim or permanent order with respect to the custody of the child as it thinks fit.

(2) Any order made under subsection (1) of this section may be made subject to such conditions as the Court thinks fit.

Disputes

13 Disputes between guardians

(1) When more than one person is a guardian of a child, and they are unable to agree on any matter concerning the exercise of their guardianship, any of them may apply to the Court for its direction, and the Court may make such order relating to the matter as it thinks proper.

(2) Where more than one person has custody of a child, and they are unable to agree on any matter affecting the welfare of the child, any of them may apply to the Court for its direction, and the Court may make such order relating to the matter as it thinks proper.

(3) Where pursuant to an order of the High Court more than one person is a guardian or has custody of a child the High Court shall have exclusive jurisdiction to settle disputes unless the order has been removed into a District Court pursuant to section 26 of this Act.

14 Review of guardian's decision or refusal to give consent

(1) A child of or over the age of 16 years who is affected by a decision or by a refusal of consent by a parent or guardian in an important matter may (unless the child is under the guardianship of the Court apply to a Family Court Judge who may, if he thinks it reasonable in all the circumstances to do so, review the decision or refusal and make such order in respect thereto as he thinks fit.

(2) Any consent given by a Family Court Judge pursuant to this section shall have the same effect as if it had been given by the parent or guardian.

(3) Nothing in this section shall limit or affect the provisions of the Marriage Act 1955 with respect to consents to the marriage of minors.

Access

15 Access rights

(1) On making any order with respect to the custody of a child the Court may make such order with respect to access to the child by a parent who does not have custody of it under the order as it thinks fit.

(2) A parent who does not have custody of his child may apply to the Court for an order granting him access to the child, and the Court may make such order with respect thereto as it thinks fit.

(2A) Any order made under subsection (1) or subsection (2) of this section may be made subject to such conditions as the Court thinks fit.**]**

(2B) Without limiting subsection (2A) of this section or section 16B of this Act, where—

(a) The Court makes an order under subsection (1) or subsection (2) of this section with respect to access to a child by a parent; and

(b) The Court is satisfied that the parent has used violence (as defined in section 16A of this Act) against the child or the other parent of the child,—the Court shall consider whether or not the order should be subject to any conditions for the purpose of protecting the safety of that other parent while the right of access conferred by the order is being exercised (including while the child is being collected from, or returned to, that other parent).

(3) In this section the term parent includes a step-parent; and the term child has a corresponding meaning.**]**

16 Access of other relatives

(1) If a parent of a child has died, or has been refused access to the child by a Court, or if a parent who has access to a child is not making any attempt to exercise access to the child, the Court may if it thinks fit order that—

(a) The parents of that parent of the child, or either of them; or

(b) Any brother or sister of that parent of the child; or

(c) Any brother or sister of the child—shall have access to the child at such times and places as the Court thinks fit.

(2) Any order made under subsection (1) of this section may be made subject to such conditions as the Court thinks fit.**]**

APPENDIX 5

Excerpts from the Care of Children Bill 2003

Part 2—Guardianship and care of children

Subpart 1—Guardianship: responsibility for children, and decisions about children

Guardianship

14 Guardianship defined

(1) For the purposes of this Act, guardianship of a child means having (and therefore a guardian of the child has), in relation to the child,—

(a) all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child (for example, the role of providing day-to-day care for the child):

(b) every duty, power, right, and responsibility that is vested in the guardian of a child by any enactment:

(c) every duty, power, right, and responsibility that, immediately before 1 January 1970 (the date on which the Guardianship Act 1968 commenced), was vested in a sole guardian of a child by an enactment or rule of law.

(2) However, under section 25(5), no testamentary guardian of a child has, just because of an appointment under section 25, the role of providing day-to-day care for the child.

15 Further examples of guardianship

(1) Further examples of duties, powers, rights, and responsibilities of a guardian of a child are the guardian's—

(a) contributing with other guardians of the child to the child's intellectual, emotional, physical, social, cultural, and other personal development; and

(b) determining (for or with the child), or helping the child to determine, questions about matters (for example, those in subsection (2)) affecting the child (in each case with other guardians of the child).

(2) The matters referred to in subsection (1)(b) are—

(a) the child's name (and any changes to it); and

(b) where, and with whom, the child lives; and

(c) medical treatment for the child; and

(d) where, and how, the child is to be educated; and

(e) the child's religious denomination and practice.

16 Exercise of guardianship

(1) A guardian of a child may exercise (or continue to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to the child, whether or not the child lives with the guardian, unless a Court order provides otherwise.

(2) In this section, Court order means a Court order made under this Act or any other enactment; and includes a Court order that is made under this Act and that embodies some or all of the terms of an agreement described in section 41(1) or section 42(2).

Natural guardianship

17 Child's father and mother usually joint guardians

(1) The father and the mother of a child are guardians jointly of the child unless the child's mother is the sole guardian of the child because of subsection (3) or subsection (4).

(2) To avoid doubt, a reference in this section (or elsewhere in this Act) to "the father of a child" is a reference to the same-sex de facto partner of the mother of the child if, by operation of Part 2 of the Status of Children Act 1969, that de facto partner is a parent of the child (see section 14(2) of that Act).

(3) If a child is conceived on or after the commencement of this Act, the child's mother is the sole guardian of the child if the mother was neither—

(a) married to the father of the child at any time during the period beginning with the conception of the child and ending with the birth of the child; nor

(b) living with the father of the child as a de facto partner at any time during that period.

(4) If a child is conceived before the commencement of this Act, the child's mother is the sole guardian of the child if the mother was neither—

(a) married to the father of the child at any time during the period beginning with the conception of the child and ending with the birth of the child; nor

(b) living with the father of the child as a de facto partner at the time the child was born.

(5) On the death of the father or the mother, the surviving parent, if he or she was then a guardian of the child, is the sole guardian of the child, unless an additional testamentary guardian of the child was appointed by the deceased parent under section 25(2).

(6) This section is subject to sections 18 to 33.

18 Father identified on birth certificate is guardian

If a child's father is not a guardian of the child just because of section 17(3) or (4), then he becomes a guardian of the child if his particulars are registered as part of the child's birth information under 1 of the following sections of the Births, Deaths, and Marriages Registration Act 1995:

(a) section 15(2)(b)(i) or (3)(a)(i) (registration at the request of the child's mother and father):

(b) section 15(2)(b)(ii) or (3)(a)(ii) (registration at the request of the child's mother, and on production of a notice in writing signed by the father, acknowledging that he is the child's father and consenting to the recording of information relating to him):

(c) section 15(2)(c) or (3)(b)(i) (registration at the request of the child's father, and on the child's mother having confirmed that he is the child's father).

19 Father who was not mother's spouse or de facto partner may apply to be appointed as guardian

(1) If, because of section 17(3) or (4), a child's mother is (or was at the time of her death) the sole guardian of the child, the child's father may apply to the Court to be appointed as a guardian of the child.

(2) The father may apply to be appointed—

(a) as a guardian of the child as well as the mother or a testamentary guardian appointed under section 25; or

(b) as a guardian of the child instead of the mother or a testamentary guardian appointed under section 25.

(3) An application under subsection (2)(b) must include an application under section 28 for an order depriving the mother of the guardianship of her child or (as the case requires) removing the testamentary guardian from office.

(4) In response to an application under subsection (2), the Court—

(a) must appoint the father as a guardian of the child, unless to do so would be contrary to the child's welfare and best interests; and

(b) must determine any included application under section 28 in accordance with that section.

20 Declaration that father is guardian because of section 17

(1) A man who alleges that he is a guardian of a child because of section 17 (other than because of an order under section 19) may apply to the Court for an order declaring that the man is a guardian of the child because of section 17.

(2) The Court may make the order if satisfied that the man—

(a) is a guardian of a child because of section 17; and

(b) has not been deprived of his guardianship by an order under section 28.

(3) The Declaratory Judgments Act 1908 applies, with all necessary modifications, to applications under subsection (1).

Subpart 2—Care of children: making arrangements and resolving disputes

Resolving disputes

38 Disputes between guardians

(1) When there are 2 or more guardians of a child, and they are unable to agree on a matter concerning the exercise of their guardianship, any of them may apply to the Court for its direction, and the Court may make any order relating to the matter that it thinks proper.

(2) If 2 or more persons have the role of providing day-to-day care for a child, and they are unable to agree on any matter affecting the welfare of the child, any of them may apply to the Court for its direction, and the Court may make any order relating to the matter that it thinks proper.

(3) If, under an order of the High Court, 2 or more persons are guardians of, or have the role of providing day-to-day care for, a child, the High Court has exclusive jurisdiction to settle disputes, unless the order has been removed into a Family Court under section 119.

39 Family Proceedings Act 1980 dispute-resolution provisions

(1) The sections of the Family Proceedings Act 1980 specified in subsection (2) apply to the proceedings if a spouse or de facto partner applies for an order under this Act relating to—

(a) the role of providing day-to-day care for a child of the marriage or a child of the de facto relationship; or

(b) contact with a child of that kind.

(2) The sections of the Family Proceedings Act 1980 are—

(a) section 10(4) and (5) (which relates to reference of the matter to a counsellor, and to a Family Court hearing not generally proceeding unless either spouse or de facto partner, not less than 28 days after the date of the reference, requests that the hearing should proceed); and

(b) section 19(1) (which, among other things, requires the Court to consider the possibility of a reconciliation between the spouses or de facto partners, or of conciliation between them on any matter in issue).

40 Certain children may seek review of parent's or guardian's decision or refusal to give consent

(1) A child of or over the age of 16 years who is affected by a decision or by a refusal of consent by a parent or guardian in an important matter may (unless the child is under the guardianship of the Court) apply to a Family Court Judge who may, if he or she thinks it reasonable in all the circumstances to do so, review the decision or refusal and make any order in respect of it that he or she thinks fit.

(2) A consent given by a Family Court Judge under this section has the same effect as if it had been given by the parent or guardian.

(3) Nothing in this section affects the provisions of the Marriage Act 1955 with respect to consents to the marriage of minors, but a child may apply under this section for a review of a parent's or guardian's refusal to consent to a de facto relationship between the child and another person (see section 9(3)(b)).

41 Agreements between parents and guardians about day-to-day care for, contact with, or upbringing of, child

(1) This section applies to an agreement between parents or guardians of a child (even if any of the parents or guardians is a minor), but only to the extent that the agreement relates to any of the following matters:

(a) who has the role of providing day-to-day care for the child:

(b) contact with the child:

(c) the upbringing of the child.

(2) A party to the agreement may request counselling in respect of a dispute relating to the agreement, under section 59(1).

(3) The agreement cannot be enforced under this Act.

(4) However, some or all of the terms of the agreement may be embodied in an order of the Court if, under 1 or more provisions of this Act other than this section (for example, under section 44),—

(a) some or all of the parties to the agreement may apply for the order; and

(b) the order may be made by the Court.

(5) The order may be enforced under this Act in the same way as an order that does not embody terms of an agreement.

Compare: 1968 No 63 s 18

42 Agreements between parents and donors about donors' contact with, or role in upbringing of, child conceived as result of assisted human reproduction procedure

(1) In this section,—

"AHR procedure" has the same meaning as in section 14(1) { sic ? } of the Status of Children Act 1969

"child" means a child conceived, or proposed to be conceived, as a result of an AHR procedure

"donor",—

(a) in relation to a child conceived as a result of an AHR procedure, means a donor of semen, or of an ovum, or of an ovum from which was derived an embryo, that was used in the procedure; and

(b) in relation to a child proposed to be conceived as a result of an AHR procedure,—

(i) means a donor of semen, or of an ovum, or of an ovum from which was derived an embryo, that is to be used in the procedure; and

(ii) includes a person who intends to be a donor of that kind; but

(c) in no case includes a person who intends to adopt the child

"parents",—

(a) in relation to a child conceived as a result of an AHR procedure, means every person who is a parent of the child when the child is conceived as a result of the procedure; and

(b) in relation to a child proposed to be conceived as a result of an AHR procedure, means every person who will be a parent of the child if and when the child is conceived as a result of the procedure; but

(c) in no case includes a person who has adopted, or intends to adopt, the child.

(2) This section applies to an agreement between the parents of a child and a donor or donors (even if any of the parents or donors is a minor), but only to the extent that the agreement relates to any of the following:

(a) contact between the donor or donors and the child:

(b) the role of the donor or donors in the upbringing of the child.

(3) The agreement cannot be enforced under this Act.

(4) However, on an application for the purpose by a party to the agreement, the Court may, with the consent of all parties to the agreement, make an order of the Court that embodies some or all of the terms of the agreement.

(5) An order under subsection (4) may, to the extent that it relates to contact with the child, be enforced under this Act as if it were a parenting order relating to contact.

(6) Where parties to the agreement are unable to agree on a matter concerning the role of the donor or donors in the upbringing of the child (being a matter that is the subject of terms of the agreement that have been embodied in an order under subsection (4)), any of those parties may apply to the Court for its direction, and the Court may make any order relating to the matter that it thinks proper.

Compare: 1968 No 63 s 18; 1980 No 94 s 15

"Part 1

"Status of children generally

"Children of equal status whether or not parents are or have been married to each other

"2A Purpose of sections 3 and 4—

"The purpose of sections 3 and 4 is to remove the legal disabilities of children born out of wedlock."

158 New heading inserted

The principal Act is amended by inserting, immediately before section 4, the following heading:

"Prior instruments and intestacies".

159 New heading inserted

The principal Act is amended by inserting, immediately before section 5, the following heading:

"Presumptions as to parenthood".

160 New heading inserted

The principal Act is amended by inserting, immediately before section 5A, the following heading:

"Grant of letters of administration and distribution of estates and property held upon trust".

161 Warning notices

(1) Section 6C(1) of the principal Act is amended by repealing paragraph (a), and substituting the following paragraph:

"(a) advising the person served of his or her right to seek to establish the relationship in question by applying to a Family Court or to the High Court under section 10 for a declaration of paternity; and".

(2) Section 6C(1)(b) of the principal Act is amended by omitting the words "the Court", and substituting the words "a Family Court or to the High Court".

162 New heading inserted

The principal Act is amended by inserting, immediately before section 7, the heading:

"Paternity".

163 Recognition of paternity

Section 7(3)(b) of the principal Act is amended by repealing subparagraph (ii), and substituting the following subparagraph:

"(ii) after the expiration of any notice under section 6C(1) and without notice of any declaration of paternity made by a Family Court or by the High Court under section 10."

164 Instruments of acknowledgment may be filed with Registrar-General

Section 9 of the principal Act is amended by repealing subsection (3), and substituting the following subsection:

"(3) If a Family Court or the High Court makes a declaration under section 10(1) or (1A), or a Family Court makes a paternity order under the Family Proceedings Act 1980,—

"(a) the Registrar of the Court must forward a copy of the declaration or order, as the case may require, to the Registrar-General for filing in his or her office under this section; and

"(b) on receipt of any such copy, the Registrar-General must file it accordingly as if it were an instrument of the kind described in section 8(2)."

165 Declaration as to paternity

(1) The principal Act is amended by repealing section 10(1), and substituting the following subsections:

"(1AA) In subsection (1)(a), **'eligible person'** means—

"(a) a woman who alleges that a named person is the father of her child; or

"(b) a person who alleges that the relationship of father and child exists between the person and another named person; or

"(c) a person who wishes to have it determined whether the relationship of father and child exists between 2 named persons, if the person has a proper interest in the result.

"(1) A Family Court or the High Court may make a declaration of paternity (whether the alleged father or the alleged child or both of them are living or dead) if—

"(a) an eligible person applies to the Court for the declaration; and

"(b) it is proved to the Court's satisfaction that the relationship exists.

"(1A) A Court considering an application under subsection (1) may, either on its own initiative or on an application for the purpose by a party to the proceedings, make a declaration of non-paternity (whether the alleged father or the alleged child or both of them are living or dead) if it is proved to the Court's satisfaction that the relationship does not exist."

(2) Section 10 of the principal Act is amended by repealing subsection (3), and substituting the following subsection:

"(3) If an application under subsection (1) is made—

"(a) to a Family Court, the provisions of the Family Proceedings Act 1980 (except sections 47 to 50) apply to the application as if it were an application for a paternity order under section 47 of that Act:

"(b) to the High Court, the provisions of the Declaratory Judgments Act 1908 apply to the application."

(3) Section 10(4) of the principal Act is amended by omitting the words "or subsection (2) of this section shall", and substituting the words "or subsection (1A) or subsection (2) must".

166 New heading inserted

The principal Act is amended by inserting, immediately before section 11, the heading:

"Miscellaneous provisions".

167 New Part 2 inserted

The principal Act is amended by inserting, after section 12, the following Part:

"Part 2

"Status of children conceived as result of AHR procedures

"Preliminary provisions

"13 Purpose of this Part—

"The purpose of this Part is—

"(a) to remove uncertainty about the status of children conceived as a result of AHR procedures:

"(b) to replace the Status of Children Amendment Act 1987 with provisions that continue the effects of that Act (except for the status of father without the rights and liabilities of a father), but also extend the status of parent to a woman living as a de facto partner of a birth mother.

"14 Interpretation—

"(1) In this Part, unless the context otherwise requires,—

"'AHR procedure' means one of the following artificial human reproduction procedures (whether or not the procedure is carried out in a clinical setting, or with the assistance of an independent registered health professional):

"(a) artificial insemination (that is, artificial insemination of a woman where the semen used for the artificial insemination—

"(i) is produced by a man who is not her partner; or

"(ii) is a mixture of semen part of which is produced by a man who is not her partner and part of which is produced by her partner):

"(b) a donor semen implantation procedure (that is, the procedure of implanting in the womb of a woman an embryo derived from an ovum produced by her and fertilised outside her body by the use of semen produced by a man who is not her partner):

"(c) a donor ovum or donor embryo implantation procedure (that is, the procedure of implanting in the womb of a woman (**'woman A'**) an embryo derived from an ovum produced by another woman (**'woman B'**) (whether or not woman B is woman A's partner), being an ovum that has been fertilised by the use of semen produced—

"(i) by woman A's partner; or

"(ii) by a man who is not woman A's partner):

"(d) a donor semen intra-fallopian transfer procedure (that is, the procedure of transferring into the fallopian tubes of a woman an ovum produced by her together with semen produced by a man who is not her partner):

"(e) a donor ovum intra-fallopian transfer procedure (that is, the procedure of transferring into the fallopian tubes of a woman (**'woman A'**) an ovum produced by another woman (**'woman B'**) (whether or not woman B is woman A's partner) together with semen produced—

"(i) by woman A's partner; or

"(ii) by a man who is not woman A's partner):

"(f) a donor embryo intra-fallopian transfer procedure (that is, the procedure of transferring into the fallopian tubes of a woman (**'woman A'**) an embryo derived from an ovum produced by another woman (**'woman B'**) (whether or not woman B is woman A's partner), being an ovum that has been fertilised by the use of semen produced by a man who is not woman A's partner):

"(g) an embryo (donor semen) intra-fallopian transfer procedure (that is, the procedure of transferring into the fallopian tubes of a woman (**'woman A'**) an embryo derived from an ovum produced by woman A, being an ovum that has been fertilised by the use of semen produced by a man who is not woman A's partner):

"(h) an embryo (donor ovum) intra-fallopian transfer procedure (that is, the procedure of transferring into the fallopian tubes of a woman (**'woman A'**) an embryo derived from an ovum produced by another woman, being an ovum that has been fertilised by the use of semen produced by woman A's partner)

"'de facto partner' has the meaning given to it by section 8 of the Care of Children Act 2003

"'partner',—

"(a) in relation to a woman who is married and to whom paragraph (b) does not apply, means the woman's husband; and

"(b) in relation to a woman (woman A) who is married but is living with a man, or with another woman, as a de facto partner, means the man or other woman who is living with woman A as a de facto partner (and so does not mean woman A's husband); and

"(c) in relation to a woman (woman A) who is not married but is living with a man, or with another woman, as a de facto partner, means the man or other woman who is living with woman A as a de facto partner

"'partnered woman' means a woman who—

"(a) is married; or

"(b) is married, but is living with a man, or with another woman, as a de facto partner; or

"(c) is not married but is living with a man, or with another woman, as a de facto partner

"'woman acting alone' means a woman—

"(a) who is not a partnered woman; or

"(b) who is a partnered woman, but has undergone an AHR procedure without her partner's consent.

"(2) A woman who is not the birth mother of a child but who, by operation of this Part, is a parent of the child must, for the purposes of an enactment or rule of law (other than this Part) that refers to, or contemplates, a mother and a father of, or 2 parents of, a child, be treated so far as practicable in the same manner as the father of, or as the other parent of, the child.

"15 Application of Part—

"(1) This Part applies in respect of a pregnancy referred to in any of sections 16 to 21,—

"(a) whether the pregnancy occurred before or after the commencement of this Part:

"(b) whether or not the pregnancy resulted from a procedure carried out in New Zealand.

"(2) This Part applies in respect of a child born of a pregnancy referred to in any of sections 16 to 21,—

"(a) whether the child was born before or after the commencement of this Part:

"(b) whether or not the child was born in New Zealand.

"(3) Nothing in this Part affects the vesting in possession or in interest of any property that occurred before the commencement of this Part.

"Rule about maternity

"16 Woman who becomes pregnant is mother even though ovum is donated by another woman—

"(1) This section applies to the following situation:

"(a) a woman (**'woman A'**) becomes pregnant as a result of an AHR procedure:

"(b) the ovum or embryo used for the procedure was produced by or derived from an ovum produced by another woman (**'woman B'**).

"(2) In that situation, woman A is, for all purposes, the mother of any child of the pregnancy (whether born or unborn).

"Rule about when non-donor partner is parent

"17 When woman's non-donor partner is parent, and non-partner semen donor or ovum donor is not parent—

"(1) This section applies to the following situation:

"(a) a partnered woman (**'woman A'**) becomes pregnant as a result of an AHR procedure:

"(b) the semen (or part of the semen) used for the procedure was produced by a man who is not woman A's partner or, as the case requires, the ovum or embryo used for the procedure was produced by, or derived from an ovum produced by, a woman who is not woman A's partner:

"(c) woman A has undergone the procedure with her partner's consent.

"(2) In that situation, woman A's partner is, for all purposes, a parent of any child of the pregnancy (whether born or unborn).

"Rules about donors of genetic material

"18 Partnered woman: ovum donor not parent unless mother's partner at time of conception—

"(1) This section applies to the following situation:

"(a) a partnered woman (**'woman A'**) becomes pregnant as a result of an AHR procedure:

"(b) the ovum or embryo used for the procedure was produced by, or derived from an ovum produced by, another woman (**'woman B'**).

"(2) In that situation, woman B is not, for any purpose, a parent of any child of the pregnancy (whether born or unborn) unless woman B is, at the time of conception, woman A's partner.

"19 Woman acting alone: non-partner ovum donor not parent unless later becomes mother's partner—

"(1) This section applies to the following situation:

"(a) a woman acting alone (**'woman A'**) becomes pregnant as a result of an AHR procedure:

"(b) the ovum or embryo used for the procedure was produced by or derived from an ovum produced by another woman (**'woman B'**) who is not woman A's partner.

"(2) In that situation, woman B is not, for any purpose, a parent of any child of the pregnancy (whether born or unborn) unless woman B becomes, after the time of conception, woman A's partner (in which case the rights and liabilities of woman B, and of any child of the pregnancy, are determined in accordance with section 22).

"20 Partnered woman: non-partner semen donor not parent—

"(1) This section applies to the following situation:

"(a) a partnered woman becomes pregnant as a result of an AHR procedure:

"(b) the semen (or part of the semen) used for the procedure was produced by a man (**'man A'**) who is not her partner.

"(2) In that situation, man A is not, for any purpose, a parent of any child of the pregnancy (whether born or unborn).

"21 Woman acting alone: non-partner semen donor not parent unless later becomes mother's partner—

"(1) This section applies to the following situation:

"(a) a woman acting alone becomes pregnant as a result of an AHR procedure:

"(b) the semen used for the procedure was produced by a man (**'man A'**) who is not her partner.

"(2) In that situation, man A is not, for any purpose, a parent of any child of the pregnancy (whether born or unborn) unless man A becomes, after the time of conception, the woman's partner (in which case the rights and liabilities of man A, and of any child of the pregnancy, are determined in accordance with section 23).

"Rights and liabilities if non-partner ovum donor or semen donor later becomes mother's partner

"22 Non-partner ovum donor later becomes mother's partner—

"If, in the situation to which section 19 applies, woman B becomes, after the time of conception, woman A's partner—

"(a) woman B has, in relation to any child of the pregnancy, the rights and liabilities of a parent of the child, but, in the absence of agreement to the contrary, those liabilities do not include liabilities incurred before woman B becomes woman A's partner:

"(b) any child of the pregnancy has, in relation to woman B, the rights and liabilities of a child of woman B, but, in the absence of agreement to the contrary, those liabilities do not include liabilities incurred before woman B becomes woman A's partner.

"23 Non-partner semen donor later becomes mother's partner—

"If, in the situation to which section 21 applies, man A becomes, after the time of conception, the woman's partner—

"(a) man A has, in relation to any child of the pregnancy, the rights and liabilities of a parent of the child, but, in the absence of agreement to the contrary, those liabilities do not include liabilities incurred before man A becomes the woman's partner:

"(b) any child of the pregnancy has, in relation to man A, the rights and liabilities of a child of man A, but, in the absence of agreement to the contrary, those liabilities do not include liabilities incurred before man A becomes the woman's partner.

Compare: 1987 No 185 s 18

"24 Only first non-partner donor to later become mother's partner becomes parent—

"Despite sections 19(2) and 21(2), a person cannot become a parent of a child under one of those provisions if another person has already done so through the application of the other of those provisions.

Amendments to other Acts

168 Births, Deaths, and Marriages Registration Act 1995 amended

(1) Section 15(3)(b)(iv) of the Births, Deaths, and Marriages Registration Act 1995 is amended by inserting, before the words "the High Court", the words "a Family Court or".

(2) Section 15(6) of the Births, Deaths, and Marriages Registration Act 1995 is amended by inserting, after the words "declaration made by", the words "a Family Court or by".

APPENDIX 6

Human Assisted Reproduction Bill

(as to be amended by Supplementary Order Paper 80/2003 excerpts)

PART 4

INFORMATION ABOUT DONORS OF DONATED CELLS AND DONOR OFFSPRING

Application

40 No retroactive application

This Part—

(a) applies to an embryo or a donor offspring if, and only if, every donated cell from which the embryo or donor offspring was formed was donated after the commencement of this Part; and

(b) applies to a donated cell if, and only if, it was donated after the commencement of this Part.

41 Provisions not applicable to all information

The provisions of this Part apply to information only if the information is required to be kept by this Part.

Duties of keepers of information when information requests are made

42 Duty to ensure that person requesting information is authorised

(1) When a person requests a provider or the Registrar-General to give the person access to information required to be kept by this Part, the provider or the Registrar-General must not give the person access to that information unless satisfied about the identity of the person who is making the request.

(2) Each provider and the Registrar-General—

(a) must adopt appropriate procedures to ensure that any information intended for a person is received—

(i) only by that person; or

(ii) if the request is made by an agent of the person, only by that person or his or her agent; and

(b) must ensure that, if the request is made by an agent of the person, the agent has the written authority of that person to obtain the information or is otherwise properly authorised by that person to obtain the information.

Advice to prospective donors

43 Providers must give advice to prospective donors

(1) A provider must ensure that, before a person consents to donating a donated cell to or through the provider, or to any service performed or arranged by the provider that involves a donated cell, the person is told the things described in subsection (2).

(2) The things are as follows:

(a) which information about donors is obtained and kept by providers:

(b) how long the information is kept:

(c) why the information is obtained and kept:

(d) which part of the information is forwarded to, and kept indefinitely by, the Registrar-General:

(e) the rights given by this Act to donor offspring, the guardians of donor offspring, and other people to obtain information about donors:

(f) the rights given by this Act to donors and other people to obtain information about donor offspring:

(g) which provisions of this Act require the information to be obtained, kept, or forwarded, or give the rights.

Information about donors

44 Providers must obtain and accept information about donors

(1) When a donor donates a donated cell to or through a provider, the provider must ensure that the provider has obtained the following information about the donor:

(a) the donor's name and the date, place, and country of the donor's birth:

(b) the donor's height:

(c) the colour of the donor's eyes and hair:

(d) the donor's ethnicity:

(e) any aspects, considered significant by the provider, of the medical history of the donor and of the donor's parents, grandparents, and any siblings.

(2) The provider must accept any information that is offered by the donor that updates or corrects any of the information about the donor obtained under subsection (1).

45 Providers and Registrar-General must keep information about donors

(1) A provider must, in accordance with this section, keep all information about a donor obtained or accepted under section 44 in relation to any donated cell.

(2) In any case where the use of the donated cell results in the birth of a living donor offspring, the provider must give the information to the Registrar-General on the earlier of the following events:

(a) the expiry of 50 years after the date of that birth:

(b) the provider ceasing to be a provider in circumstances where there is no successor provider.

(3) The Registrar-General must keep indefinitely all information given under subsection (2).

(4) In any case where no living donor offspring is formed from the donated cell, the provider may destroy the information on the occurrence of any of the following events:

(a) the termination (otherwise than by the birth of a living child) of a pregnancy resulting from the implantation of an embryo formed from the donated cell:

(b) the destruction before implantation of an embryo formed from the donated cell:
(c) the destruction of the donated cell.

46 Access by donors to information about them kept by providers

If asked to do so by a donor, a provider must—

(a) give the donor access to any information about the donor that the provider is keeping; and
(b) tell the donor whether the donor offspring has asked for information about the donor.

47 Access by donor offspring to information about donors kept by providers

(1) If asked to do so by a donor offspring who is 18 years or older, a provider must tell the donor offspring whether the provider is keeping any information about the donor and, if so, give the donor offspring access to it.

(2) If asked to do so by a guardian of a donor offspring who is under 18 years, a provider must tell the guardian whether the provider is keeping any information about the donor and, if so, give the guardian access to it.

(3) A provider may refuse to give a person access to information about a donor if satisfied, on reasonable grounds, that the disclosure is likely to endanger any person.

(4) Subsection (3) overrides subsections (1) and (2).

48 Access by donor offspring to information about donors kept by Registrar-General

(1) If asked to do so by a donor offspring who is 18 years or older, the Registrar-General must tell the donor offspring whether the Registrar-General is keeping any information about the donor and, if so, give the donor offspring access to it.

(2) If asked to do so by a guardian of a donor offspring who is under 18 years, the Registrar-General must tell the guardian whether the Registrar-General is keeping any information about the donor and, if so, give the guardian access to it.

(3) The Registrar-General may refuse to give a person access to information about a donor if satisfied, on reasonable grounds, that the disclosure is likely to endanger any person.

(4) Subsection (3) overrides subsections (1) and (2).

49 Restriction on access to information about donors

A provider or the Registrar-General must not allow any person access to information about a donor unless—

(a) authorised or required to do so by this Act; or
(b) required to do so by any other enactment or rule of law; or
(c) the information is relevant for the purposes of providing medical treatment or medical advice to a person, and is requested by a medical practitioner who produces a certificate signed by 2 medical practitioners that states that access to the information should be obtained for those purposes.

Information about donor offspring

50 Providers must keep track of donor offspring births

A provider must ensure that, at all times, there is in place an efficient system for being notified of, or otherwise becoming aware of, the births of donor offspring.

51 Providers must notify Registrar-General of donor offspring births

A provider who learns of the birth of a donor offspring must promptly—

(a) take all practicable steps to obtain, from any person who knows of the donor offspring, the following information:
  (i) the date and place of the donor offspring's birth:
  (ii) the donor offspring's sex:
  (iii) the donor offspring's name; and

(b) give to the Registrar-General, on a form provided by the Registrar-General for the purpose,—
  (i) the information that the provider has been able to obtain under paragraph (a); and
  (ii) the names and addresses of the guardians of the donor offspring; and
  (iii) the donor's name and the date, place, and country of the donor's birth; and
  (iv) the name of the provider.

52 Providers must give Registrar-General corrected information

If a provider who has given the Registrar-General information under section 51(b) receives additional information that updates or corrects any of the information already given, the provider must promptly give the Registrar-General the updated or corrected information.

53 Registrar-General and providers must keep information about donor offspring

(1) The Registrar-General must keep indefinitely all information given under section 51 or section 52.

(2) A provider must keep all information obtained under section 51 or accepted under section 54 until the expiry of the specified period.

(3) In subsection (2), specified period means the period that starts with the date of the birth of the donor offspring concerned and expires on the earlier of the following:

(a) the expiry of 50 years after the date of that birth:

(b) the provider ceasing to be a provider in circumstances where there is no successor provider.

54 Providers to accept updated and corrected information about donor offspring

(1) If a donor offspring who is 18 years or older offers to a provider any information that updates or corrects any of the information already given under section 51(b) about the donor offspring, the provider must accept the updated or corrected information.

(2) If a guardian of a donor offspring who is under 18 years offers to a provider any information that updates or corrects any of the information already given under section 51(b) about the donor offspring, the provider must accept the updated or corrected information.

55 Access by donor offspring to information about them kept by providers or Registrar-General

(1) If asked to do so by a donor offspring who is 18 years or older, a provider or the Registrar-General must—

(a) give the donor offspring access to any information about the donor offspring kept by the provider or the Registrar-General, as the case equires:

(b) tell the donor offspring whether the donor has asked for information about the donor offspring.

(2) If asked to do so by the guardian of a donor offspring who is under 18 years, a provider or the Registrar-General must—
  (a) give the guardian access to any information about the donor offspring kept by the provider or the Registrar-General, as the case requires:
  (b) tell the guardian whether the donor has asked for information about the donor offspring.

56 Donor offspring 18 years or older may consent to disclosure of identifying information to donor

(1) A donor offspring who is 18 years or older may give a provider or the Registrar-General a written notice—
  (a) consenting to the disclosure of identifying information about the donor offspring to the donor; or
  (b) cancelling a notice given to the provider or the Registrar-General by the donor offspring under paragraph (a).

(2) A provider or the Registrar-General must keep with any information about the donor offspring kept under this Act every notice given by the donor offspring under subsection (1).

(3) For the purposes of any provision of this Act, a provider or the Registrar-General has the consent of a donor offspring to the disclosure to the donor of identifying information about the donor offspring if, and only if,—
  (a) the provider or the Registrar-General holds a notice given by the donor offspring under subsection (1)(a); and
  (b) that notice has not been cancelled under subsection (1)(b).

57 Access by donors to information about donor offspring kept by providers

(1) At the request of a donor, a provider must tell the donor whether, to the best of the provider's knowledge, there have been born any donor offspring formed from a donated cell given to or through the provider and (if so) the sex of each donor offspring.

(2) If the provider has the donor offspring's consent to give the donor access to identifying information about the donor offspring, the provider must do so at the donor's request.

(3) The provider may refuse to disclose to the donor, or give the donor access to, information about the donor offspring if satisfied, on reasonable grounds, that to do so is likely to endanger any person.

(4) Subsection (3) overrides subsections (1) and (2).

58 Access by donors to information about donor offspring kept by Registrar-General

(1) At the request of a donor, the Registrar-General must tell the donor whether information given to the Registrar-General under section 51(b) discloses that there have been any donor offspring born and, if so, the sex of each donor offspring.

(2) If the Registrar-General has the donor offspring's consent to give the donor access to identifying information about the donor offspring, the Registrar-General must do so at the donor's request.

(3) The Registrar-General may refuse to disclose to the donor, or give the donor access to, identifying information about the donor offspring if satisfied, on reasonable grounds, that to do so is likely to endanger any person.

(4) Subsection (3) overrides subsections (1) and (2).

59 Restriction on disclosure of information about donor offspring

A provider or the Registrar-General must not disclose any information about a donor offspring unless—

(a) authorised or required to do so by this Act; or

(b) required to do so by any other enactment or rule of law. Court orders deeming certain donor offspring to be 18

60 Family Court may confer certain rights on donor offspring aged 16 or 17

(1) A donor offspring who is 16 years or older but under 18 years may apply to the Family Court for an order that for the purposes of 1 or more of the provisions stated in subsection (2) the donor offspring is to be treated as a donor offspring who is 18 years old.

(2) The provisions are sections 47(1), 48(1), 54(1), 55(1), and 56(1).

(3) If satisfied that it is in the best interests of the donor offspring to do so, a Family Court Judge may make an order that requires a named provider or the Registrar-General, or both, to treat, for the purposes of 1 or more of the provisions specified in subsection (2), the donor offspring as a donor offspring who is 18 years old.

(4) Rules may be made under section 16A of the Family Courts Act 1980 relating to the practice and procedure of Family Courts in proceedings under this Act.

Application of Privacy Act 1993

61 Application of Privacy Act 1993

(1) Any person may make a complaint to the Privacy Commissioner holding that office under section 12 of the Privacy Act 1993 if—

(a) the person is dissatisfied with any decision, action, or failure to act by a provider or the Registrar-General in relation to—

(i) a request under this Act for information or access to information; or

(ii) a request under this Act to accept updated or corrected information; or

(b) the person believes that information—

(i) has been obtained, kept, or disclosed otherwise than in accordance with this Act; or

(ii) has not been obtained, accepted, kept, or given, as required by this Act.

(2) Sections 40 and 41 of the Privacy Act 1993, so far as applicable and with any necessary modifications, apply to any request of a kind referred to in subsection (1)(a).

(3) Parts VIII, IX, and XII of the Privacy Act 1993, so far as applicable and with any necessary modifications, apply to the making of a complaint under subsection (1) as if the matter to which the complaint relates were an interference with privacy within the meaning of section 66 of that Act.

(4) Nothing in this section limits the jurisdiction of the Privacy Commissioner under the Privacy Act 1993 to investigate any complaint made under Part VIII of that Act.

Part V

To omit this Part from page 12.

Part VI

To omit this Part from pages 12 and 13, and substitute the following Part:

APPENDIX 7

National Ethics Committee on Assisted Human Reproduction (NECAHR) Guidelines

Guidelines for Non-commercial Altruistic Surrogacy Using IVF as Treatment

Prepared by the National Ethics Committee on Assisted Human Reproduction
Revised March 2002
c/o Ministry of Health
PO Box 5013
Wellington
NEW ZEALAND

Ethical themes within the guidelines for non-Commercial altruistic surrogacy using IVF as treatment

Introduction

The National Ethics Committee on Assisted Human Reproduction (NECAHR), formerly the National Ethics Committee on Assisted Reproductive Technology (INECART), developed these guidelines for non-commercial, altruistic surrogacy using in vitro fertilisation (IVF) as treatment over a period of almost ten years. The guidelines are based on surrogacy applications submitted to the Committee by fertility clinics for ethical review, on public consultation, and on a wide range of national and international publications in the field of ethics. The guidelines apply in situations where infertility arises from medical causes.

Advances in reproductive technologies offer many potential benefits for infertile persons. However, there are also uncertainties, risks, and unknowns. These guidelines seek to balance harms and benefits in ways that respect the wishes of individuals, demonstrate caution in relation to possible harms, and give due respect to society's evolving norms. In particular, the guidelines acknowledge the intrinsic worth of persons, who must not be used as a means to an end, through commercialism and commodification for example.

The guidelines respect the autonomy of all parties: persons seeking the assistance of others to form their families; those offering to assist; and any existing children involved in the arrangements. In this regard, choice and informed consent are essential. Respect for privacy is also important.

In particular, the guidelines seek to protect the interests of the child-to-be, including his or her need to grow up in a caring family and form a clear concept of self-identity that is underpinned with accurate information about origins.

Tikanga Maori has an important role, reflecting values evident in New Zealand society generally. Notions of caring for children in the wider group of

whanau, gifting children through whangai, and knowing whakapapa underpin the guidelines. There is an emphasis on caring family relationships, and altruism within families and among close friends.

The guidelines respect the professionalism of fertility specialists and others working in reproductive medicine, counsellors, and legal advisers who work with the parties in a proposed surrogacy arrangement, acknowledging their expertise and ethics as professionals. They also take into account relevant law, at the same time acknowledging that this was mostly written for purposes other than those forming the subject matter of these guidelines.

The language of the guidelines reflects graduated levels of expectation. Hence, careful attention should be given to words such as 'requires', 'expects', 'prefers', 'advises', 'must be', 'should be', 'may be', 'are likely to be'. Such language allows NECAHR, on a basis of reasoned negotiation underpinned by shared ethical values, to work with applicants for ethical review, who, in turn, work with their clients.

1. Provider of fertility services

1.1 NECAHR requires a report on the medical status of the prospective birth mother, including her age, medical history and the number of children she has. Information on the prospective birth mother's age is necessary as the risks to the mother's health and likelihood of a less successful outcome increase with age. Information on the number of children is necessary in order to assist in the assessment of obstetric risk. Also, a surrogate mother who already has children of her own is likely to be more aware of the medical and psychological risks to herself.

1.2 The application for ethical review should be explicit about conditions that may impact on the safety of the prospective birth mother when undertaking treatment and pregnancy and should include documentation from medical advisers.

1.3 The treatment must be in accordance with the RTAC[1] guidelines.

1.4 If the prospective birth mother has a partner the provider must discuss with the prospective birth mother and her partner how they will ensure that they do not conceive their own child during the IVF treatment.

1.5 Screening of the prospective birth mother's partner should be the standard screening carried out for partners of women undergoing IVF treatment, i.e. for HIV tand Hepatitis B and C.

1.6 Providers must notify NECAHR in the case of each non-commercial altruistic surrogacy using IVF as treatment which has been approved:

a) when the IVF programme begins

b) when pregnancy is confirmed or the programme is discontinued

c) any adverse events

d) the outcome of pregnancy.

1.7 NECAHR requires that the clinic's protocols take account of cultural diversity.

2. Commissioning parents

2.1 One or both of the commissioning parents should be the potential child's genetic parent(s). This means that at least one of the commissioning parent's gametes should be used.

---

[1] Reproductive Technology Accreditation Committee

2.2 There should be a medical condition that precludes the commissioning mother from pregnancy or makes pregnancy damaging to her or the child.

2.3 NECAHR prefers that the birth mother be either a family member or close friend of the commissioning parents.

2.4 Recompense may be made for expenses related to pregnancy and childbirth, but no payment should be made in lieu of employment.

3. Prospective birth mother and her partner

3.1 The prospective birth mother and her partner should have completed their family as this may reduce the likelihood that they will want to keep the child. Problems could arise if they had not completed their family or begun it, including the possibility of medical complications due to the surrogacy preventing further pregnancy.

3.2 If the prospective birth mother has a partner, the prospective birth mother and her partner should take measures to ensure that they do not conceive their own child during the IVF treatment.

4. Legal advisers

4.1 NECAHR requires a report from a legal adviser for each family group, indicating that the family groups clearly understand the legal issues and the current environment in which surrogacy agreements are legally unenforceable. The same legal adviser must not advise both family groups.

4.2 NECAHR does not require a formal agreement. This does not preclude a statement of intent between the two family groups that allows them to work through the issues and clearly state their intentions and expectations.

4.3 NECAHR advises that the two family groups discuss possible disputes, for example, about the custody of the child, termination of pregnancy and lifestyle issues during pregnancy, with their legal advisers and counsellors before the proposal is finalised. It should be noted that a court might ultimately resolve disputes.

4.4 Legal advisers must ensure that both family groups understand that the child will legally be the child of the prospective birth mother (and her partner if there is agreement to the surrogacy arrangement) until adopted by the commissioning parents.

4.5 Legal advisers must ensure that both family groups clearly understand procedures relating to guardianship, custody and adoption and the requirements that adoptive parents have to meet, including the requirements of CYFS[2], if they wish to adopt the child.

5. Counsellors

5.1 NECAHR requires counselling reports which confirm that the following issues raised by NECAHR have been discussed and, in the professional judgement of the counsellors, have been adequately understood. NECAHR requires that two counsellors be involved, one for each family group.

5.2 Counselling must be undertaken by qualified counsellors and be culturally appropriate.

5.3 Counselling must include discussion of the following:

a) the possibility of a breakdown in the arrangement such that the prospective birth mother wishes to keep the child or the commissioning parents do not wish to take custody of the child;

---

[2] Child Youth and Family Service

b) the position of both parties in the event of a multiple birth;
c) the risk of rejection of a child for any reason, for example, if the child is born with a disability or abnormality;
d) the possibility of legal termination of a pregnancy if foetal abnormality is diagnosed before birth, having regard for the Contraception, Sterilisation and Abortion Act 1977;
e) the possibility of the prospective birth mother deciding against a termination in the above situation, and the subsequent care of the child
f) the amount of control that genetic parents have over the prospective birth mother's conduct of her pregnancy;
g) the availability to the child of a permanent, accurate record of conception and gestation for the child;
h) the likely impact of the surrogacy arrangement on any existing children, taking into account the age of the existing children and any issues covered in a written agreement.

5.4 NECAHR requires that the parties be counselled as two separate family groups, two family groups together, and, if necessary, as individuals. Counsellors should pay particular attention to ensuring that all individuals' decisions to participate are made on a free and informed basis.

5.5 NECAHR prefers that there be a month free of counselling after the initial counselling period and then further counselling, to allow for the issues to be thought through without counselling intervention.

5.6 Counsellors are expected to follow the usual counselling practice of recording the family histories of those involved in the surrogacy arrangement. If there are life experiences, for example, psychiatric problems, substance/physical/sexual abuse which may predispose any of the persons to risk when moving into a new situation, or which may pose a risk to the potential child, these must be referred to in the counsellors' reports.

5.7 A process should be set up for the resolution of disputes, for example, about the custody of the child or any other issues that arise in discussion with counsellors and legal advisers, before the proposal is finalised.

6. Further considerations

6.1 NECAHR is prepared to consider an application deviating from the proposed guidelines. If applicants wish to deviate from any of the proposed guidelines, they should indicate this and give their reasons at the time of the application.

6.2 Please note that these guidelines are provisional only. NECAHR cannot at this time guarantee that the guidelines include all the issues it might wish to have addressed by applicants in such proposals. Where new issues do come to its attention, NECAHR undertakes to inform potential providers of this in as timely a fashion as possible.

6.3 NECAHR welcomes comment on the proposed guidelines to assist in the ongoing development of the guidelines. NECAHR requests that previous draft guidelines be destroyed.

Bibliography

REPORTS

New Zealand

Department of Social Welfare *Puao-Te-Ata-Tu: The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (Department of Social Welfare, Wellington, 1986)

Claire Dominick *Early Contact in Adoption: contact between birth mothers and adoptive parents at the time of and after the adoption* (Research section, Department of Social Welfare, Wellington, 1988)

Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, Wellington, 2000)

Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001)

A Mikaere, G Ririnui and D Pitama "Guardianship, Custody and Access: Maori Perspectives and Experiences" (Paper for the Ministry of Justice, Wellington, August, 2002)

Ministerial Committee on Assisted Reproductive Technologies *Assisted Human Reproduction: Navigating our Future* (Wellington, 1994)

B Slane *Guthrie Tests* (Office of the Privacy Commissioner, Auckland, 25 September 2003)

Statistics New Zealand *New Zealand Now: Children* (Wellington, 1998).

Statistics New Zealand *2001 Census: Families and Households (2001)* (Wellington, December 2002)

Australia

Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96, Sydney, March 2003)

United Kingdom

M Brazier, S Golombok and A Campbell *Surrogacy: Review for Health Ministers of Current Arrangements for Payment and Regulation,* Report of the Review Team (London, October 1998)

British Medical Association *Changing Conceptions of Motherhood: A Report of Surrogacy* (London, 1995)

Human Genetics Commission report for the Department of Health *Inside Information: Balancing Interests in the Use of Personal Genetic Data* (London, 2002)

Lord Chancellor's Department *Procedures for the Determination of Paternity and on the Law of Parental Responsibility for Unmarried Fathers – A Consultation Paper* (March 1998)

United States

New York State Task Force on Life and Law *Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy* (New York, 1998)

Canada

The Offspring Speak report to Health Canada on an international conference of donor offspring (Toronto, 12 August 2000)

Royal Commission on New Reproductive Technologies *Proceed with Care: final report of the Royal Commission on New Reproductive Technologies* (Canadian Communications Group, Ottawa, 1993)

TEXTS

B P Aigen *Motivations of Surrogate Mothers: Parenthood, altruism and self actualisation (a three year study)* (The American Surrogacy Centre, 1996)

E Blyth, M Crawshaw and J Spiers *Truth and the Child 10 Years On: Information exchange in donor assisted conception* (British Association of Social Workers, Birmingham, 1998)

E Blyth and C Potter "Paying for it: Surrogacy, Market Forces, Assisted Conception" in R Cook, S Day Sclater and F Kaganas (eds) *Surrogate Motherhood: International Perspectives* (Hart, Portland (Oregon), 2003) 227

Ken Daniels "The Policy and Practice of Surrogacy in New Zealand" in R Cook, S Day Sclater and F Kaganas (eds) *Surrogate Motherhood: International Perspectives* (Hart, Portland (Oregon), 2003) 55

A Dickey *Family Law* (3 ed, LBC Information Services, Sydney, 1997)

G Dodd "Surrogacy and the Law in Britain: Users' Perspectives" in R Cook, S Day Sclater and F Kaganas (eds) *Surrogate Motherhood: International Perspectives* (Hart, Portland (Oregon), 2003) 118

R Edelmann "Psychological Assessment in Surrogate Motherhood" in R Cook, S Day Sclater and F Kaganas (eds) *Surrogate Motherhood: International Perspectives* (Hart, Portland (Oregon), 2003) 146

R Edwards *Life Before Birth – Reflections on the Embryo Debate* (Century Hutchinson, London, 1989)

A Else *A Question of Adoption: Closed stranger adoption in New Zealand 1944–1974* (Bridget Williams Books, Wellington, 1991)

D Evans (ed) *Creating the Child: The ethics, law and practice of assisted procreation* (Nijhoff Publishers, The Hague, 1996)

J Fortin *Children's Rights and the Developing Law* (2 ed, LexisNexis, United Kingdom, 2003)

D Hall and J Metge "Kua Tutu Te Puehu, Kia Mau: Maori Aspirations and Family Law" in M Henaghan and B Atkin (eds) *Family Law Policy in New Zealand* (2 ed, LexisNexis, Wellington, 2002) 41

Judge Inglis QC *Family Law* (Sweet & Maxwell, Wellington, 1960)

R G Lee and D Morgan *Human Fertilisation and Embryology: Regulating the Reproductive Revolution* (Blackstone Press, London, 2001)

L Melville *Children and Young People in New Zealand: Key Statistical Indicators* (FAIR Centre, Wellington, 2003)

R Pickford "Unmarried Fathers and the Law" in A Bainham, S Day Sclater and M Richards (eds) *What is a Parent? – A Socio-Legal Analysis* (Hart, Oxford, 1999)

L Pihama "Reconstructing meanings of family: lesbian/gay whanau and families in Aotearoa" in V Adair and R Dixon (eds) *The Family in Aotearoa* (Longman, Auckland, 1998) 179

R Rao "Surrogacy Law in the United States: The Outcome of Ambivalence" in R Cook, S Day Sclater and F Kaganas (eds) *Surrogate Motherhood: International Perspectives* (Hart, Portland (Oregon), 2003) 23

A Stirling and A Salmond *Amiria: The life story of a Maori Woman* (A H & H W Reed, Wellington, 1976)

F Tasker and S Golombok *Growing Up in a Lesbian Family: Effects on child development* (Guildford, London 1997)

E Temen "Knowing the Surrogate Body in Israel" in R Cook, S Day Sclater and F Kaganas (eds) *Surrogate Motherhood: International Perspectives* (Hart, Portland (Oregon), 2003) 261

J Triseliotis *In Search of Origins: The Experiences of Adopted People* (Routledge and Kegan Paul, London, 1973)

ARTICLES AND PAPERS

M Anderlik and M Rothstein "DNA-Based Identity Testing and the Future of the Family: A Research Agenda" (2002) 28 American Journal of Law & Medicine 215

G J Annas "Fathers Anonymous: Beyond the Best Interests of the Sperm Donor" (1980) 14 FLQ 11

E L Baker "Who's the Daddy?" (April 2003) *She* Magazine New Zealand 63

E Bartholet "Guiding Principles for Picking Parents" in *Conference Papers – Genetic Bonds and Family Law: The Challenge of DNA Parentage Testing* (American Society of Law, Medicine and Ethics New Orleans, March 27–28 2003)

E Blyth "I wanted to be interesting. I wanted to be able to say 'I've done something interesting with my life': Interviews with surrogate mothers in Britain" (1994) Journal of Reproductive and Infant Psychology 189

R Chan, B Raboy and C Patterson "Psychosocial adjustment among children conceived via donor insemination by lesbian and heterosexual mothers" (1998) 69 Child Development 443

S Gilmore "Parental responsibility and the unmarried father – a new dimension to the debate" (2003) 15–1 Child and Family Law Quarterly 21

M Garrison "Law Making for Baby Making: An interpretative approach to the determination of legal parentage" (2000) 113 Harv L Rev 835

Judge John Mitchell "Identity, Paternity and Human Rights" (February 15 2002) New Law Journal, 212

R A Monson "State-ing Sex and Gender: Collecting Information from Mothers and Fathers in Paternity Cases (June 1997) 11–3 Gender and Society 279

P Roberts JD "Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children" in *Conference Papers – Genetic Bonds and Family Law: the Challenge of DNA Parentage Testing* (American Society of Law, Medicine and Ethics, New Orleans, March 27–28 2003)

L Shanner, R Harris, E Blyth "Building Families through Donor Conception" (2002) 9–2 Journal of Infertility Counselling 18

D Sharp "Paternity Testing – Time to Update the Law?" (August 2000) Fam Law 560

F L Sonenstein, P A Holcomb, K S Seefeldt "What Works in Improving Paternity Rates (Fall 1993) 26 Public Welfare 26

R Stevens "Finding Out Who You Are: Issues Arising from Assisted Conception" (8 February 2003) 167 Justice of the Peace

M D Turner "Child Enforcement and In-Hospital Paternity Establishment in Seven Cities" (2001) 23–6 & 7 Children and Youth Services Review 557

J Wallbank "Too Many Mothers? Surrogacy, Kinship and the Welfare of the Child" (Autumn 2002) 10 Medical Law Review 272

UNPUBLISHED PAPERS

V Adair "Interim Report on Parents of Donor Children" (University of Auckland, approx 2002)

B Atlas "Lifting the Veil of Secrecy: The rights of donor conceived individuals" (dissertation for LLB(Hons), University of Auckland, 2003)

Caroline Bree "Lesbian Mothers: Queer Families: The Experience of Planned Pregnancy" (Master of Health Science thesis, School of Nursing and Midwifery, Auckland University of Technology, 2003)

Robin Fleming and Toni Atkinson "Families of a different kind – life in the households of couples who have children from previous marriages or marriage-like relationships: a social research project" (Families of Remarriage Project, Waikanae, 1999)

McNair and Dempsey "Queer Parenting: a thriving endeavour" (AIFS seminar, University of Melbourne, 21 February 2002)

Index

The initial numeric character of references identifies the chapter; subsequent number(s) refer to the numbered paragraph(s) within that chapter. For example, 8.55 refers to paragraph 55 in chapter 8.

References prefixed with an "n" refer to the footnotes, numbered continuously through the chapters. For example, "n25" refers to the 25th footnote in the text.

References prefixed with an "A" refer to an appendix. For example "A2" refers to the second appendix.

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

R

S

T

U

W

Y

Other Law Commission publications

Report series

NZLC R1	Imperial Legislation in Force in New Zealand (1987)
NZLC R2	Annual Reports for the years ended 31 March 1986 and 31 March 1987 (1987)
NZLC R3	The Accident Compensation Scheme (Interim Report on Aspects of Funding) (1987)
NZLC R4	Personal Injury: Prevention and Recovery (Report on the Accident Compensation Scheme) (1988)
NZLC R5	Annual Report 1988 (1988)
NZLC R6	Limitation Defences in Civil Proceedings (1988)
NZLC R7	The Structure of the Courts (1989)
NZLC R8	A Personal Property Securities Act for New Zealand (1989)
NZLC R9	Company Law: Reform and Restatement (1989)
NZLC R10	Annual Report 1989 (1989)
NZLC R11	Legislation and its Interpretation: Statutory Publications Bill (1989)
NZLC R12	First Report on Emergencies: Use of the Armed Forces (1990)
NZLC R13	Intellectual Property: The Context for Reform (1990)
NZLC R14	Criminal Procedure: Part One: Disclosure and Committal (1990)
NZLC R15	Annual Report 1990 (1990)
NZLC R16	Company Law Reform: Transition and Revision (1990)
NZLC R17(S)	A New Interpretation Act: To Avoid "Prolixity and Tautology" (1990) (and Summary Version)
NZLC R18	Aspects of Damages: Employment Contracts and the Rule in *Addis v Gramophone Co* (1991)
NZLC R19	Aspects of Damages: The Rules in *Bain v Fothergill* and *Joyner v Weeks* (1991)
NZLC R20	Arbitration (1991)
NZLC R21	Annual Report 1991 (1991)
NZLC R22	Final Report on Emergencies (1991)
NZLC R23	The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance (1992)
NZLC R24	Report for the period 1 April 1991 to 30 June 1992 (1992)
NZLC R25	Contract Statutes Review (1993)
NZLC R26	Report for the year ended 30 June 1993 (1993)
NZLC R27	The Format of Legislation (1993)
NZLC R28	Aspects of Damages: The Award of Interest on Money Claims (1994)
NZLC R29	A New Property Law Act (1994)
NZLC R30	Community Safety: Mental Health and Criminal Justice Issues (1994)
NZLC R31	Police Questioning (1994)
NZLC R32	Annual Report 1994 (1994)
NZLC R33	Annual Report 1995 (1995)
NZLC R34	A New Zealand Guide to International Law and its Sources (1996)
NZLC R35	Legislation Manual: Structure and Style (1996)
NZLC R36	Annual Report 1996 (1996)
NZLC R37	Crown Liability and Judicial Immunity: A response to *Baigent's* case and *Harvey v Derrick* (1997)
NZLC R38	Succession Law: Homicidal Heirs (1997)
NZLC R39	Succession Law: A Succession (Adjustment) Act (1997)

NZLC R40 Review of the Official Information Act 1982 (1997)
NZLC R41 Succession Law: A Succession (Wills) Act (1997)
NZLC R42 Evidence Law: Witness Anonymity (1997)
NZLC R43 Annual Report 1997 (1997)
NZLC R44 Habeas Corpus: Procedure (1997)
NZLC R45 The Treaty Making Process: Reform and the Role of Parliament (1997)
NZLC R46 Some Insurance Law Problems (1998)
NZLC R47 Apportionment of Civil Liability (1998)
NZLC R48 Annual Report (1998)
NZLC R49 Compensating the Wrongly Convicted (1998)
NZLC R50 Electronic Commerce Part One: A Guide for the Legal and Business Community (1998)
NZLC R51 Dishonestly Procuring Valuable Benefits (1998)
NZLC R52 Cross-Border Insolvency: Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency? (1999)
NZLC R53 Justice: The Experiences of Māori Women Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei (1999)
NZLC R54 Computer Misuse (1999)
NZLC R55 Evidence (1999)
NZLC R56 Annual Report (1999)
NZLC R57 Retirement Villages (1999)
NZLC R58 Electronic Commerce Part Two: A Basic Legal Framework (1999)
NZLC R59 Shared Ownership of Land (1999)
NZLC R60 Costs in Criminal Cases (2000)
NZLC R61 Tidying the Limitation Act (2000)
NZLC R62 Coroners (2000)
NZLC R63 Annual Report 2000 (2000)
NZLC R64 Defaming Politicians: A Response to *Lange v Atkinson*
NZLC R65 Adoption and Its Alternatives: A Different Approach and a New Framework (2000)
NZLC R66 Criminal Prosecution (2000)
NZLC R67 Tax and Privilege: Legal Professional Privilege and the Commissioner of Inland Revenue's Powers to Obtain Information (2000)
NZLC R68 Electronic Commerce Part Three: Remaining Issues (2000)
NZLC R69 Juries in Criminal Trials (2001)
NZLC R70 Acquittal Following Perversion of the Course of Justice (2001)
NZLC R71 Misuse of Enduring Powers of Attorney (2001)
NZLC R72 Subsidising Litigation (2001)
NZLC R73 Some Criminal Defences with Particular Reference to Battered Defendants (2001)
NZLC R74 Minority Buy-Outs (2001)
NZLC R75 Annual Report (2001)
NZLC R76 Proof of Disputed Facts on Sentence (2001)
NZLC R77 The Future of the Joint Family Homes Act (2001)
NZLC R78 General Discovery (2002)
NZLC R79 Some Problems in the Law of Trusts (2002)
NZLC R80 Protections Some Disadvantaged People May Need (2002)
NZLC R81 Annual Report (2002)
NZLC R82 Dispute Resolution in the Family Court (2003)
NZLC R83 Improving the Arbitration Act 1996 (2003)
NZLC R84 Annual Report (2003)

Study Paper series

NZLC SP1 Women's Access to Legal Services (1999)

NZLC SP2 Priority Debts in the Distribution of Insolvent Estates: An Advisory Report to the Ministry of Commerce (1999)

NZLC SP3 Protecting Construction Contractors (1999)

NZLC SP4 Recognising Same-Sex Relationships (1999)

NZLC SP5 International Trade Conventions (2000)

NZLC SP6 To Bind their Kings in Chains: An Advisory Report to the Ministry of Justice (2000)

NZLC SP7 Simplification of Criminal Procedure Legislation: An Advisory Report to the Ministry of Justice (2001)

NZLC SP8 Determining Representation Rights under Te Ture Whenua Māori Act 1993: An Advisory Report for Te Puni Kōkiri (2001)

NZLC SP9 Maori Custom Values in New Zealand Law (2001)

NZLC SP10 Mandatory Orders Against the Crown and Tidying Judicial Review (2001)

Preliminary Paper series

NZLC PP1 Legislation and its Interpretation: The Acts Interpretation Act 1924 and Related Legislation (discussion paper and questionnaire) (1987)

NZLC PP2 The Accident Compensation Scheme (discussion paper) (1987)

NZLC PP3 The Limitation Act 1950 (discussion paper) (1987)

NZLC PP4 The Structure of the Courts (discussion paper) (1987)

NZLC PP5 Company Law (discussion paper) (1987)

NZLC PP6 Reform of Personal Property Security Law (report by Prof JH Farrar and MA O'Regan) (1988)

NZLC PP7 Arbitration (discussion paper) (1988)

NZLC PP8 Legislation and its Interpretation (discussion and seminar papers) (1988)

NZLC PP9 The Treaty of Waitangi and Māori Fisheries – Mataitai: Nga Tikanga Māori me te Tiriti o Waitangi (background paper) (1989)

NZLC PP10 Hearsay Evidence (options paper) (1989)

NZLC PP11 "Unfair" Contracts (discussion paper) (1990)

NZLC PP12 The Prosecution of Offences (issues paper) (1990)

NZLC PP13 Evidence Law: Principles for Reform (discussion paper) (1991)

NZLC PP14 Evidence Law: Codification (discussion paper) (1991)

NZLC PP15 Evidence Law: Hearsay (discussion paper) (1991)

NZLC PP16 The Property Law Act 1952 (discussion paper) (1991)

NZLC PP17 Aspects of Damages: Interest on Debt and Damages (discussion paper) (1991)

NZLC PP18 Evidence Law: Expert Evidence and Opinion Evidence (discussion paper) (1991)

NZLC PP19 Apportionment of Civil Liability (discussion paper) (1992)

NZLC PP20 Tenure and Estates in Land (discussion paper) (1992)

NZLC PP21 Criminal Evidence: Police Questioning (discussion paper) (1992)

NZLC PP22 Evidence Law: Documentary Evidence and Judicial Notice (discussion paper) (1994)

NZLC PP23 Evidence Law: Privilege (discussion paper) (1994)

NZLC PP24 Succession Law: Testamentary Claims (discussion paper) (1996)

NZLC PP25 The Privilege Against Self-Incrimination (discussion paper) (1996)

NZLC PP26 The Evidence of Children and Other Vulnerable Witnesses (discussion paper) (1996)

NZLC PP27 Evidence Law: Character and Credibility (discussion paper) (1997)

NZLC PP28 Criminal Prosecution (discussion paper) (1997)

NZLC PP29 Witness Anonymity (discussion paper) (1997)

NZLC PP30 Repeal of the Contracts Enforcement Act 1956 (discussion paper) (1998)

NZLC PP31 Compensation for Wrongful Conviction or Prosecution (discussion paper) (1998)

NZLC PP32 Juries in Criminal Trials: Part One (discussion paper) (1998)

NZLC PP33 Defaming Politicians: A response to *Lange v Atkinson* (discussion paper) (1998)

NZLC PP34 Retirement Villages (discussion paper) (1998)

NZLC PP35 Shared Ownership of Land (discussion paper) (1999)

NZLC PP36 Coroners: A Review (discussion paper) (1999)

NZLC PP37 Juries in Criminal Trials: Part Two (discussion paper) (1999)

NZLC PP38 Adoption: Options for Reform (discussion paper) (1999)

NZLC PP39 Limitation of Civil Actions (discussion paper) (2000)

NZLC PP40 Misuse of Enduring Powers of Attorney (discussion paper) (2000)

NZLC PP41 Battered Defendants: Victims of Domestic Violence Who Offend (discussion paper) (2000)

NZLC PP42 Acquittal Following Perversion of the Course of Justice: A Response to *R v Moore* (discussion paper) (2000)

NZLC PP43 Subsidising Litigation (discussion paper) (2000)

NZLC PP44 The Future of the Joint Family Homes Act (discussion paper) (2001)

NZLC PP45 Reforming the Rules of General Discovery (discussion paper) (2001)

NZLC PP46 Improving the Arbitration Act 1996 (discussion paper) (2001)

NZLC PP47 Family Court Dispute Resolution (discussion paper) (2002)

NZLC PP48 Some Problems in the Law of Trusts (discussion paper) (2002)

NZLC PP49 Protecting Personal Information from Disclosure (discussion paper) (2002)

NZLC PP50 Entry, Search and Seizure (discussion paper) (2002)

NZLC PP51 Striking the Balance: Your Opportunity to Have Your Say on the New Zealand Court System (discussion paper) (2002)

NZLC PP52 Seeking Solutions: Options for Change to the New Zealand Court System (discussion paper) (2002)

NZLC PP53 Life Insurance (discussion paper) 2003