Biology, Parentage and Responsibility in Australian Family Law – Accounting for the 'Vagaries of Nature'

Aileen Kennedy

The Australian *Family Law Act 1975* (Cth) (hereinafter referred to as 'the FLA') identifies the family as the 'natural and fundamental group unit of society' (section 43B (b)). The ideal family of mother, father and biological offspring has long been a normative construction within Australian society. This construction is infused with great ideological value and invested with assumptions about rights and responsibilities of family members. As argued by Chambers, 'Meanings about the family and gender roles are essentialised and fixed not through a single site but through a range of discursive sites, including biological, scientific, psychological and historical codes of knowledge that attempt to universalise and de-historicise the family.' (Chambers 2001: 53) Another such discursive site is law. The construction of the natural family incorporates both social and biological relationships, but increasingly the biological and social aspects of family and kinship are configured as dichotomous, with biological relationships being conceived as more authentic and inexorable than socially-inscripted ones. Given the paramountcy in family law of promoting the best interests of the child, assigning parental responsibility according to biological connections is likely to be seen as securing long-term and enduring care for children.

The extent to which the family is regarded as natural and fixed masks historical and cultural constructions of family and kinship. As Finkler notes, 'Whereas science and biomedicine regard genetic transmission as a universal and natural biological process that takes place in all living things, conceptualizations of family and kinship are culturally produced.' (Finkler 2000: 21) For example, parenthood is generally perceived as coextensive with biology. Historical and anthropological accounts of kinship, however, reveal the extent to which paternity is mediated through the social relationship between a child's father and mother through marriage or other social institutions. (Schneider 1992, Dolgin 1992-1993). Whilst popular conceptions of paternity account for this as the social recognition of biological facts, Schneider asks whether

> Since we have been given to understand that in some societies physical paternity is denied, should the relationship be stated so that the father is the mother's husband – a particular kind of member of the family perhaps, and the kinship is not so much the cultural recognition of biological facts as it is a necessary and special adaptation to them which may even ignore, deny, or be unaware of certain of them but focuses on 'reproduction'? (Schneider 1992: 95)

In short, the question of kinship, incorporating both social and biological aspects, plays out in more complex ways than normative constructions of it might suggest.

There has long been overt tension between biological and social paternity. For example, *Ah Chuck v Needham*, a New Zealand case from 1931, concerned an application for child maintenance brought by the mother of a small boy. Her husband challenged paternity, based on the fact that the child bore a striking resemblance to the Chinese market gardener who lived down the road, with whom the mother was known to 'associate.' Judge Herdman relied on the legal presumptions surrounding marriage, and confirmed the husband's legal parental status. When discussing the child's Asian appearance, he dismissed the father's objections with the comment that 'there is no accounting for the vagaries of nature.' The tension was resolved in favour of the social rather than the biological construction of paternity.

In recent history the common law concerning paternal rights and responsibilities privileged social over biological paternity. This was generally attributed to the fact that paternity defied a purely biological focus given that humans were not able to access the biological markers of paternity. Biological paternity was conceived as uncertain because, unlike maternity, it was not transparent. The law relied upon presumptions in order to establish paternity. The primary common law rebuttable presumption related to birth within marriage, whereby a child of the marriage was presumed to be a child of the husband of his or her mother. (Blackstone 1765)[1]

Legal presumptions of paternity recognise that biological paternity may be unknown. The presumptions are recognised as social constructions whereby legal paternity may not accord with biological paternity and are an unreliable means of delineating biological 'truth' or 'fact'. Biological relatedness (conceived as genetics and/or consanguinity) is regarded as a fundamental 'truth' which ideally underpins social constructions of parenthood. Exceptions to this ideal, such as adoption, are acknowledged and incorporated into both social and legal accounts of parenthood. The distinction between scientific/biomedical 'truths' and social constructions is stark. Finkler terms this the 'medicalization of kinship.' (2000)

The perception of biological kinship as the fundamental truth of relatedness has been bolstered by its scientific status. Biotechnological innovations in the realm of reproduction render parenthood both transparent and manipulable. Advances in biotechnology, particularly paternity testing, can reveal the 'truth' underlying the socially-inscripted relationships. Consanguinity and genetics can be rendered transparent, making social and legal presumptions more redundant. Where biotechnology reveals a different reality from the socially inscripted reality, the latter is deemed fraudulent.[2] While paternity testing has allowed biological

[1] Presumptions of paternity currently arise out of marriage, cohabitation, acknowledgement of paternity, birth registration and court finding. In Australia all state jurisdictions have enacted relatively uniform legislation creating presumptions relating to parentage and the federal Family Law Act and Child Support Act both contain provision creating presumptions of parentage - *Family Law Act 1975* (Cth), Pt. VII, Div. 12, Subdiv. D ss 69P, 69Q, 69R, 69S and 69T; *Child Support (Assessment) Act* s29(2).

[2] See for example, the case of *Magill v Magill* heard in the High Court in 2007, the subsequent media coverage of that case, and similar paternity fraud suits. In McGill the plaintiff father sought damages for the wife's deceit regarding his paternity of the two younger children of the marriage. The parties had three children, the oldest of whom was the biological child of Mr McGill, but paternity testing proved the younger two to be the children of another man. Mr McGill had been repaid child support, but sought damages for pain and suffering, loss of enjoyment of life and past economic loss, constituted primarily by expenses relating to the children. This latter

connectedness to be traced, verified and delineated, assisted reproduction technology[3] has introduced fragmentation and proliferation into parenthood, whereby a child may have two, three, four or five 'parents' who have all contributed to the genesis of the child.[4] Accordingly, the innovations which have contributed to the medicalising of kinship have simultaneously introduced unexpected proliferation and uncertainty into translating biological into legal parenthood.

A further impetus to biological determinism has been the emergence of concerns about 'genealogical bewilderment' in children who have been adopted, fostered or born through IVF via anonymous donor.[5] The 'clean break' theory and the 'substitution principle' which previously informed adoption and anonymous egg and semen donor practices,[6] have been subject to trenchant criticism leading to legal reform directed to securing the right of children to authentic identity and information about medical inheritance. Legislation has been enacted in all Australian states to provide for the release of information to adoptees about their biological parents.[7] More recently Victoria and NSW have introduced mandatory registration of identifying donor information in the context of IVF.[8]

There are two primary consequences that flow from the reification of scientific interpretations of kinship. One is that, science having revealed the fundamental truths of kinship, such truths are perceived as universal and constant. Cultural interpretations of biological truth become secondary and inferior to scientific knowledge. Linked to this is a perception that biological kinship is innate, inexorable and fixed - unlike social ties, which are contingent and conditional, subject to individual choice and requiring continued performance and enactment.

Shneider argues that anthropological studies of kinship reflect an underlying assumption which has powerfully influenced the shape and contours of such studies (1992). That assumption is that 'Blood is Thicker Than Water' (1992: 165). In Schneider's thesis, much of the power of that belief is conferred by its very status as underlying, unexamined and latent. The assumption

---

included both money spent on the children, and lost opportunity to make income when he was engaged in a paternal role with the children.

[3] Using the term 'assisted reproduction technology' and defining it as a bio-technological development ignores the fact that many alternative reproductive procedures are not high-tech. Self-insemination of donor sperm, for example, does not require access to medical technology and was not developed in the context of IVF. Similarly, surrogacy may arise through sexual intercourse rather than any medical procedure. However, the development of assisted reproductive technology has normalised alternate modes of conception. The analysis which follows does not distinguish between high- and low-tech assisted reproduction technology.

[4] See, for example *Re Mark* (2003)179 FLR 248 concerning a child (Mark) born out of a surrogacy arrangement between a homosexual couple (Mr X and Mr Y) and a married woman (Mrs S) and her husband (Mr S) using the sperm of Mr X and a donor egg.

[5] The term was first coined in Sants 1964.

[6] Meaning a complete substitution of the adoptive parents for the biological parents in terms of law, rights, and obligations, providing a clean break between the pre- and post-adoption situation of the child.

[7] *Adoption Act 1993* (ACT) Pt V; *Adoption Act 2000* (NSW) Chapter 8 Pt 2; *Adoption of Children Act 1994* (NT) Pt 6; *Adoption of Children Act 1964* (Qld) Pt 4A; *Adoption of Children Act 1988* (SA) Pt 2A; *Adoption Act 1988* (Tas) Pt VI; *Adoption Act 1984* (Vic) Pt VI; and *Adoption Act 1994* (WA) Pt 4.

[8] *Infertility Treatment Act 1995* (Vic); *Assisted Reproductive Technology Act 2007* (NSW).

leads to a perception that blood bonds are stronger and more compelling than other bonds. As Schneider puts it:

> They are states of being, not of doing or performance – that is, the grounds for the bonds 'exist' or they do not, the bond of kinship 'is' or 'is not,' it is not contingent or conditional, and performance is presumed to follow automatically if the bond 'exists'. (Schneider 1992: 166)

Biological kinship is conceived as a question of fact. Social performance of kin relations is conceived as an artificial cultural construct. Underlying this dichotomy is a latent perception that biological kinship will play out in prescribed ways. Where the bond of kinship exists, it determines the nature of relationships within narrow parameters and prescribes the function and role of family members. The perception of such functions and roles flowing naturally from the biological facts persists even where parties fail to enact and perform such roles or functions. As Chalmers puts it:

> ...the social investment in representing the practices of the ideal nuclear family as normal, natural and inevitable contradicts the perceived need to train and teach people – through family welfare policy, education, and medical care – to perform the 'natural' and instinctual roles in such ways as to censor other versions of being and living and performing cultural practices and meanings. (2001:33)

At the same time as the biological concept of kinship is increasing medicalised and invested with scientific legitimacy, there have been significant cultural shifts in the meaning and structures of family. Dolgin highlights the transition from a traditional context whereby the family (and home and hearth) represented a private space separate from the public sphere of the marketplace. Within this paradigm, the family provides enduring authentic relationships, determined by status and hierarchical in nature. (Dolgin 2008) The marketplace provides autonomy and choice, whereby relationships are transient in nature but represent a meeting of equals. In the nineteenth and twentieth centuries, by contrast;

> Family members, and especially adults within families, began to envision their familial lives as they understood their lives in the marketplace – through the presumptions of autonomous individuality (Dolgin 2008:354).

Giddens characterises this transition as liberalising, leading to democratisation of relationships (1992). Relationships are negotiated and collaborated between equals, rather than hierarchically fixed by status.

One trend which reflects this transition is the significant increase in same-sex couples with children (or, at least, an increase in families which identify as same-sex).[9] Although definitive statistics are difficult to find, surveys and anecdotal evidence suggest that an increasing number of gay and lesbian couples are choosing to have children using some form of assisted reproduction technology. For example the Australian Gay and Lesbian Rights Lobby report that '50 – 70% of children being raised in lesbian households are born into lesbian families,

[9] See for example ABS Year Book Australia 2005

rather than come from previous relationships.' (GLRL, 2007). That the social and technological developments are concurrent is not entirely coincidental:

> [t]he increasing social acceptance of assisted reproductive technology (ART) has also contributed to the proliferation of 'families of choice' that include children. The decentring of sexual intercourse as a core symbol of close family relations is characteristic of the era of ART. (Dempsey, 2004, 79)

Technological innovations, together with cultural change, have challenged nexus between biological and social kinship. An analysis of family court decisions dealing with parenthood in the context of assisted reproductive technology, particularly where such technology is deployed by same-sex couples, reveals the contours of kinship as it is constructed within the legal discourse. The particular complexities and interplay between biology and culture in such cases require judges to confront the meaning of parenthood in situations which defy the normative construction of family.

Who is a parent and why does it matter?

In Australian family law, a reference to a 'parent' is prima facie a reference to the biological parent of a child. (*Tobin v Tobin* 1999, Dickey 2002: 312). The FLA does not define the term 'parent' except to include non-biological parents in the context of adoption and assisted reproduction technology (ss 60H and 66). The premise of biological parentage permeates the legislation but is not explicitly stated.

Law has sought to regulate non-biological parentage indirectly by confining legal identification of non-biological parents according to status-based criteria. In the arena of adoption, until the late 1980s, legal adoption was available only to married couples, subject to exceptional circumstances whereby a single adult could adopt where it was in the best interests of the child. Currently, heterosexual couples are able to adopt in all jurisdictions, but same-sex couples can only adopt in ACT, Tasmania and Western Australia. Until recently, similar restrictions applied to identifying parents of children born as a result of ART procedures, though that has now changed in four state and territory jurisdictions.[10] In the light of the 'gay baby boom', the exclusion of non-biological parents in same-sex couples from consideration under the legislation was (and, in several Australian jurisdictions, remains) a lacuna which constitutes a form of regulation through omission.

Over the last twenty years or so, amendments to Australian family law legislation (including both the FLA and Child Support scheme[11]) have been in part a by-product of increased focus on promoting financial responsibility of fathers for their children, and promoting contact and parental ties between post-separation fathers and children. In 1989 the federal government introduced a scheme of administrative assessment and collection of child support to enforce

---

[10] *Artificial Conception Act 1985* (WA), *Status of Children Act 1979* (NT), *Parentage Act 2004* (ACT), *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW)

[11] Comprised of *Child Support (Registration and Collection) Act 1988* (Cth) and *Child Support (Assessment) Act 1989* (Cth) and ancillary regulations.

the 'primary duty' of each parent to maintain his or her children. Amendments to the FLA, introduced in 1995 and 2006, were directed to reinforcing a philosophy of shared parenting. The 1995 amendments explicitly give primacy and paramountcy to the 'best interests' of children. The indeterminacy of the paramountcy principle is fettered by legislative criteria which recognise that a child's best interests are generally served by maintaining a relationship with *both* parents. This philosophy was bolstered in 2006 by the introduction of a requirement that courts presume, in the absence of risk of violence or harm, that a child's best interests will be served by an order for equal shared parental responsibility.[12]

On the other hand, the federal family law scheme provides mechanisms whereby a person who is not a parent may have responsibility for a child. Under the FLA, for example, step-parents may incur financial liability for children (s 66D). Under the FLA parenting orders such as for residence or contact may be made in relation to any person who is concerned with the care, welfare or development of the child (ss 64C and 65C). However, the legal identity of parents remains highly significant in family law. The FLA confers 'default' parental responsibility for a child on 'each of its parents' in the absence of specific parenting orders (s 61C). Both the FLA and CSA provide that the primary responsibility for financial maintenance of children falls on the parents.[13]

Although the FLA allows parenting orders (for example residence or contact orders) to be made in favour of non-parents, parental status is clearly privileged in the criteria to be considered when determining a child's best interests,[14] despite dicta indicating that

> while the fact of parenthood is an important and significant factor in considering which of the proposals best advance a child's welfare, the fact of parenthood does not establish a presumption in favour of a natural parent nor generate a preferential position in favour of that parent from which the Court commences the decision making process (Re Evelyn 1998)[15]

The legislation is premised on a philosophy of the natural family whereby parents are, in the absence of contrary evidence and orders, responsible for their biological children and the best

---

[12] *Family Law Amendment (Shared Parental Responsibility Act 2006* (Cth)

[13] *Child Support (Assessment) Act 1989* (Cth) s 3; *Family Law Act 1975* (Cth) s 66C

[14] For example, s 60B defines the objectives of Part VII (relating to children) to include (inter alia) that a child's best interests are met by "ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child." (emphasis added). The principles underlying the objectives are that "children have the right to know and be cared for by both their parents" and "children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives)."
Section 60CC effects a two-tier system of considerations relevant to assessing best interests, giving primacy to the benefit of a meaningful relationship between a child and both parents. The 2006 amendments to the FLA introduced a rebuttable presumption that the best interest of a child will be served if the parents have equal shared parenting responsibility, except in situations where there is a risk of abuse or family violence. Furthermore, only parents can register parenting plans which can prima facie be enforced as court orders.

[15] citing *Rice v Millar*. Reference to the 'fact of parenthood' is clearly, in context, a reference to biological parenthood.

interests of children are served by promoting and protecting that relationship. The philosophical grounding of the legislation assumes an unproblematic nexus between biological and social parenting.

The legislation delineates and addresses particular categories of cases where that nexus is fractured. The categories are where children are legally adopted or where assisted reproduction technology is deployed within a hetero- (or, since 2008, homo-) nuclear family, in which case biological connections between parent and child are severed and social connections forged, retaining the nuclear character of the family. The legislative model of the family is increasing inclusive of same-sex and de facto families. Despite this inclusiveness, however, there remain families and relationships which do not fit the model.

It is suggested that the biological imperative will continue to influence judicial decisions even where the legislation explicitly severs the nexus between biology and parenting. An analysis of selected cases determined in the federal family court reveals increasing emphasis on the importance of biology in identifying parents and/or assigning responsibility for children. This is seen in most powerfully in cases where courts have conferred parent-like status on sperm donors who are not, under the legislation, parents. Less compellingly, there are judgements in which a lack of biological connectedness has led to a weakening of parental status despite the existence of strong social ties with children.

The Legislative Context

The federal nature of the Australian legal system considerably complicates the issue of defining parents in the context of assisted reproduction technology. The state and commonwealth schemes do not mesh well together. Under the Australian Constitution, the federal government has power to legislate with respect to marriage (s 52(xxi)), divorce and matrimonial causes including parental rights and the custody and guardianship of infants (s 52(xxii)).[16] Under a referral of powers by the states,[17] the federal government also has jurisdiction in respect of parental rights, custody and guardianship of ex-nuptial children.[18] NSW, Queensland, Victoria and Tasmania have also referred power to legislate with respect to financial matters in de facto, including same-sex de facto, relationships.[19]

State Legislation

Jurisdiction with respect to assisted reproduction technologies and the status of children remains with the states. All states have enacted legislation concerning the status of children

[16] *The Australian Constitution 1900* (Cth) s 52(xxii)
[17] All states except WA
[18] *Commonwealth Powers (Family Law) Act 1986* (NSW); *Commonwealth Powers (Family Law - Children) Act 1986I (Vic); Commonwealth Powers (Family Law) Act 1986* (SA); *Commonwealth Powers (Family Law - Children) Act 1987* (Tas) and *Commonwealth Powers (Family Law - Children) Act 1990* (Qld).
[19] *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW): *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld): *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic).

born as a result of assisted reproduction technology.[20] The statutes provide a scheme whereby the parents of children born using assisted reproduction technology are irrebuttably presumed to be the gestational mother and her consenting husband or de facto partner, whether or not they have a genetic link to the child.[21] The legislative response to identifying parents in the context of assisted reproduction technologies has generally been dedicated to preserving the hetero-nuclear family structure. However, recent amendments to legislation in three states and one territory now provide that where the gestational mother is in a same-sex de facto relationship, her lesbian partner is deemed to be a parent of the child.[22] In all states, donors of genetic material are irrebuttably presumed not to be the child's parents. In Victoria, the Act provides that a sperm donor 'has no rights and incurs no liabilities in respect of a child born as a result of a pregnancy occurring'.[23] The legislation tends to be both convoluted and marred by internal inconsistencies and incoherence.[24]

Federal Legislation

At the federal level, the FLA includes a provision for defining parents of children born using assisted reproduction technologies (s 60H), which was amended in 2008.[25] Prior to the Amendment Act, the effect of s60H was that a birth mother and her male partner were recognised as parents. Where the birth mother had no male partner, the child would have only one legal parent under the Family Law Act. The status of a donor of genetic material (i.e. sperm or egg donor) was ambiguous. Section 60H provided that where a child was born using assisted reproduction technology, a person identified as a parent under state legislation was also a parent under the FLA. The negative presumption that a donor of genetic material was not a parent was not brought into the Family Law Act. Thus, while a sperm donor was not a parent under s 60H, he could still be identified as a parent by virtue of his biological connection to the child. The amended provision[26] provides that where a child is born using an artificial conception

---

[20] *Status of Children Act* 1974 (Vic); *Artificial Conception Act 1985* (WA*); Family Relationships Act 1975* (SA); *Parentage Act 2004* (ACT); *Status of Children Act 1996* (NSW); *Status of Children Act 1978* (Qld); *Status of Children Act 1974* (Tas) and *Status of Children Act 1975* (NT).

[21] for example *Status of Children Act 1996* (NSW) s 14.

[22] *Artificial Conception Act 1985* (WA), *Status of Children Act 1979* (NT), *Parentage Act 2004* (ACT), *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW)

[23] *Status of Children Act* 1974 (Vic) s 10F

[24] See, for example, the discussion of the NSW Act in *Ganter v Whalland* 2001

[25] *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008* (Cth)

[26] The amended section 60H reads as follows:

(1) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the other intended parent); and

(b) either:

(i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or

(ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;

then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:

(c) the child is the child of the woman and of the other intended parent; and

procedure then the birth mother and her consenting partner are the parents of the child for the purposes of the Act.[27] Donors of genetic material are not parents for the purposes of the Act.[28] These amendments provide a much-welcome clarification of the status of non-biological partners of lesbian women and the status of donors of biological material where the birth mother is in a relationship, whether married or de facto, heterosexual or same sex. However, where single women give birth using assisted reproduction technology, the status of donors of genetic material is not addressed. Further, given the decisions in *Re Patrick* and *Re Mark* (see discussion below) conferring parent-like status on sperm donors as persons concerned with the care, welfare and development of a child, it is possible that the amendments will make no difference to the outcome of similar cases.

The *Child Support (Assessment) Act 1989* (Cth) (hereinafter 'CSA') also includes a definition of parents of children born as a result of assisted reproduction technology (s 5), whereby only a person who is a parent under s 60H FLA can be a parent of a child born through assisted reproduction technology. This has been interpreted to exclude sperm donors, since this definition is exclusive and exhaustive rather than, as under s 60H, inclusive (*B v J*). Paradoxically, then, non-financial parental responsibility could be conferred on a sperm donor as a person concerned with the care, welfare and development of a child (under s 65C), but he could not be a parent for the purposes of financially supporting his children under the Child Support scheme.

Analysis of Cases

The Family Court was established in 1975, coincident with the enactment of the *Family Law Act*. The Court has been confronted with relatively few cases where the issue to be decided was identifying parents or parental roles when the biological and social nexus of parenthood has been disrupted by the use of assisted reproduction technology. Until the late 1980's complexities concerning parenthood in the context of assisted reproduction technology had not begun to filter through to the courts. However, there have been several early decisions

---

(d) if a person other than the woman and the other intended parent provided genetic material- the child is not the child of that person.

(2) If:

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

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

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

(3) If:

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

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

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

[27] S60H (1) and (2)

[28] S60H (1)(d)

regarding the relative weight to be accorded to biological parenthood where there was a custody contest between a child's biological parent and a non-parent. (for example *Rice v Millar* 1993)

The discussion which follows considers a selection of cases concerning the relevance of biological parenthood in making parenting orders under the FLA. There are three reported cases from the 1980s where the Family Court denied contact between children and biological fathers out concern for the confusion to the child likely to be caused by the introduction of an additional parental figure. Though these cases do not involve children born using assisted reproduction technology, they are relevant to the thesis of this chapter that during this period the court was less concerned with biological ties than with the social context of the family and with preserving the nuclear character of a child's family. In 1989, two cases came before the court concerning disputes involving reproductive biotechnology. One concerned parental orders in respect of a child gestated by a surrogate mother. The other concerned parenting orders where paternity testing revealed that the husband of the child's mother was not the biological progenitor of the child. These cases reveal, it is argued, an increased emphasis on biological kinship over socially-inscripted kinship. Finally, two cases from 2002 and 2003 concerning the parental status of sperm-donor fathers reveal a new configuration of the sperm-donor, focussing on a combination of biological kinship and paternal intention.

Early Cases

In three reported cases in Australia in the 1980s, the Family Court denied contact between children and biological fathers out of concern for the confusion to the child likely to be caused by the introduction of an additional parental figure. In *T v N* there had been no contact between the child and her father since the child was 18 months old. The mother had subsequently re-married, and there were two children of the second marriage. Although the court found that the father's character presented no barrier to contact, there was evidence from a psychology expert to suggest that the hazards of introducing the father to the child could include 'loss of identify, depression and deterioration of language and learning skills and social relationships.' Against this, the court weighed the potential advantages of contact, which included:

> …the possibility of the entering into her life of an additional person with whom she may have a warm relationship. This, however, is not something of which she is in need. She has not been left … without a loving father figure in her life. She is not being deprived of 'the material and emotional contribution' to her development that a father can make. The most important thing for her is to maintain the present warm family situation which she enjoys in all its security. (53)

In the Marriage of N and H presents a more complex situation, whereby the father seeking contact was a pre-operative male-to-female transsexual. The primary concerns of the court were twofold: firstly, that the child would be faced with two parents of the same sex; and secondly, that this would disrupt the nuclear family in which the child now lived.

> …there is the fact that the child has now become part of a family unit consisting of his mother, his half sister and a person whom he believes to be his father…The child now has a stable home environment, with a stable mother and father as role models. To add

> another role model, especially one that may turn out to be confusing, is to introduce an unknown and unnecessary risk. (580)

In *In the Marriage of B and C*, the biological father had not seen the child for many years. In the interim, he had contracted HIV and the application for contact was opposed by the mother partly on the basis of the risk to the child's health. Although the court accepted expert medical evidence that the father's condition posed no health risk to the child, contact was nevertheless denied on the basis that it would cause more short term detriment than long term benefit to the child. In support of that conclusion, the court pointed to the anxiety of the mother, the likely social ostracism by the child's friends and family, and the lack of a meaningful relationship between the father and child.

In these three cases, the court is not particularly concerned with 'the vagaries of nature'. Where biological connections intrude on the identity and security of the nuclear family, those connections must give way in the best interests of the child.

Re Evelyn and *Re C and D*

By the late 1990s a change in the attitude of the court was emerging, as is evident in two cases from 1998. *Re Evelyn* concerned parenting orders in respect of a child born out of a surrogacy arrangement. Mr and Mrs Q were unable to have children. Their friend, Mrs S, with the consent and approval of her husband, offered to be a surrogate. The child was conceived by Mrs S being inseminated with Mr Q's sperm, meaning that Mrs S was the genetic mother and gestated the child, and Mr Q was the genetic father. Following birth, the child lived primarily with the Qs, and the S's sought parental orders for residence in their favour. At hearing it was ordered that Evelyn should reside with the Mr and Mrs S, and the appeal against that order was ultimately dismissed.

At the trial, Justice Jordan summarised the position of the Ss as follows:

> Evelyn should be with her natural mother and that such a placement would provide Evelyn with a sense of completeness and have the benefit of enabling her to be raised with her biological siblings.

In the course of his decision, Jordan J couched the issue in terms of a contest between Evelyn's biological mother (and siblings) and her biological father (and adoptive step-brother);

> I acknowledge that a placement with the Ss will deprive Evelyn of the opportunity to reside with her biological father and with a child with whom she would have already formed some relationship. I have concluded that, on balance, a child in Evelyn's situation is more likely to cope readily with the prospect of being required to visit the home of her biological father and step-brother from the comfort of the home of her biological mother and two biological sisters and one biological brother, than she would on the alternate outcome… [A] sense of loss of the opportunity to be raised with her biological siblings is a greater loss than that likely to be occasioned if she is now separated from Tom. On that issue I have accepted the proposition …that a child is likely to place some special significance on biological sibling relationships which is not

> so readily replicated in non-biological relationships… In the longer term, I have a sense that Evelyn would find residence in her mother's home as a more natural situation…

The relationship between Evelyn and Mrs Q is absent from this depiction of the issues (though not from his Honours judgment overall), and the non-biological relationship between Evelyn and the Q's adopted son Tom is configured as inherently less significant and meaningful than the potential relationship that would eventually form between Evelyn and the Ss' three children, given its biological grounding.

One ground of appeal in the Full Court of Appeal was the primacy accorded to the biological relationship between the birth mother, Mrs S, and the child. The Family Court of Appeal affirmed that the law recognised no presumption in favour of a biological parent and found that the trial judge had applied the correct approach. Quoting extensively from Jordan's judgment, including the extract above, they conclude that 'it is quite clear...that his Honour was weighing up on the basis of the personal qualities of the parties as well as the situation in which they found themselves.' However, many passages in Jordon's judgement interpret and assess the personal qualities of the parties through the filter of underlying assumptions about the inherent qualities of the biological mother/daughter relationship, which is depicted as more natural and supportive than either the biological father/daughter relationship or the social mother/daughter relationship. This reflects not only an emphasis on biological over social kinship (Mrs S v Mrs Q) but also a highly gendered account of the social enactment of biological relationships (Mrs S v Mr Q).

Re C and D, also heard in 1998 in the Family Court of Appeal, concerned an application for parenting orders, including contact and shared parental responsibility, in relation to a child born during the party's marriage, who the father had assumed was his biological child. After separation, paternity testing revealed that the biological father was in fact the mother's new partner, with whom she had had a long-standing affair during the marriage. The mother opposed any contact or parental responsibility orders in favour of her ex-husband because he had no biological connection to the child.

The court rejected that argument on the basis that the FLA clearly recognises the importance of maintaining a relationship between a child and a person concerned with the care, welfare or development of the child. The applicant, who had been the child's 'social father' throughout his life, was clearly such a person. However, the court did express some reservations about 'the issue relating to the child's obvious confusion over the identity of his father'(8.4.7). Much of the concern arose from evidence that the applicant had described himself to the child as the 'real daddy' in contrast to the 'pretend daddy'. This issue was described by Fogarty J as 'obviously one of the central issues in this case and one of its great dilemmas.' (2.14) Although orders for contact and parental responsibility in favour of the social father were made, the court also noted that 'for the sake of the child, [the social father] and his family will have to accept a less prominent position in relation to the child.'(8.4.14) Arguably, the fact that there was no biological relationship between the social father and the child, combined with the fact that child was part of a 'normal' family with his biological parents, made it appear inevitable that the socially-inscribed relationship must not be allowed to intrude on that natural family structure.

Re Patrick and *Re Mark*

The case of *Re Patrick*, decided in 2003, is considered a landmark case concerning parentage of children born as a result of artificial conception procedures. The child in *Re Patrick* was conceived by a woman in a committed lesbian relationship using the sperm of a known donor. Following the child's birth, the donor sought direct and substantial contact with the child, which was strenuously opposed by the mother and her partner. The facts leading up to the hearing were bitterly contested by the parties, and in his judgement Guest J preferred the evidence of the donor, which led to findings of fact largely against the version of the mother and her partner.

In his decision, Guest J adopted noteworthy terminology by referring to the mother and her partner as 'the mother and the co-parent' respectively and to the donor as 'the father.' This terminology presaged His Honour's attitude to the parties and the merits of their claims in relation to the child. (Kelly, 2006) Ultimately, orders were made in favour of the mother and co-parent in respect to residence and parental responsibility, and in favour of the father for substantial contact, akin to contact which would normally be granted to 'traditional' non-resident parents. However, the contact orders were *not* premised on a finding that the father was a parent under the FLA. Justice Guest explored the implications of (pre-amendment) s 60H, and concluded that "a child is to be regarded as the child of the biological father and the biological father a 'parent' only if there is a specific State or Territory law which expressly confers that status on a semen donor." (291) Having found that the father was not a parent under the FLA, Guest J identified the father as a person who was concerned with the care, welfare or development of the child under s 65C and accordingly a person in whose favour parenting orders could be made.

The parental status of the wife's lesbian partner was also explicitly identified. "In my view, Patrick's 'family' is comprised of the mother and the co-parent. It is a homo-nuclear family. They are his parents. … The term 'family' has a flexible and wide meaning. It is not one fixed in time and it is not a term of art. It necessarily and broadly encompasses a description of a unit which has 'familial characteristics'." As to the father's role within Patrick's family, Guest J explained "I do not see him as being a member of the family construct. It is his relationship with Patrick that is the central focus of his role and which should be permitted to grow parallel with the happiness and well-being of the 'family'." He further commented 'Children conceived via artificial donor insemination may have only two mothers, others, such as Patrick, may have two mothers and a father, and others, may have two mothers and two fathers. In a rare number of cases, a child may have only two fathers.'

Re Patrick is a landmark case for a number of reasons, including Guest J's explicit recognition of a homosexual family unit, and the acknowledgement that families need not be limited to a two-parent structure (despite his description of the family as 'homo-nuclear'). It has been persuasively argued that an important but unacknowledged factor in the case was the desire to provide a father for the child, even where paternity was explicitly severed by the legislation (Dempsey 2004). It is argued in this chapter that the decision to grant the father substantial contact with the child despite the legislative severing of his paternal identity and the strenuous

opposition of the mother and co-parent was influenced by an unacknowledged perception that the biological connection was inherently significant. Although Guest J is careful not to identify the father as a parent under the FLA, throughout the judgment and in the orders made it is clear that the father is treated as a legal parent. This is ascribed to his continued interest in and commitment to the child's welfare, his persistent enactment of the paternal role.

Re Mark: An application relating to parental responsibilities concerned a child (Mark) born out of a surrogacy arrangement between a homosexual couple (Mr X and Mr Y) and a married woman (Mrs S) and her husband (Mr S). The agreement, conception and birth all occurred in California, where commercial surrogacy agreements are legal and enforceable. The mechanics of conception were that Mrs S carried an embryo from a donor egg fertilised by Mr X's sperm. Mrs S therefore had no genetic connection to Mark. Pursuant to the surrogacy agreement, both Mr and Mrs S relinquished any parental relationship, rights or obligations to Mark, and the agreement expressed the shared intention of all parties that Mr X and Mr Y would be the parents of Mark.

On returning to Australia after Mark was born, Mr X and Mr Y sought parenting orders from the family court and their application was uncontested. The matter was heard by Brown J, who made the orders sought. In the course of her judgement, Brown J considered whether Mr X could be defined as a parent under the FLA by virtue of his biological connection to Mark. Such a finding would contradict the obiter opinion of Guest J in *Re Patrick*. After reviewing the legislation and previous decisions[29] Brown J concluded that the meaning of 'parent' in the FLA, should be given its 'ordinary' meaning. The ordinary meaning of a parent had been defined in an earlier case as a biological parent. (*Tobin v Tobin* 1999) However, Brown J's conclusion provides an interesting re-interpretation of the sperm donor father, aligning him with the more normative figure of the social/genetic father:

> Mr X provided his genetic material with the express intention of fathering (begetting) a child he would parent. He is not a sperm donor (known or anonymous) as that term is commonly understood. The fact that the ovum was fertilised by a medical procedure, as opposed to fertilisation in utero through sexual intercourse, is irrelevant to either his parental role or the genetic make-up of Mark. (59)

Of course, such a fact is highly relevant to establishing paternity under the CSA.[30] Although possibly less relevant under the FLA, the mode of inception by medical procedure can hardly be dismissed as irrelevant to assigning paternity in the context of the complex legislative framework concerning that very fact.

In the result, Brown J did not make a positive finding that Mr X was Mark's parent under the FLA, relying instead on his standing and that of Mr Y as people 'concerned with the care, welfare or development of the child' under s 65C. In doing so, she explicitly acknowledged the

---

[29] *W v G*, *Re B v J* and *Re Patrick*

[30] See, for example, *ND v BM*, where conception was through sexual intercourse between the mother and the father on the express agreement that the father would have no rights, obligations or responsibilities for the children born. The Court found that the father was a parent under the CSA and was liable to pay child support.

importance of including Mr Y in the parenting orders, not only for day-to-day convenience, but also to provide for the eventuality of Mr X's death or incapacity.

Taken together, *Re Patrick* and *Re Mark* are important in assessing the judiciary's understanding and construction of parenthood. In both cases, the sperm donor, legislatively excluded from the category of parent, was conferred de facto, though not legal, parental status, circumventing the intentions of the state legislatures and, arguably, the intention of s60H. In both cases, the intentions of the sperm donor was an important factor in assignment parental responsibility, if not the legal status of parent.

In *Re Mark*, Brown J's somewhat oblique comment that Mr X is not a sperm donor 'as the term is commonly understood' merits some attention. In the early years of assisted reproduction technology, sperm donors were configured as anonymous, altruistic and charitable men who would play no role in the life of any child conceived from their genetic material, beyond giving the gift of life. The 'domestic sovereignty' of the nuclear family was protected by secrecy and anonymity. However, this configuration has been overtaken by major re-thinking in relation to the rights and interests of children born out of the reproductive revolution. Much of this process was generated by emerging concerns about the social impact of adoption, including the risk of 'genealogical bewilderment.' (Sants 1964) The common understanding of sperm donors has fundamentally changed. As Dempsey notes "Among lesbians, belief in the significance of the biogenetic facts of human reproduction has given rise to the concept of the 'known donor.'" (80) This conception was explicitly discussed by Guest J in *Re Patrick*.

> Although gay and lesbian families are increasing, they cannot be characterised as an homogenous group…Within each of these family forms itself there may also be variations in the level of involvement of the father or fathers in the child's life. (328)

The role of a known donor in the life of a child varies greatly, ranging from little or no contact, (but being available to the child if and when the child seeks to resolve identity issues), to something similar to a non-resident parent with regular substantial contact. The role of the sperm donor is often negotiated between or among those actively involved in the child's genesis.

The terms of the agreement negotiated among the mother, the co-parent and the father were, as noted above, bitterly contested by the parties in Re Patrick. Ultimately, Guest J found in favour of the father's version of what agreement had been reached, which was that it had been agreed even prior to conception that the father was to play a central role in the child's life. It is clear that this was a vital consideration in Guest J's decision to grant substantial contact.

> On the face of its plain wording, s 60H(3) of the Act, as it presently stands, provides that the father is not a 'parent' of Patrick, despite the fact that the child bears his genetic blue print. That may be understandable on the basis of the specific role undertaken by a 'donor' in the historic sense of artificial insemination…But what of the father's position in the circumstances as I have found them to be in the proceedings before me? He was the donor of his genetic material upon an understanding (as I have found) that he was to have a role in the life of any prospective child. He has at all times following Patrick's birth intelligently demonstrated by both sacrifice and concession a sensitive

> tolerance of a secondary role to that of the mother and co-parent. I am quite satisfied that he has never relinquished nor wavered in his desire to be part of Patrick's life. He has actively, solicitously and patiently contributed to his conception. He has persevered, despite the imposition of many unreasonable conditions to which I have earlier referred, in his contact with Patrick and collaterally maintained "…a strong and unrelenting wish" to be part of his life.

Like Brown J in *Re Mark*, Guest J distinguishes between a 'donor' in an historic sense and a provider of genetic material who negotiates, plans and actively participates in the genesis of a child with the intention of occupying a parental role. In this way, the intention of the father transforms him from a mere donor into a quasi-parent.

Dempsey (2004) provides an insightful analysis of *Re Patrick* which argues that Guest J, in reaching a finding of fact about the terms of the agreement between the mother and the donor father, was swayed by 'an unsubstantiated assumption that the lesbian parents' concept of kinship was irrational.' (2004: 76) Whilst acknowledging that the concept of sperm donor had changed from the traditional or historic figure, evidence of a model which departed from both that figure and the normative father figure was perceived as irrational and unreasonable. Dempsey notes that 'The mother and the co-parent's concept of Patrick's family had been formed within their pre-existing social networks' (2004: 91) and they sought to refigure the father's role as a 'known donor', a role which they struggled to communicate in both their evidence before the court and their communications with the father before the proceedings commenced. Moreover, Dempsey argues, '[t]he role of donor is perceived as ascribed rather than subject to negotiation.' (2004: 95) So while Patrick's mother and co-parent did not consider that the father's role was legitimately open to negotiation, Guest J was concerned to identify the role that the father had consented to play. The father's intentions as to his role were central in identifying its legitimate parameters.

What emerges from both *Re Patrick* and *Re Mark* is a focus on the paternal intentions of the genetic donor, reached through a process of negotiation and agreement. Guest explicitly acknowledges that an agreement which delineates the parental role of a donor could not prevail over a finding by the Court that such a role was not in the child's best interest. Similarly, it is clear that an agreement concerning a donor's financial responsibility for a child would be unenforceable under child support legislation. However, it seems that in fashioning parenting orders, the intentions of the father and/or the agreement between the parties may be determinative, at least where such an agreement is of an 'opt-in' rather than 'opt-out' nature. Moreover, in both cases the father/donor was engaging in enacting the paternal role.

The test of 'intent to procreate' has been adopted in several American cases concerning parentage of children and has been argued by commentators as the preferable test, particularly where intent and genetic or gestational connections are at odds (Johnson v Calvert 1993, Bazzunca v Bazzunca 1998, Anderson 2009, Hill 1991, Shulz 1990), that is, in cases where intending parents have no bio-genetic link to the child. This test could be argued to underpin legislative conferral of parental status on consenting spouses of women who conceive and

gestate a child using artificial insemination procedures.[31] It seems that the court in both *Re Patrick* and *Re Mark* was invoking parental intention in its decisions to confer parental responsibilities on sperm donors, despite the directive in the relevant state legislation that sperm donors are not parents. It is argued, however, that such intention would have been less influential had the sperm donors not been able to point to genetic ties to the children involved. Guest J, for example referred to the mother's attempts to preclude the father from 'any role in Patrick's life in a natural, ordinary, parental and fatherly manner'(114). In other words, the intention of the sperm donors became relevant primarily because they were biogenetic progenitors and the natural role of a biological father is to parent his children. Thus the facts invoked no contest between biological and social parenting.

The evidence of the mother and co-parent in *Re Patrick* was that they understood that the father's role would be limited to intermittent contact to facilitate a relationship based primarily on the child's potential need to understand his identity and genesis. Such a role, while unconventional, was familiar within the social network in which the parties moved. On the spectrum of possible relationships, from anonymous (historic) donor of genetic material to fully engaged resident father, the role which the mother and co-parent identified would have been located closer to the former than the latter. Whilst the mother and co-parent arguably perceived the father's role as ascribed by the shared understanding of the known donor's role within the context of the community they identified with, it seems in reality the known donor's role was available to be claimed by him.

Dolgin traces a move in US maternity disputes from 'biology to intention as a key determinant of legal parentage' which she connects to 'social efforts to mediate the gap between presumptions that undergird a commitment to choice in defining families and presumptions that undergird a commitment to biological "facts" in defining families.' (Dolgin 2008: 37) In Dolgin's thesis, the move from biology to intention reflects the dissolution of the once-strong boundary between the private (family) realm and the public (marketplace) realm. Choice and autonomy, once confined to the purview of the public realm, have now overtaken the private realm whereby family is an expression of individual commitment – fragile, active, contingent and democratic – as much as it is a natural dynamic emerging out the essential biological truths of kinship, whereby relationships and conduct within relationships are ascribed by the facts of nature. In *Re Mark* and *Re Patrick*, the court is able to mediate the gap between intent to parent and an ascribed biological parental role by virtue of the fact that in both cases the sperm donor could satisfy both criteria.

Conclusion

Popular and legal constructions of the family evoke an inherent and unproblematic nexus between biological and social kinship. Social kinship, particularly parentage, is perceived as the recognition of inherent and inexorable biological ties whereby the traditional family is a natural and fundamental unit of society, comprised of father, mother and biological children. Within the family unit, roles and relationships are determined by the nature of things. Parental

[31] Though other interpretations, such as the need to protect the nuclear family unit, are also persuasive.

responsibility and function emerge from the biological facts. The social enactment of parental roles is assumed to follow from 'what are held to be inherent, relatively inflexible conditions of the biological bases of human behaviour.' (Schneider 1994:172) Where such enactments do not follow naturally, theories of deviance and regulatory constraints emerge, as in the 'deadbeat dad' discourse. Scientific knowledge and innovation in the realm of reproduction has given momentum to the perception of biology as the essential truth of kinship. The ability to map and delineate the scientific truth of genetic connectedness in paternity, for example, is seen as the stripping away of socio-cultural overlay to reveal the truth of kinship.

Developments in biotechnology have generated significant challenges to the unproblematic perception of parenthood as natural and self-evident. By facilitating a range of reproductive possibilities, ranging from surrogacy to IVF, involving a number of parties who contribute to the genesis of a child in differing ways (donation of genetic materials, gestation, intention, etc) assisted reproductive technology has spawned a complex mosaic of potential kinship claims.

Concurrently, social transformations in the meaning of family have emerged which reflect a dissolution of the boundary between the private realm of the family and the public realm of the marketplace. These transformation flow from a valorisation of individualised autonomy which emphasises choice and negotiation in the forging of relationships. One social movement which exemplifies these transformations is the gay baby-boom, whereby increasing numbers of same-sex couples are choosing to procreate using various modes of assisted reproduction technology. That this is occurring at the same time as the normalisation of bio-reproductive innovation is not a coincidence:

> The acknowledgement of a severance of sexuality from reproduction in popular consciousness means that the possibility of shaping and moulding sexuality is culturally legitimised, and increases the social tolerance for gay identities as familial (Chalmers 117).

Increasing, the Family Court is required to identify parents in the context of competing claims raised by biological kinship and social construction of families of choice, where the roles ascribed by reference to the traditional model of the family have been profoundly disrupted. The legislative framework in relation to legal parentage of children born using assisted reproductive technology, operating at both the state and federal levels, frequently fails to anticipate particular configurations of family and kinship which emerge. Even where the legislation implicitly excludes a particular claimant from legal parental status, courts have circumvented the legislative intention by refiguring the claimant as a person concerned with the care, welfare and development of the child to confer quasi-parental status. The analysis of cases heard and determined in the Family Court in which the dispute involves parenting of children born using assisted reproduction technology or where the claims of biological parents intrude on the social nuclear family reveals an increasing emphasis on the importance of biology in attributing responsibility for children. As biological kinship is perceived as more authentic, innate and inexorable than social-inscripted kinship, it is likely that courts will continue to defer to biological claims to safe-guard the long-term interests of children, since

within this paradigm, the binds of biology are more dependable than family bonds forged voluntarily and contingently by autonomous individuals.

This will be particularly compelling where an applicant for parental responsibility is able to rely on biological kinship and to demonstrate a commitment to the socially inscripted parental role which that mode of kinship invokes. Thus even where the legislative framework explicitly sunders the legal parental relationship, the family court has conferred parental responsibility on sperm donors by configuring them as different in kind from the traditional or historic sperm donor.

While the court seeks to identify what is essential to parenting children to preserve the best interests of children within the myriad of competing claims and values, the seductive appeal of biological essentialism needs to be resisted. Biological essentialism's power comes from a positioning of biological knowledge as truth. Thus biological and scientific fact are elevated above other claims to authentic identity and connectedness, such as social, relational and cultural factors. Biology and socially inscripted kinship are increasingly constructed as binary opposites, with socio-cultural relatedness subjugated to biological and genetic truths. A more nuanced appreciation of the cultural and social mediation of biogenetic kinship needs to be developed and nurtured to assist the courts in interrogating underlying assumptions about the nature of family and parenting in order to reach principled decisions concerning responsibility for children.

Bibliography

Anderson, L.S. 2009. Adding Players to the Game: Parentage Determinations When Assisted Reproductive Technology is Used to Create Families. *Arkansas Law Review*, 62, 29-56

Australian Bureau of Statistics Year Book Australia, 2005 [online] Available at: http://www.abs.gov.au/ausstats/abs@.NSF/Previousproducts/1301.0Feature%20Article82005?opendocument&tabname=Summary&prodno=1301.0&issue=2005&num=&view= [accessed: 8 January 2010].

Blackstone, W. 1766. *Commentaries On the Laws of England.* 2nd Edition, Oxford.

Chambers, D. 2001. *Representing the Family*. London: Sage Publications.

Dempsey, D. 2004. Donor, Father or Parent? Conceiving Paternity in the Australian Family Court. *International Journal of Law, Policy and the Family*, 18, 76-102.

Dickey, A. 2002 Family Law. 4th Edition Pyrmont: Lawbook Company.

Dolgin, J.L. 2008. Biological Evaluations: Blood, Genes and Family. *Akron Law Review*, 41, 347-398

Dolgin, J.L. 1999-2000. Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family 32 *Connecticut Law Review*, 32, 523-566

Dolgin, J.L. 1992-1993. Just a Gene: Judicial Assumptions About Parenthood. University of California Law Review 40, 637-694.

Finkler, K. 2000. *Experiencing the New Genetics: Family and Kinship on the Medical Frontier.* Philadelphia: University of Pennsylvania Press.

Giddens, A. 1992. *The transformation of intimacy: sexuality, love and eroticism in modern societies*. Oxford: Polity Press

Sants, H. (1964). Genealogical Bewilderment in Children with Substitute Parents. *British Journal of Medical Psychology* 37, 133

Hill, J.L. 1990-1991. What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights. *New York University Law Review* 66, 353-420

Kelly, F. 2002. Redefining Parenthood: Gay and Lesbian Families in the Family Court – the Case of *Re Patrick*. *Australian Journal of Family Law*, 16,

Maule L.S. and Schmid K. 2006. Assisted Reproduction and the Courts. *Journal of Family Issues.* 27(4), 464-482

McConvill, J. And Mills, E. 2003. *Re Patrick* and the Rights and Responsibilities of Sperm Donor Fathers in Australian Family Law. *Queensland University of Technology Law and Justice Journal*, 3(2), 1-22

Millbank, J. 2002. *Meet the parents: A review of the Research on Lesbian and Gay Families* [online]. Available at: http://www.qahc.org.au/files/shared/docs/meet_the_parents.pdf [accessed: 2 March 2010]

Minnow, M. 1991. Redefining Families: Who's In and Who's Out? *Colorado Law Review*, 62(2), 269-285.

Schneider, C.E. 1984-1985 Moral Discourse and the Transformation of American Family Law. *Michigan Law Review*, 83, 1803-1879

Schneider, D.M. 1992. *A Critique of the Study of Kinship*. Ann Arbor: The University of Michigan Press

Sifris, A. 2005. Known Semen Donors: To Be or Not To Be A Parent. *Journal of Law and Medicine*, 13, 230-244.

Tobin, J. 2008 Recognising Same Sex Parents: Bringing Legitimacy to the Law. *Alternative Law Journal,* 33 (1), 36-40

Cases

Ah Chuck v Needham (1931) NZLR 559

B v J [1996] FLC 92-716

Bazzunca v Bazzunca 72 Cal. Rptr.2d 280 (Cal. Ct. App. 1998)

Ganter v Whalland (2001) 54 NSWLR 122

In the Marriage of B and C (1989) 13 Fam LR 299

In the Marriage of N and H (1982) 8 Fam LR 577

Johnson v Calvert 857 P.2d 776 (Cal. 1993)

Magill v Magill (2006) 226 CLR 551

Re Evelyn (1998) 23 Fam LR 90

Re Mark (2003) 179 FLR 248

Re Patrick (an Application Concerning Contact) (2002) 28 Fam LR 579

Rice v Miller [1993] FLC 92-415

T v N (1981) 7 Fam LR 50

Tobin v Tobin (1999) FLC 92-848

W v G (1990) 20 Fam LR 49

ND v BM [2003] Fam CA 469

Legislation

Adoption Act 1984 (Vic)

Adoption Act 1988 (Tas)

Adoption Act 1993 (ACT)

Adoption Act 1994 (WA)

Adoption Act 2000 (NSW)

Adoption of Children Act 1964 (Qld)

Adoption of Children Act 1988 (SA)

Adoption of Children Act 1994 (NT)

Artificial Conception Act 1985 (WA)

Assisted Reproductive Technology Act 2007 (NSW).

Child Support (Assessment) Act 1989 (Cth)

Child Support (Registration and Collection) Act 1988 (Cth)

Commonwealth Powers (De Facto Relationships) Act 2003 (NSW)

Commonwealth Powers (De Facto Relationships) Act 2003 (Qld)

Commonwealth Powers (De Facto Relationships) Act 2004 (Vic).

Commonwealth Powers (Family Law - Children) Act 1986I (Vic)

Commonwealth Powers (Family Law - Children) Act 1987 (Tas)

Commonwealth Powers (Family Law - Children) Act 1990 (Qld).

Commonwealth Powers (Family Law) Act 1986 (NSW)

Commonwealth Powers (Family Law) Act 1986 (SA)

Family Law Act 1975 (Cth),

Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008

Family Relationships Act 1975 (SA)

Infertility Treatment Act 1995 (Vic)

Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008 (NSW)

Parentage Act 2004 (ACT),

Status of Children Act 1974 (Tas)

Status of Children Act 1974 (Vic)

Status of Children Act 1975 (NT).

Status of Children Act 1978 (Qld)

Status of Children Act 1979 (NT)

Status of Children Act 1996 (NSW)

The Australian Constitution 1900