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LAW·COMMISSION  
TE·AKA·MATUA·O·TE·TURE

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*Report 88*

New Issues in  
Legal Parenthood

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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.

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# Contents

	<i>Para</i>	<i>Page</i>
Glossary		vii
Letter of transmittal		xiii
Foreword		xv
Acknowledgements		xvi
Executive summary		xvii
Recommendations		xxii
1 INTRODUCTION		1
Issues in this report	1.1	1
The changing nature of families	1.3	1
The changing nature of parenthood laws	1.13	4
Guiding principles used in this report	1.17	5
Sources we have drawn from	1.26	7
Families in the future	1.29	8
2 CHILDREN, PARENTS AND THEIR FAMILIES		10
Family models	2.1	10
Genetic connection in parent–child relationships	2.5	11
Best families for children	2.10	12
The approach of the Commission	2.19	14
3 LEGAL PARENTHOOD AND WHY IT IS IMPORTANT		15
Legal parents and legal parenthood	3.1	15
The view of the Commission	3.5	16
Why is legal parenthood important?	3.6	16
Parenthood and guardianship	3.6	16
Legal parenthood and genetics	3.18	19
Children’s interest in legal parenthood rules	3.19	19
4 ESTABLISHING PARENTHOOD BY PRESUMPTION		21
Presumption of paternity	4.1	21
Historical purposes for the presumption	4.7	22
Benefits of the presumption	4.8	23
Issues with the presumption	4.11	23
Views from submissions and consultations	4.22	26
Civil Union Act 2004	4.25	26
Options for reform	4.26	26
The view of the Commission	4.33	28
Presumption of maternity	4.48	31
Issues with the presumption of maternity	4.49	31
5 PROVING PARENTHOOD BY DNA TESTING		33
Background	5.1	33
Regulation of DNA parentage testing	5.11	35
Options	5.15	36
The view of the Commission	5.25	38
Samples other than blood	5.30	39
Voluntary testing	5.33	40

	<i>Para</i>	<i>Page</i>
Knowledge of test and consent – one or both parents	5.37	41
Consent of children and young persons	5.42	42
Options for a legal scheme for voluntary testing	5.45	43
The view of the Commission	5.49	43
Court intervention	5.54	45
Current law	5.54	45
Best interests of the child	5.59	46
Options	5.62	47
The view of the Commission	5.63	47
Sanctions	5.72	48
6 DONOR GAMETE CONCEPTION AND LEGAL PARENTHOOD		51
The legal landscape	6.2	51
Agreements between parents and known donors	6.9	54
Transferring legal parenthood when donor gamete conception is used	6.12	55
Alternative means of transferring parenthood	6.17	56
Should a known donor be able to become a legal parent?	6.28	58
The decision in <i>P v K</i>	6.28	58
Legal parenthood for a known donor	6.31	59
Consultations with families created by known donor insemination	6.33	60
Legislative and judicial approaches	6.37	61
The view of the Commission	6.51	65
Proposed model	6.58	67
More than two legal parents	6.67	70
Section 41 agreements	6.74	72
Court’s ability to vary agreement	6.76	72
Child support liabilities	6.85	74
Should the law continue to enable a child to have one legal parent?	6.88	75
7 SURROGACY AND LEGAL PARENTHOOD		78
Background	7.1	78
“Traditional” or “partial” surrogacy	7.2	78
“Gestational” or “full” surrogacy	7.4	78
Incidence of surrogacy in New Zealand	7.7	79
The shift towards legislative intervention	7.9	79
The position in New Zealand	7.12	80
Ethical approval requirements under NECAHR	7.13	81
Legal parenthood	7.18	81
Difficulties arising from the application of the law	7.22	82
Overseas legislative approaches to transferring parenthood	7.31	84
Regulation and transfer by prior approval of the surrogacy agreement	7.31	84
Enforceable surrogacy agreements	7.38	86
Parental orders post-birth	7.41	86
Judicial approaches when arrangements have broken down	7.46	87
The view of submitters	7.53	89
The view of the Commission	7.57	89
Best interests on a case-by-case basis	7.60	90

	<i>Para</i>	<i>Page</i>
Automatic transfer	7.61	90
Considerations for reform	7.65	91
Proposed model	7.73	93
8 MISTAKEN IMPLANTATION AND LEGAL PARENTHOOD		98
Introduction	8.1	98
<i>Perry-Rogers v Fasano</i>	8.5	99
Genetic and gestational motherhood	8.8	99
Legal parenthood under New Zealand law	8.10	100
More than two parents?	8.15	101
9 EMBRYO DONATION AND LEGAL PARENTHOOD		103
Introduction	9.1	103
Legal parenthood of children born through embryo donation	9.4	104
10 IDENTITY		106
Introduction	10.1	106
Human Assisted Reproductive Technology Act 2004	10.3	106
Outstanding issues	10.11	109
Genetic identity – a legal right to know?	10.12	109
Māori view of identity	10.18	111
The importance of genetic identity	10.23	112
Consultations and submissions	10.35	115
Enabling children to know they are donor-conceived	10.40	116
Legal duty on parents to tell?	10.40	116
Birth certificates	10.44	116
The view of the Commission	10.53	118
Annotations	10.54	118
Education and counselling	10.67	120
The way forward	10.77	122
Age	10.79	123
People conceived by donor gametes prior to 21 August 2005	10.84	124
How successful are voluntary registers?	10.88	125
Counselling for offspring and donors using the voluntary register	10.91	126
DNA testing to establish a genetic link	10.95	127
Should the Human Assisted Reproductive Technology Act 2004 apply retrospectively?	10.97	127
Donor offspring not conceived through clinics	10.106	129
Naming fathers on the birth record	10.115	130
Getting registered	10.116	130
Initiatives to get fathers on the birth record	10.121	132
Submissions	10.127	133
The view of the Commission	10.132	134
INDEX		136



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## Glossary

### *Access order*

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. As of 1 July 2005, under the Care of Children Act 2004, access orders will be replaced by parenting orders.

### *Advisory Committee on Assisted Human Reproductive Procedures and Human Reproductive Research (advisory committee)*

This committee is established under section 32 of the Human Assisted Reproductive Technology Act 2004 and consists of between 8 and 12 members appointed by the Minister of Health. It provides advice to the Minister and issues guidelines and advice to the ethics committee on any matter relating to assisted human reproduction. It and the “designated ethics committee” replace the National Ethics Committee on Assisted Human Reproduction (NECAHR) as from 21 August 2005.

### *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. Under the Human Assisted Reproductive Technology Act 2004, assisted reproductive procedures and research fall into three categories: established procedures which do not require ethical approval before being undertaken, non-established activities which require ethics committee approval before being undertaken, and prohibited activities.

### *Atawhai*

An orphan or adopted child, used interchangeably with “whāngai”.

### *Biological parents*

This term is commonly used in society to refer to genetic parents but is not used in this report. Developments in assisted human reproduction mean that it is now too general a term as it can also refer to persons without a genetic connection to the child (such as the gestational mother who is not a genetic parent). The term genetic parent(s) is used when reference is made to the parents whose gametes have resulted in the conception of the child.

### *Commissioning parents*

The person or persons in a surrogacy arrangement who organise for the surrogate mother to gestate and give birth to a child for them to raise from birth. One or both of them may also be the child's genetic parent(s) if their gametes were used in conception. In this report, the term intending parents is used in place of commissioning parents, in line with the policy of the Human Assisted Reproductive Technology Act 2004 that commercial surrogacy arrangements are prohibited, but the term "commissioning parents" is used when referring to arrangements in other countries.

### *Custody order*

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. As of 1 July 2005, under the Care of Children Act 2004, custody orders will be replaced by parenting orders.

### *Donor(s)*

A person who gives an egg or sperm or persons who give an embryo in order to assist other(s) to conceive a child artificially.

### *Donor-conceived child*

A person conceived and born as a result of a donated egg, sperm or embryo.

### *Donor eggs*

Eggs (oocytes or ova) that have been donated for use in artificial human conception.

### *Donor embryo*

An embryo created by the gametes of a man and woman, which is given to another person(s) so that they can have a child. The procedure of embryo donation is not yet carried out in New Zealand, but ethical approval for it is expected in the near future.

### *Donor gamete conception*

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

- with medical assistance or the assistance of a fertility clinic; or
- in the case of donor sperm, through self-insemination.

### *Donor offspring*

Persons conceived and born as a result of a donated egg, sperm or embryo.



### *Donor sperm*

Sperm that has been donated by a man to a woman, who is not his wife or partner, for use in artificial human conception.

### *Embryo*

A term used to refer to a fertilised egg until approximately the end of the eighth week of development.

### *Ethics committee*

The Minister of Health designates a committee as the ethics committee under section 27 of the Human Assisted Reproductive Technology Act 2004 for the purposes of considering and approving cases and research in the area of assisted human reproduction. In determining whether approval for a particular procedure or research project will be granted, the ethics committee must ensure that the application complies with the guidelines created by the advisory committee. The ethics committee will be functional from 21 August 2005 and together with the advisory committee will replace the current National Ethics Committee on Assisted Human Reproduction (NECAHR).

### *Full surrogacy*

This refers to the arrangement in which the gametes of intending parents and/or a donor(s) are transferred to another woman to gestate and give birth to the child for the intending parents to raise as their child. This is sometimes called “IVF surrogacy” or “gestational surrogacy”.

### *Gametes*

These are the human cells necessary for sexual reproduction, that is, eggs in women and sperm in men.

### *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*

Those persons, usually the child's genetic parents, who have responsibility for the child's upbringing. People who are not parents can be appointed a guardian by the Family Court where such an appointment is in the child's best interests.

### *Guardian's responsibilities and rights*

A guardian has the duties, powers, rights and responsibilities to be able to provide day-to-day care of the child and contribute to the child's development and

determine, for or with the child, questions about important matters affecting the child.

### *Intending parent(s)*

In donor gamete conception, the intending parent(s) is the woman who conceives using donated gametes and her husband or partner where both intend to raise the child. In these circumstances, the child will typically be genetically unrelated to one parent. In a surrogacy arrangement, the intending parent(s) (also known as the commissioning parent(s)) is the person or persons who arrange for the surrogate mother to gestate and give birth to a child for them to raise from birth. One or both of them may also be the child's genetic parent(s) if their gametes were used in conception.

### *In vitro fertilisation (IVF)*

Fertilisation occurring outside the human body, where eggs are fertilised with sperm in a laboratory, usually in a dish or test tube.

### *Iwi*

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

### *National Ethics Committee on Assisted Human Reproduction (NECAHR)*

NECAHR is a ministerial committee established in 1995 on the recommendation of the Ministerial Committee of Inquiry into Assisted Human Reproduction. It issues guidelines for fertility clinics to ensure that ethical issues are addressed in reproductive procedures, and it processes applications for new assisted human reproduction treatment and research. It also provides advice to the Minister of Health. This committee will be replaced on 21 August 2005, under the Human Assisted Reproductive Technology Act 2004, by the advisory committee and an ethics committee.

### *Parenting order*

As of 1 July 2005, under the Care of Children Act 2004, custody orders and access orders will be replaced by parenting orders. A parenting order is a court order that defines when a specified person has the responsibility for providing the day-to-day care for, or may have contact with, the child. The child's parent, guardian, parent's partner or any other member of the child's family may apply for a parenting order. Other people may also apply for a parenting order but may do so only with the leave of the court.

### *Self-insemination*

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

### *Surrogacy*

An arrangement in which a woman agrees to carry and give birth to a child for another person or persons to raise. Under the Human Assisted Reproductive Technology Act 2004, commercial surrogacy arrangements are illegal.

### *Surrogate mother*

A woman who agrees to gestate and give birth to a child for another person or persons (the intending 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*

This term refers to arrangements in which the surrogate mother's own egg is used to achieve conception, either with the assistance of a fertility clinic or through self-insemination with the sperm of the intending father or of a donor.

### *Whakapapa*

A person's genealogy, cultural identity, or 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 includes grandparents or great-grandparents and their direct descendants.

### *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.





*The Hon Marion Hobbs*  
Minister Responsible for the  
Law Commission  
Parliament Buildings  
Wellington

19 April 2005

Dear Minister

I am pleased to present to you Report 88 of the Law Commission *New Issues in Legal Parenthood*, which we submit to you under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J Bruce Robertson'. The signature is fluid and cursive, with a long horizontal stroke at the end.

*J Bruce Robertson*  
President



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## Foreword

THE LEGAL STATUS of parent–child relationships has not kept pace with increasing diversity in family form arising from social change and new birth technologies. In 2003, the Minister Responsible for the Law Commission asked the Commission to review the legal rules that determine parenthood.

The open-ended potential for change in the field of assisted human reproduction means that a coherent and principled framework is needed, not only to assist with immediate issues but to take us into the future. In this review we adopt five guiding principles, which need to be carefully weighed in making specific recommendations in this area. These are: the child’s welfare and best interests; the desirability of clarity and certainty at the earliest possible time in the child’s life and of simple procedures to achieve this; the need for individuals to access information about their genetic and gestational parentage; the desirability of autonomy and collaboration in parenting; and the equality of children regardless of the circumstances of their creation or family form.

Since publication, in March 2004, of the discussion paper *New Issues in Legal Parenthood*, we have analysed written submissions and consulted with people directly affected by the issues as well as with public officials. Five statutes have been recently enacted which directly impact on the issues: the Care of Children Act 2004; the Status of Children Amendment Act 2004; the Human Assisted Reproductive Technology Act 2004, the Civil Union Act 2004, and the Care of Children Amendment Act 2005. Our recommendations take account of the legal landscape following these enactments.

This report reviews the legal meaning of parent, the purpose of parenthood laws, and the importance of the legal relationship between a parent and child. We recommend amendments and additions to the presumptions of parenthood and to the mechanisms for proving and disproving parenthood to take into account the advent of DNA testing. With donor gamete conception, our recommendations primarily relate to the legal status of known donors; in the area of surrogacy, we recommend a comprehensive new legal regime for the transfer of parenthood. We also review embryo donation and mistaken implantation. We make several recommendations to repair gaps in existing law and practice that mean some children cannot obtain a record of their genetic parentage.

Frances Joychild was the Commissioner responsible for this project. She was assisted in the preparation of this final report by Susan Hall and, at varying times, by Claire Phillips, Alexander Schumacher and Emma Jeffs.

*J Bruce Robertson*  
President

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# Executive summary

## INTRODUCTION (CHAPTER 1)

**T**HIS REPORT addresses new issues in legal parenthood. Many of the issues arise from the impact of social change and assisted human reproductive procedures on children and family forms.

The report is guided by the following principles: the child's welfare and best interests; the desirability of clarity and certainty at the earliest possible time in the child's life and of simple procedures to achieve this; the need for individuals to access information about their genetic and gestational parentage; the desirability of autonomy and collaboration in parenting; and the equality of children regardless of the circumstances of their creation or family form.

## CHILDREN, PARENTS AND THEIR FAMILIES (CHAPTER 2)

Families in New Zealand come in diverse forms. Situations have always existed where children are not raised by their genetic parents. A wealth of literature points to loving, committed and stable parent-child relationships as key to good outcomes for children. The role of assessing and evaluating the ethical issues surrounding the use of various birth technologies to create children sits with the government and its advisory ethics committees. The role of the Law Commission in this review is to ensure all children have equal protection under parental laws.

## LEGAL PARENTHOOD AND ESTABLISHING PARENTHOOD (CHAPTERS 3 AND 4)

Legal parenthood bestows powers, duties, rights and responsibilities upon adults in relation to children, so that they can provide security and protection to them as vulnerable members of society. The benefits to the child from legal parenthood, as distinct from guardianship, are significant and include citizenship, inheritance and maintenance rights.

The legal parenthood of naturally conceived children is determined under general legislative rules. "Assisted human reproduction" rules apply where children are conceived artificially using donated gametes or embryos or by a surrogacy arrangement.

### **The general laws**

Who is a "mother" or a "father" is not defined in legislation, although the effect of the law is that a child's father is his or her genetic father and a child's mother is his or her genetic and gestational mother. "Mother" and "father" should be specifically defined (Recommendation 1) and there should be an express provision that evidence of birth constitutes proof of maternity (Recommendation 2).

Paternity can be established by scientific testing, acknowledgment, or the operation of a presumption that the father is the husband of the mother. Since 42 per cent of all births occur outside marriage, the presumption should be extended to opposite-sex civil unions and de facto relationships. The risk of the wrong father being presumed needs to be minimised. The presumption should only operate in relation to conceptions that take place during cohabitation (Recommendation 3).

## PROVING PARENTHOOD BY DNA TESTING (CHAPTER 5)

It is in the child's interests to have accurate knowledge of their genetic lineage, and in the interests of justice that doubt about parentage can be conclusively resolved. DNA testing is the most reliable means of proving genetic parenthood and should be available where parentage issues arise.

### **Accreditation**

The DNA testing procedure is fraught with potential error, and there is no accreditation of DNA parentage testing providers in New Zealand.

The government should work to develop standards and establish an accreditation system for laboratories that undertake DNA testing. Courts and government agencies should then only use test results obtained from accredited laboratories (Recommendations 4–5). Testing should be allowed on any bodily sample that is able to produce DNA of sufficient quality and quantity (Recommendation 4).

### **One parent voluntary testing**

It is usually in the child's interests that both parents know when a test is taking place. One parent should not be able to thwart the other by unreasonably refusing to consent to the test. The responsibility should be on the objecting parent to challenge the test in court, rather than on the other parent to get court approval to test.

A parent should be required to inform the other parent if they intend to obtain a DNA test (Recommendation 5). The laboratory should not go ahead with testing until it has been provided with evidence that the other parent has been informed and 28 days have passed with no objection (Recommendation 5). Where there is objection, the court should be able to issue an order preventing or delaying testing only if there are compelling reasons to do so (Recommendation 6).

Protocols should be developed to verify the consent of parents and to ensure that a child who is of an age and maturity to give consent has done so (Recommendation 7).

### **Court-ordered testing**

Currently the court can only recommend that an adult be DNA tested, although it can consent to testing on behalf of a child. The court should have the power to order testing where there is a reasonable doubt about parentage and where there are no compelling reasons against it. Individual wishes should be taken into account, but should not be determinative (Recommendation 8).

Enforcement sanctions should be aligned with the enforcement of parenting orders under the Care of Children Act 2004, which includes warrants to enforce and penalties (Recommendation 8). The court should be able to set conditions upon the disclosure of test results (Recommendation 8). Counselling or mediation services should be available to those affected by testing and test results (Recommendation 8).

## DONOR GAMETE CONCEPTION (CHAPTER 6)

Distinct rules exist that transfer parenthood automatically from the donor to the non-genetic mother (in egg donation) or to mother's partner (in sperm donation) and extinguishes the legal parenthood of the donor automatically.

Consideration was given to whether this is the most appropriate means of allocating parenthood in these circumstances. It is considered that the existing rules should remain as they provide certainty and clarity at the earliest opportunity.

### **Known donors**

The law treats all donors in the same way. Where a donor gives gametes to a woman or couple with the agreement of all that the donor will be a full parent to the child, the law still automatically extinguishes his or her parental status. Such a "known donor" should, with the agreement of the woman or couple, be able to become a legal parent by a simple court process. In some families, this will result in a child having three legal parents (Recommendations 9–10).

At present, the law allows a donor to enter into an agreement about contact and roles with the parents of his or her genetic child. In some cases this may mean a donor has the benefits, but not the liabilities, of parenthood. Where such a donor makes a knowing and participatory assumption of responsibility for a child, they should not be excluded from liability under the Child Support Act 1991 (Recommendation 13).

Where a dispute about an agreement between a donor and parents regarding contact and roles comes before the court, the terms of the agreement should be enforceable unless to do so would not be in the best interests of the child (Recommendation 11). Parties to an agreement that will be made an order of the court should be required to obtain independent legal advice (Recommendation 12).

### **One legal parent**

Under the assisted human reproduction laws, a child born by donated sperm to a single woman will have only one legal parent. Where an unpartnered woman conceives by donated gametes, fertility clinics should be required to counsel the woman about the importance of appointing a second guardian (Recommendation 14).

## SURROGACY (CHAPTER 7)

At present, in a surrogacy arrangement the only means of transferring parenthood from a birth mother and her partner to the intending parents is through adoption, even if the intending parents are the genetic parents of the child. The adoption rules are inappropriate for surrogacy arrangements and can create uncertainty and

legal fiction. Therefore, adoption is often not used and as a result children are being cared for informally, without the protections a legal parent can provide.

If the child is the genetic child of one or both intending parents and certain requirements are fulfilled, parental status should be able to be transferred by a court order, without all the requirements of the adoption legislation (Recommendation 15).

Protections for the surrogate mother should also be required. If a surrogacy arrangement breaks down, or the surrogate mother changes her mind, a court process is recommended to resolve the dispute and to determine legal parenthood, guardianship and care of the child (Recommendation 15).

## MISTAKEN IMPLANTATION (CHAPTER 8)

There is a small risk that women undergoing fertility treatment may be mistakenly implanted with the wrong egg or embryo, or inseminated with the wrong semen. As a result a dispute may arise about the legal parentage of the child. Although no New Zealand case is known, overseas estimates are that this has happened in 1 in 1000 cases. Special provision should be made for parenthood to be determined by the court in the best interests of the child, and by reference to specified criteria (Recommendation 16).

## EMBRYO DONATION (CHAPTER 9)

In New Zealand, embryo donation is likely to gain ethical approval soon. The draft guidelines were not available at the time this report went to print. Embryo donation can be said to sit between adoption, where there is no genetic or gestational link between the parents and the child, and donor gamete conception, where there is typically both a gestational link and partial genetic link.

At present, the law will transfer parenthood automatically in cases of embryo donation, as for donor gamete conception. People conceiving with donated embryos should undertake education on the challenges of parenting a child with no genetic connection, and should be screened. Fertility clinics should not undertake donor embryo treatment unless these requirements have been fulfilled (Recommendation 17).

## IDENTITY (CHAPTER 10)

### **Enabling children to know their genetic origins**

At present, the law reflects the importance of knowledge of genetic parentage to a person's sense of identity. Although donor offspring will, from 21 August 2005, be able to access identifying information about their genetic parentage, the child's only way of knowing they are donor-conceived is if they are told. The evidence is that many parents do not tell.

All birth certificates should include a statement that the official birth register may contain other information that may be accessed by the person named on the certificate (Recommendation 18). Parents can choose to have a note on their child's birth certificate indicating that they are donor-conceived (Recommendation 19).

To assist parents in telling their children they are donor-conceived, people wishing to conceive with donated gametes or eggs, and through surrogacy arrangements, should be required to undertake an education programme. The development of these programmes should be the joint task of government and fertility service providers (Recommendation 20). Fertility clinics and counsellors should develop a best-practice counselling protocol (Recommendation 21).

The policy work on minimum ages being undertaken by government should include the age at which children can access their own genetic information (Recommendation 22).

### **The pre-2005 voluntary register**

The Human Assisted Reproductive Technology Act 2004 introduces a voluntary register for those conceived before 21 August 2005, whereby donor-conceived persons and donors can give their details to the Registrar-General of Births, Deaths and Marriages. The Registrar-General can pass this information on if there is reason to believe the persons may be genetically related. The launch of the register should be accompanied by a publicity campaign designed to reach as many donor offspring and donors as possible (Recommendation 23).

In line with overseas models, counselling services should be provided for people using the register (Recommendation 24). Given the role that the state and clinics have played in enabling donor gamete conception, the government should give consideration to subsidising both counselling and DNA testing for people using the register (Recommendations 24–25).

### **Donor offspring conceived outside clinics**

Children born of private gamete donation or private surrogacy arrangements do not have the protections of the Human Assisted Reproductive Technology Act 2004, which places duties on clinics to retain information about their genetic parentage and pass it to the Registrar-General of Births, Deaths and Marriages. In these circumstances, parents should also be required to notify the Registrar-General of identifying information about their child's donor or surrogate mother (Recommendations 26–27).

### **Children with no named father on the birth certificate**

A large number of New Zealand children have no named father on their birth certificate (6.84 per cent in 2003). Child support obligations operate as a disincentive in many situations. There are also indications that more fathers would be named if the mechanisms for establishing paternity were easier and cheaper. The government should consider subsidising DNA paternity testing and should undertake work to identify the policy objectives in recording legal parents and genetic information on the Births, Deaths and Marriages register (Recommendations 28–29).

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# Recommendations

## DEFINING PARENTHOOD

- R1** The general rules in the Status of Children Act 1969 should make explicit that, unless any other provision of that or any other enactment identifies another person as a mother, father or parent, a legal father of a child is the genetic father of that child and a legal mother of a child is the genetic and birth-giving mother of that child.

## PROOF OF MATERNITY

- R2** There should be an explicit provision that evidence of birth constitutes proof of maternity unless any other provision of that or any other enactment applies. The presumption of maternity should be abolished.

## PROOF OF PATERNITY

- R3** Section 5 of the Status of Children Act 1969 should be amended to read:

“(1) A child conceived during cohabitation of spouses or partners to an opposite-sex civil union or opposite-sex de facto relationship shall, in the absence of evidence to the contrary, be presumed to be the child of the husband of the marriage, male partner of the civil union or male partner of the de facto relationship as the case may be.

(2) A de facto relationship has the meaning given to it in section 2D of the Property (Relationships) Act 1976 except that a de facto relationship shall not exist unless there is a sexual relationship between the parties.”

Consequential amendments to the presumption of paternity should be made to other legislation which imports the presumption in whole or in part to include opposite-sex civil unions and de facto relationships and to specifically provide that the presumption can be rebutted.

## STANDARDS AND ACCREDITATION IN DNA PARENTAGE TESTING

- R4** The government should ensure accessible, efficient, accurate and ethical DNA parentage testing services are available in New Zealand by:
- undertaking work to develop standards and accreditation of laboratories offering DNA parentage testing in New Zealand, with particular attention to the accuracy of testing and verification of the identity of samples and persons;

- ensuring that such standards incorporate all relevant legislative requirements, such as a prohibition against testing of children without the other parent being informed;
- ensuring that information about DNA parentage testing, such as the benefits of using accredited providers and issues relating to the interests of children, is accessible to the public and the professionals who are involved; and
- ensuring that parentage tests can be conducted on any sample able to produce DNA of sufficient quality and quantity.

## VOLUNTARY DNA PARENTAGE TESTING PROTOCOLS

**R5** Legislation should be enacted to ensure that government agencies requiring proof of parentage and courts dealing with civil proceedings only accept the results of DNA testing of a child under 16 as proof of parentage if the following requirements are met:

- the laboratory undertaking the DNA parentage testing complies with standards developed for New Zealand, as may be required by regulation and/or accreditation;
- the laboratory has received verifiable agreement of the parents that parentage testing of the child or young person can take place; or
- where only one parent seeks the test, that parent has served notice of the test on the other parent and provided proof of service to the testing provider; and
- before carrying out the test, the testing provider waited 28 days from the date of the notice to other parents and did not receive notice from the court that an objection had been filed.

**R6** Legislative provisions should be enacted to ensure that:

- a parent served with a notice for parentage testing of their child can file an objection with the Family Court;
- an objection to parentage testing must be filed within 28 days of the date the notice was served on the objector;
- if a valid notice of objection is received, the court must notify the testing provider that they should not proceed with the test until the issue is determined by the court;
- the court can cancel the notice to the provider if the objecting party has unreasonably delayed court determination of the matter;
- the court only intervenes to prevent testing where there are compelling reasons why testing would not be in the interests of justice, including the best interests of the child;
- the results of tests are delivered to each parent by the testing agency at the same time.



**R7** Protocols should be developed and prescribed in regulation and/or the accreditation standards to establish:

- an effective method of verifying the agreement of parents to parentage testing;
- the age and capacity of consent for children and young persons under 16 years, when a parent can consent on behalf of children or young persons, and verification of these consents.

## COURT-ORDERED DNA PARENTAGE TESTING

**R8** Legislative provisions should be enacted to ensure that a court may make an order for parentage testing or preventing parentage testing, including testing in relation to deceased persons, and that:

- in determining whether to order parentage testing of a child, the court must be satisfied there is a reasonable possibility a person recognised as a parent is not the genetic parent or that a person not recognised as a parent is the genetic parent, and shall then order testing unless there are compelling reasons why it would not be in the interests of justice, including the best interests of the child;
- in assessing the best interests of the child, the court must take account of the wishes of a child under 16 years, having regard to their age and maturity;
- lack of consent by any party, including children, is not determinative of the matter;
- in making an order the court can require that testing and disclosure of the results take place under certain conditions, such as that testing must or must not take place within a specified time or that the results must be disclosed in a particular way;
- counselling or mediation is available for persons and children who undertake parentage testing and others who need to resolve issues arising from the test;
- enforcement of parentage orders are aligned with the provisions in the Care of Children Act 2004 that deal with dispute resolution, making parenting orders work, and enforcement of parenting orders.

## LEGAL PARENTHOOD FOR “KNOWN” DONOR AS A CHILD’S SECOND PARENT

*This recommendation applies where a donor and woman intend to conceive or have conceived a child by assisted human reproduction on the basis that the donor will be a legal parent and raise the child jointly with the mother.*

**R9** Part 2 of the Status of Children Act 1969<sup>i</sup> should be amended to provide that the woman can appoint the donor to be a parent of the child in two stages.

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<sup>i</sup> As amended by the Status of Children Amendment Act 2004.



Stage 1: Before conception or birth, the woman and donor should present to a registrar of the Family Court a form accompanied by:

- a sworn statement by the woman that the donor will be a genetic parent of the child and that she wants him or her to be a legal parent and a sworn statement by the donor that he or she will be a genetic parent of the child and wants to be a legal parent.

The registrar, being satisfied, having made all reasonable inquiries, that the documentation appears to be in order, shall give interim approval to the appointment.

Stage 2: After the birth of the child, upon proof of the named donor's genetic parentage of the child, the registrar shall approve the application and a parent and child relationship shall exist.

## LEGAL PARENTHOOD FOR “KNOWN” DONOR AS A CHILD'S THIRD PARENT

*This recommendation applies where a donor and couple intend to conceive or have conceived a child by assisted human reproduction on the basis that the donor will be a legal parent and raise the child jointly with the couple.*

**R10** Part 2 of the Status of Children Act 1969<sup>ii</sup> should be amended to provide that the couple can appoint the donor to be a parent of the child in two stages.

Stage 1: Before conception or birth, the couple and donor should present to a registrar of the Family Court a form accompanied by:

- a sworn statement by the woman and her partner that the donor will be a genetic parent of the child and that they want him or her to be a legal parent and a sworn statement by the donor that he or she will be a genetic parent of the child and that he or she wants to be a legal parent;
- evidence that all three parties have received independent legal advice;
- evidence that all three parties have received counselling about the issues raised by their planned family; and
- an agreement, in similar terms to an agreement under section 41 of the Care of Children Act 2004.

The registrar, being satisfied, having made all reasonable inquiries, that the documentation and evidence appears to be in order, shall give interim approval to the appointment.

Stage 2: After the birth of the child, upon proof of the named donor's genetic parentage of the child, the registrar shall approve the appointment and a parent and child relationship shall exist.

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<sup>ii</sup> As amended by the Status of Children Amendment Act 2004.

## SECTION 41 AGREEMENTS BETWEEN DONORS AND PARENTS

- R11** Section 41(6) of the Care of Children Act 2004 should be amended to provide for a presumption that a pre-conception agreement made between the parties that is the subject of a court consent order is enforceable on its terms, unless the court considers it is demonstrably in the child's best interests to vary it.
- R12** Before the court makes an order under section 41(1)(a) of the Care of Children Act 2004, the parties to the agreement should have obtained independent legal advice.

## CHILD SUPPORT LIABILITIES OF "KNOWN" DONOR ACTING AS PARENT

- R13** A new paragraph of section 7(1) of the Child Support Act 1991 should be introduced to provide that, notwithstanding section 7(4) of that Act, a person who has been declared a liable donor by the court shall be liable for child support.

## SOLE LEGAL PARENTHOOD

- R14** Fertility clinics should be required under the Human Assisted Reproductive Technology Act 2004 to counsel all unpartnered women receiving donor gametes about the importance of appointing a second person as guardian to their child.

## TRANSFERRING PARENTHOOD IN SURROGACY ARRANGEMENTS

- R15** A new Part 3 of the Status of Children Act 1969 should be introduced. The Family Court should be empowered to make an interim order transferring legal parenthood to the intending parents if it is satisfied that:
- the surrogate mother is over 18 years and has already had one child herself;
  - the child would be the genetic child of at least one of the intending parents;
  - the only money that will pass between the parties is for "reasonable and necessary expenses" incurred in the pregnancy;
  - the intending parents and surrogate mother have had separate and joint counselling; and
  - the surrogate mother and her partner have entered into the arrangement voluntarily and have given their unconditional consent to the making of the order, having had independent legal advice and having a full understanding of what is involved.

If an interim order has been made, after 21 days and upon proof of the genetic parentage of one of the intending parents, that they have the child in their

care, and in the absence of a petition being filed by the surrogate mother, a registrar of the Family Court shall approve the application and a parent and child relationship shall exist.

If no interim order has been sought, the Family Court should be empowered to issue a parental order at any time from 21 days post-birth to 6 months post-birth if it is satisfied that:

- the surrogate mother is over 18 years and has already had one child herself;
- the child is the genetic child of at least one of the intending parents;
- the only money that passed between the parties was for “reasonable and necessary expenses” incurred in the pregnancy;
- the intending parents and surrogate mother have had separate and joint counselling;
- the surrogate mother and her partner have entered into the arrangement voluntarily and have given their unconditional consent to the making of the order, having had independent legal advice and having a full understanding of what is involved; and
- making the order is in the best interests of the child.

## MISTAKEN IMPLANTATION AND THE COURT’S POWERS

**R16** Part 2 of the Status of Children Act 1969 should be amended to provide for situations of mistaken implantation of an embryo, mistaken fertilisation of an egg, or mistaken insemination. The court should be empowered to make parental orders in favour of, or to extinguish the legal parenthood of, any one or more of the group of adults with a proper interest in the parenthood of the resulting child, on the basis of the child’s best interests taking account of specified criteria.

## LEGAL PARENTHOOD OF CHILDREN BORN THROUGH EMBYRO DONATION

**R17** Prior to a fertility clinic treating recipient parents using donated embryos, the parents should be required under ethical guidelines or legislation to undertake both education on the challenges of parenting a child without a genetic connection and screening.

## BIRTH CERTIFICATES FOR CHILDREN CONCEIVED BY ASSISTED HUMAN REPRODUCTION

**R18** Birth certificates should include a statement to indicate that the Births, Deaths and Marriages register contains other information that may be accessed by the person whose certificate it is.

- R19** Births, Deaths and Marriages should consider allowing parents to choose to have an annotation stating that the child was born by “donor”.

## EDUCATION FOR INTENDING PARENTS

- R20** Pre-conception educational programmes for adults using donated gametes and embryos should be developed as a joint task of the government and fertility service providers. It should be a requirement of treatment under the Human Assisted Reproductive Technology Act 2004 that recipients attend the programmes.

## FERTILITY CLINIC COUNSELLING

- R21** Fertility clinics and counsellors should develop a best-practice counselling protocol to be included in accreditation standards. Work to develop the protocol should include consideration of whether counselling should be a requirement before prospective parents undergo treatment.

## AGE TO ACCESS GENETIC PARENTAGE INFORMATION

- R22** The policy work on minimum ages, currently being undertaken by government, should include the question of whether there ought to be a restriction on the age at which children can access their own genetic information, and if so, what that age should be.

## IMPROVING THE SUCCESS OF VOLUNTARY REGISTERS

- R23** The voluntary register provided for in the Human Assisted Reproductive Technology Act 2004 should be accompanied by a publicity campaign designed to reach as many donor offspring and donors as possible.
- R24** Counselling should be available for donor-conceived offspring and donors using the voluntary register, and the Registrar-General of Births, Deaths and Marriages should inform offspring and donors of the availability of counselling for those using the voluntary register. Government should consider paying for or subsidising such counselling.
- R25** The government should consider the provision of subsidised DNA testing for people using the voluntary register.

## GAMETE DONATION AND SURROGACY OUTSIDE FERTILITY CLINICS

- R26** The parents of a child born as a result of gamete donation or surrogacy should be required to notify the Registrar-General of Births, Deaths and Marriages of the same identifying information about the donor as that required under sections 47 and 53 of the Human Assisted Reproductive Technology Act 2004 and it should be available to donor offspring as prescribed in that Act.

**R27** The Notification of Birth for Registration form should be amended to state that under New Zealand law parents must register details about a donor or surrogate, if one was used.

## INITIATIVES TO GET FATHERS ON BIRTH CERTIFICATES

**R28** Government should consider subsidised DNA paternity testing where real doubt exists as to paternity.

**R29** Government should undertake work to identify the policy objectives in recording legal parents and genetic information on the Births, Deaths and Marriages register, and develop strategies to achieve these objectives.

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# 1

## Introduction

### ISSUES IN THIS REPORT

- 1.1 **T**HIS REPORT addresses new issues in legal parenthood. These issues arise from change in family structures and forms and recent developments in assisted human reproduction. Recommendations for law reform in this report are primarily to the Status of Children Act 1969 and subsequent amending legislation, and have the dual aims of ensuring that all children have the benefits and protections of legally recognised parental relationships and access to information about their genetic and gestational parentage. Other important changes are to the Family Proceedings Act 1980, where the processes for proving parenthood have required review.
- 1.2 The focus in this report is on how the law determines who is a parent; it is not on custody, foster parenting, step-parenting, whāngai arrangements or the rules governing the actual parenting of children. Legal parenthood includes, in the vast majority of situations, the automatic bestowal of guardianship.<sup>1</sup> Parenthood and guardianship involve different legal rights and duties, even when held by the same person. Being a guardian usually enables exercise of the rights of day-to-day care of the child and decision-making about important matters affecting the child.<sup>2</sup> Children, therefore, gain important legal protections from their guardians. They gain a different set of benefits and protections from their legal parent. It is that relationship which determines, among other things, the child's citizenship rights, inheritance rights, and rights to maintenance upon breakdown of parental relationships.

### THE CHANGING NATURE OF FAMILIES

- 1.3 Over the past 30 to 40 years, major changes have occurred in how parents and children live together and in the family structures that exist. The traditional family of a mother and father raising their genetic child together from a common household now exists alongside many other family forms.<sup>3</sup> One-parent households are now common, although frequently children have two parents involved

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<sup>1</sup> Guardians need not be parents, however, and people who are neither parents nor guardians can have custody and contact with a child.

<sup>2</sup> Except if there is a custody order in place in favour of another person, the day-to-day-care rights are limited by that order.

<sup>3</sup> In fact, there has never been one uniform family structure or set of norms as to how children are raised in New Zealand. Māori customary law and practice, as it relates to the family, has remained outside the laws of this country. For a detailed account see D Hall and J Metge "Kua Tutū Te Puehu: Kia Mau: Māori Aspirations and Family Law" in M Henaghan and B Atkin (eds) *Family Law Policy in New Zealand* (2 ed, LexisNexis Butterworths, Wellington, 2002) 41.

in raising them.<sup>4</sup> Many parents have their children within a de facto relationship rather than marriage, although some later marry.<sup>5</sup> Some children are born as a result of a brief union, to parents who have never been in a relationship with each other.

- 1.4 This diversity is recognised in the Families Commission Act 2003<sup>6</sup> which contains a wide definition of family and requires the Commission to have regard to the “kinds, structures and diversity of families”. There is no statutory definition of parent, mother or father, instead these roles are to be deduced rather than declared. Furthermore, despite nearly 60 per cent of first-born New Zealand children now being born outside marriage, the law still uses a marital presumption to determine who is a father.<sup>7</sup>
- 1.5 Parenting of children by non-genetic parents has always existed. The law has enabled genetic parents to relinquish parenthood and non-genetic parents to be given that status by adoption, which creates a strict two-parent model where one set of parents is replaced with another.<sup>8</sup>
- 1.6 The development of new reproductive procedures to address infertility and the creation of families by people in gay and lesbian relationships have meant the existence of families in which children are being raised from birth by a genetic–non-genetic (or non-gestational) parent combination.<sup>9</sup> In such families, more than two adults will have been involved in the creation of the child. These may be any combination of genetic parents, their partners, an egg donor, a sperm donor and a surrogate mother. Donor sperm conceptions can occur with or without medical assistance. Donor egg and donor embryo implantations require technical medical procedures. Fertility clinic statistics suggest that around 100 children are born from donated sperm or eggs each year in New Zealand. In the past the numbers have been higher.<sup>10</sup> In total, we estimate there are around 3000

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<sup>4</sup> The 2001 Census recorded 18.9 per cent of New Zealand families as containing only one parent. Just over four-fifths of these families had a female parent – Statistics New Zealand *Census 2001: Families and Households* (Statistics New Zealand, Wellington, 2001) Table 1. However, in our consultations, it was pointed out by men representing fathers’ interests that many of these children will nevertheless have two active parents in their lives and it is such statistics that often make fathers’ contributions to parenting on separation invisible.

<sup>5</sup> Statistics New Zealand information reveals that “nearly 60 per cent of first births were ex-nuptial in the late 1990s” and in total 42 per cent of all births in 1998 were outside marriage – Statistics New Zealand *Socio-economic Factors and the Fertility of New Zealand Woman* (Statistics New Zealand, Wellington, 2001) 31. See also, A Dharmalingam et al *Patterns of Family Formation and Change in New Zealand* (Ministry of Social Development, Wellington, 2004).

<sup>6</sup> According to section 10(2) of the Families Commission Act 2003 a “family includes a group of people related by marriage, blood, or adoption, an extended family, 2 or more persons living together as a family, and a whanau or other culturally recognised family group”.

<sup>7</sup> Status of Children Act 1969, s 5.

<sup>8</sup> See New Zealand Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, Wellington, 2000).

<sup>9</sup> Many children are also raised in genetic–non-genetic parent combinations when their parents’ relationship breaks down and the parents re-partner. Stepfamilies are not specifically addressed in this review and are different to these families: parenting in this combination is planned pre-conception and the adults are the child’s “parents” as opposed to step-parents.

<sup>10</sup> Certain new birth technologies now enable more people with infertility problems to conceive using their own gametes.



persons in New Zealand who have been conceived by donor gametes. Eighteen years ago, new laws were enacted transferring legal parenthood from donor to the non-genetic partner of the mother on the basis of the intentions of the former to relinquish their status and the latter to become a legal parent.<sup>11</sup>

- 1.7 Donor insemination through fertility clinics is commonly used by lesbian couples to have children.<sup>12</sup> Many, however, conceive in their own homes by self-insemination, with sperm donated by a friend or associate. Our consultations and research lead us to estimate that there are at least as many lesbian women conceiving privately as through clinics.<sup>13</sup>
- 1.8 In these families, known donor conceptions are increasingly common. They are also common with donor egg conceptions. Increasingly, the known donor has ongoing contact with the family. The role this person assumes varies enormously from family to family and in a few it amounts to a parental role which is equal to that of the mother and her partner. Here the difficulties arise for the law. What should it do with this hybrid form of parent? How does the law recognise that person's role in relation to the child's legal parents, taking account of the need for certainty and stability in the child's family and a fair balance of rights and responsibilities among the adults? Would it be anomalous to create three legal parents where that was, in effect, what the child had?
- 1.9 Some older single women who do not have a male partner, are choosing donor gamete conception as a means of having a child.<sup>14</sup> Should the law continue to extinguish the legal parenthood of the donor, thus leaving the child with only one legal parent?
- 1.10 Families where the woman cannot gestate a child are also resorting to in vitro fertilisation (IVF) and private surrogacy arrangements.<sup>15</sup> IVF surrogacy gained ethical approval six years ago, and last year Parliament legislated that a surrogacy arrangement is not of itself illegal, though commercial arrangements are.<sup>16</sup> The application of the donor gamete laws to surrogacy arrangements has perverse results for the parent-child relationships. The intending parents, even if they are each genetic parents, may not be legal parents. The only way to change parental

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<sup>11</sup> Status of Children Amendment Act 1987.

<sup>12</sup> An Auckland fertility clinic counsellor, Robyn Galvin, estimated that 20 per cent of clients on their waiting list for donor sperm are lesbian couples. See "Wanted More Donor Sperm" (30 January 2005) *New Zealand Herald* Auckland 15.

<sup>13</sup> Results from the 1996 and 2001 censuses found that 684 and 1356 same-sex couples respectively had one or more dependent or adult children – Statistics New Zealand 2001 *Census of Population and Dwellings: Families and Households* (Statistics New Zealand, Wellington, 2002) Table 11. The data does not distinguish between children born into gay relationships and those resulting from previous heterosexual liaisons.

<sup>14</sup> An Auckland fertility clinic counsellor, Robyn Galvin, estimates that 40 per cent of clients on the clinic's waiting list for donor sperm are single woman. See "Wanted More Donor Sperm" (30 January 2005) *New Zealand Herald* Auckland 15.

<sup>15</sup> The National Ethics Committee on Assisted Human Reproduction approved 29 surrogacy applications by people using clinics between 1997 and 2004 (including 2 provisional approvals) – information provided by a Policy Analyst, Ministry of Health, to the Law Commission (16 February 2004) email. Again, like donor conception, some surrogacy arrangements happen without clinic assistance, and our consultation leads us to believe the same number again may take place outside the clinics.

<sup>16</sup> Human Assisted Reproductive Technology Act 2004, s 14.

status in those circumstances is by adoption, the philosophy of which is at odds with aspects of surrogacy.

- 1.11 We have also considered the impact of scientific developments in DNA analysis, which enable genetic parenthood to be proved to a high degree of certainty. Should parents be able to test their child without the knowledge or consent of the other parent? If not, how does the law prevent one parent from being unreasonably obstructive? Should the court be able to order DNA testing? What is the status of DNA testing outside the court system? How can accuracy and reliability of results be ensured? How are the rights and needs of the child protected where parents are challenging their parentage of him or her?
- 1.12 Where donor gamete conception occurs outside fertility clinics, the children may not have information as to their genetic and gestational parentage. How should these shortcomings be remedied? There is a growing number of children who have no named father on their birth certificate. While recent initiatives may decrease the numbers, they will not solve the problem.<sup>17</sup> There is no responsibility on the state to ensure that all children have their father identified and registered, despite the heritage and legal benefits that potentially flow to children from this.

## THE CHANGING NATURE OF PARENTHOOD LAWS

- 1.13 The legal status of parent–child relationships has undergone radical change over the past 165 years of New Zealand’s European legal system. During the nineteenth and early twentieth centuries, all children, apart from Māori children, who were born outside the marriage of their parents were “fillius nullus” meaning “born to no one” and parents had no legal duties in relation to them.<sup>18</sup> However, in 1969 all children were declared by the law to be of equal status, whether or not their parents had been married to each other.<sup>19</sup>
- 1.14 In the same early decades, fathers had exclusive common-law rights to the custody of the children of their marriage.<sup>20</sup> The law evolved so that mothers came to have rights also, although a mother who was guilty of adultery was considered unsuitable to have custody or access to her children.<sup>21</sup> In 1970, the newly enacted Guardianship Act 1968 changed the balance. For the first time the child’s welfare

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<sup>17</sup> For example, Care of Children Act 2004, s 17(2)(b) and also the announcement by Steve Maharey, Minister for Social Development and Employment, regarding increased penalties for woman on the domestic purposes benefit who do not name the father – Steve Maharey, Minister for Social Development and Employment “New Bill Contains Important Social Security Changes” (8 September 2004) Press Release.

<sup>18</sup> Special legislation was enacted in 1860 to protect Māori children from this status classification, as it was contrary to Māori culture to differentiate among children in this way. See V Ullrich “Parents at Law” (1981) 11 VUWLR 95.

<sup>19</sup> Status of Children Act 1969, s 3. Duties were gradually imposed on parents until by 1969 only small inequalities remained.

<sup>20</sup> W Atkin and G Austen “Family Law in Aotearoa/New Zealand: Facing Ideologies” in J Eekalaar and T Nhlapo (eds) *The Changing Family: International Perspectives on the Family and Family Law* (Hart Publishing, Oxford, 1998) 307.

<sup>21</sup> W Atkin and G Austen “Family Law in Aotearoa/New Zealand: Facing Ideologies” in J Eekalaar and T Nhlapo (eds) *The Changing Family: International Perspectives on the Family and Family Law* (Hart Publishing, Oxford, 1998) 307. The authors cite *Fleming v Fleming* [1948] GLR 220 (CA) as illustrative.

became the first and paramount consideration.<sup>22</sup> A parent's gender was specified as being irrelevant to decisions to be made about the child, and the conduct of a parent only relevant to the extent it affected the welfare of the child.

- 1.15 Typically, in a society where women have been the primary caregivers and men the breadwinners, custody has most often been awarded to a mother as the child's primary bond was with her. However, the last decade or so has seen an assertion of the rights and needs of a child to have ongoing relationships with both parents upon their separation. The loosely termed "father's movement" has been a major influence in this development, as has New Zealand's ratification of the 1989 United Nations Convention on the Rights of the Child (UNCROC).
- 1.16 At the same time, the role of parents in children's lives has evolved, so that now the concept of parents having rights is recognised by the law only to the extent that parental rights are needed for the protection of the child, and such rights yield to the child's rights to make his or her own decisions when he or she reaches a sufficient understanding and intelligence to be capable of this.<sup>23</sup>

## GUIDING PRINCIPLES USED IN THIS REPORT

- 1.17 In conducting this review and making recommendations for law reform we have identified the following five guiding principles:

### **1 The child's welfare and best interests are a primary consideration**

- 1.18 This accords with UNCROC<sup>24</sup> and with the tenor of domestic legislation. We have considered legislation such as the Care of Children Act 2004, which has elevated the child's welfare and best interests to "the first and paramount consideration",<sup>25</sup> and legislation such as the Human Assisted Reproductive Technology Act 2004, which makes it an important consideration.<sup>26</sup>

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<sup>22</sup> Guardianship Act 1968, s 23.

<sup>23</sup> See, for example, *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 (HL) and also the United Nations Convention on the Rights of the Child (20 November 1989) [1993] NZTS No 3, art 5: "State Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided 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 recognised in the present Convention" and article 12 where children, who are capable of forming their own views, have rights to express them freely and to have them be given due weight in accordance with the age and maturity of the child.

<sup>24</sup> United Nations Convention on the Rights of the Child (20 November 1989) [1993] NZTS No 3, art 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".

<sup>25</sup> Care of Children Act 2004, s 4(1): "the welfare and best interests of the child must be the first and paramount consideration – (a) in the administration and application of the Act . . . [and] (b) in any other proceedings involving the guardianship of . . . or day-to-day care for a child . . .". See also the Children, Young Persons, and Their Families Act 1989.

<sup>26</sup> Human Assisted Reproductive Technology Act 2004, s 4: "All persons exercising powers or performing functions under this Act must be guided by each of the following principles that is relevant to the particular power or function: (a) the health and well-being of children born as a result of the performance of an assisted reproductive procedure . . . should be an important consideration in all decisions about that procedure".

- 1.19 The Commission's view, in this report, is that a child's welfare and best interests should be a primary but not paramount consideration as other factors may need to be taken into account where parenthood laws are concerned. For example, where the interests of justice require, a presumed father who has reason to believe he is not the father should be able to have the matter resolved, regardless of the fact that the child may lose his or her financial support. Other considerations include: the need to ensure the vulnerable situation of a surrogate mother is protected; the need to give effect to the intentions of the parties, in certain situations, to relinquish legal parenthood;<sup>27</sup> and the need of the state to ensure that parents assume their child support obligations.

## **2 Clarity and certainty of status at the earliest possible time and simplicity in court processes**

- 1.20 Where a number of adults have been involved in a child's creation, the law needs to declare, at the first appropriate opportunity, what their legal status, responsibilities and rights to the child are. Certainty and clarity are important for the harmonious functioning of the child's family and to enable people to plan their lives. Where possible, matters should be resolved pre-birth so that the child's legal status in relation to the adults is clear on birth. However, in some situations, such as surrogacy and where embryos and gametes are mistakenly implanted, that will not be possible.
- 1.21 Where court processes for the allocation of parenthood are required, they should be as simple and inexpensive as possible.

## **3 Everyone should be able to access information about their genetic and gestational parentage**

- 1.22 An awareness of the need to know one's roots – one's genetic identity and lineage – was brought to the fore of public consciousness in the debates preceding the Adult Adoption Information Act 1985. The law's role in maintaining secrecy and legal fictions under the closed stranger adoption legislative scheme was the subject of harsh criticism. Already, a generation of children conceived by donor gametes have, upon reaching adulthood, articulated the same strong needs to know their genetic parentage as adult adoptees have done.
- 1.23 The principle that everyone has a right to access information about their genetic parentage already underlies two pieces of legislation: the Adult Adoption Information Act 1985<sup>28</sup> and the Human Assisted Reproductive Technology Act 2004.<sup>29</sup> Any areas where children remain without state recorded and accessible details of their genetic and gestational lineage should be identified and remedied.

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<sup>27</sup> For example: in adoption, the birth parents are unable or unwilling to take on parental responsibilities; in donor gamete conception, the genetic parents have gifted gametes to others to enable them to have children which they would not otherwise be able to have; and in surrogacy, the surrogate mother has altruistically agreed to carry (and often conceive) a child for others to have and raise.

<sup>28</sup> The long title states: "An Act to provide for greater access to information relating to adoptions and to the parties to adoptions by adult adopted persons and their birth parents ...".

<sup>29</sup> Human Assisted Reproductive Technology Act 2004, s 4(e): "donor offspring should be made aware of their genetic origins and be able to access information about those origins".

#### **4 Collaborative and autonomous parenting should be facilitated by legal processes**

- 1.24 Where more than two adults are involved in the creation of a child, the legal approaches to determining parenthood should facilitate collaborative parenting and enable autonomy in the decision-making process as to roles and responsibilities. This principle is also found in recent legislative amendments and has evolved in recognition of the fact that so many children are being parented outside intact relationships and without common parental households.<sup>30</sup>

#### **5 Children are to be equal and they and their families not disadvantaged by the circumstances of their creation or form of family**

- 1.25 That there should be equality between children and that children should not be discriminated against is evident in the Status of Children Act 1969 with its articulation of equality regardless of the marital status of the child's parents. The principle also exists in UNCROC, which New Zealand ratified in 1993.<sup>31</sup> Comprehensive prohibitions against discrimination on stated grounds are also provided for in the Bill of Rights Act 1990 and the Human Rights Act 1993. As there are important protections and rights that flow to the child when in a legal parent–child relationship, all children in all families should have access to such protections regardless of the shape or form of the family or the status of the child's parents.

#### **SOURCES WE HAVE DRAWN FROM**

- 1.26 Our Discussion Paper proposed a number of possible legal solutions to the issues we identified as arising from our review. We discussed these issues directly in small group meetings and one-to-one meetings with persons directly affected by the issues or who were representing other such persons. In all we met with more than 100 individuals including: men concerned about men's and fathers' interests; sperm donors who are unknown to the recipients and who donate on the basis of gifting; egg donors who are generally known to the recipients but also "gift" their eggs; sperm donor fathers who donate sperm on the basis they have parenting or donor contact with the child; gamete recipient couples, both heterosexual and lesbian; single women who had conceived using donor gametes; gay fathers; and surrogate mothers and commissioning parents in surrogacy arrangements.

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<sup>30</sup> See the Care of Children Act 2004: section 3(2)(d) "this Act ... encourages agreed arrangements for, and provides for the resolution of disputes about, the care of children"; and see section 5 where the principles relevant to a child's welfare and best interests are "(a) the child's parents ... should be encouraged to agree to their own arrangements, for the child's care, development and upbringing ... (c) the child's care, development and upbringing should be facilitated by ongoing consultations and co-operation among and between the child's parents and guardians and all persons exercising the role of providing day-to-day care for ... the child".

<sup>31</sup> See United Nations Convention on the Rights of the Child (20 November 1989) [1993] NZTS No 3, art 2.1: "State Parties shall respect and ensure the rights set forth . . . 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"; and art 2.2: "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".

- 1.27 We have also consulted with fertility clinics, non-governmental ethics bodies and government agencies. We received 67 written submissions in response to the issues raised in the Discussion Paper. As some of the issues we were considering were also being addressed in the Care of Children Bill (as it then was), we also reviewed the submissions made to the Select Committee on the then proposed Part 4 of the Bill. This provided for known-donor arrangements and for parenthood for the female partner of the birth mother in donor-sperm conceptions.
- 1.28 We conducted extensive international research, and we have reviewed case law and legislation in other countries and states that deal with the issues under review. We have also reviewed the current legal and social literature in this field. The most striking feature of our research is the speed at which developments are occurring, spurred mostly by developments in technology, changes to the social structure of families, and government responses to them.

## FAMILIES IN THE FUTURE

- 1.29 Because of the seemingly open-ended potential for change in the field of assisted human reproduction, we have focused carefully on considering what policy values might underlie the law to assist in future situations.
- 1.30 After we finished our consultations, we received draft guidelines from the National Ethics Committee on Human Reproduction (NECAHR) on embryo donation.<sup>32</sup> This procedure, proposed to be allowed to occur in New Zealand, produces children with no genetic relationship to the adults raising them, though the mother has a gestational relationship to the child. Although we had not sought submissions or conducted consultations on parental laws for families created by embryo donation, we have nevertheless considered legal parental issues raised by this fertility treatment. We also became aware of the problem of mistaken implantation of eggs and embryos and mistaken insemination. Because of its reported scale overseas, we have suggested a solution to the legal parenthood issues that arise.
- 1.31 We have also noted that British scientists are recently reported to be making an application to the United Kingdom Human Fertilisation and Embryology Authority for permission to do research aimed at preventing mothers passing on degenerative genetic diseases to their children, by implanting the nucleus of an egg from an affected mother into an egg from a donor that has been stripped of its nucleus.<sup>33</sup> Because some mitochondrial DNA remains in the outer egg, the child would, in effect, have three genetic parents. It is reported that permission is likely to be given, but the practice would be three years away at least. A reported concern from the Life Charity was that the “real” mother’s identity would be in doubt.
- 1.32 If such a procedure is approved in the United Kingdom it is possible it would be undertaken here in the not too distant future. In light of this and future unknown developments, we have sought to base our recommendations for new rules upon principles that can apply to any variety of new situations arising from

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<sup>32</sup> National Ethics Committee on Assisted Human Reproduction *Guidelines for the Practice of Embryo Donation for Reproductive Purposes: Consultation Document* (Ministry of Health, Wellington, 2004).

<sup>33</sup> A Barnett and R McKie “Babies with Three Parents Ahead” (17 October 2004) *The Observer* London 1.

the developments in the science of genetics that are given ethical approval by the relevant bodies. Our aim is that a coherent and consistent approach to the determination of legal parenthood can be developed for all situations.

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## 2

# Children, parents and their families

### FAMILY MODELS

- 2.1 **A**S STATED in the previous chapter, the family model upon which the law has traditionally been based, that of two genetic parents in a marital relationship raising the child from a common household, shares its place with a number of other family models.
- 2.2 Situations have always existed in which, for one reason or another, genetic parents do not raise their children and others take their place. This can occur through death, disability, economic difficulties or any number of other factors besides those considered in this report. Single parenthood and parenthood outside marriage have always existed, even though for centuries, law derived from England did not recognise parental duties to children born outside marriage. In fact, customary Māori practice did not account for “marriage” as such. Except in the case of arranged partnerships, usually amongst the high born, committed relationships were recognised by a hapū after a couple had lived together and demonstrated permanence.
- 2.3 Non-European customary practices often place as much emphasis on the wider family group as on the nuclear group. For example, in relation to Māori it has been said:
- In Māori thinking, children are not the exclusive possession of their parents. Indeed the ideas of possession and exclusion, separately or in association, outrage Māori sensibilities. Children belong not only to their parents but also to the whānau, 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.<sup>34</sup>
- 2.4 The practice of whāngai or atawhai, in which a child is given to others to raise, remains in operation today particularly in some communities. A whāngai child remains the child of his or her birth parents as well as the child of the matua whāngai. Sometimes whāngai practices have been adopted where persons are infertile.<sup>35</sup> There

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<sup>34</sup> D Hall and J Metge “Kua Tutū Te Puehu: Kia Mau: Māori Aspirations and Family Law” in M Henaghan and B Atkin (eds) *Family Law Policy in New Zealand* (2 ed, LexisNexis Butterworths, Wellington, 2002) 41, 53. Also cited in New Zealand Law Commission *New Issues in Legal Parenthood* (NZLC PP54, Wellington, 2004) 11.

<sup>35</sup> Loneliness in old age, special skills in nursing a sick baby, or instilling cultural knowledge in a child marked for leadership were other reasons why older persons took over the care of a young child. Indeed, it was and still is common practice for children to be raised by their grandparents for educational purposes. This is a vital way in which mātauranga Māori and Māori culture is transferred from one generation to the next.



are parallels between whāngai and modern surrogacy practices.<sup>36</sup> Other minority cultures in New Zealand, such as Polynesian and some Middle Eastern, Asian and African cultures, also extend parenting rights and responsibilities to a wider group of adults than the genetic parents.

## GENETIC CONNECTION IN PARENT–CHILD RELATIONSHIPS

- 2.5 The unfolding scientific analysis of human DNA has triggered an intense community discourse about the importance of genetics.<sup>37</sup> In this paper it arises in two contexts. The first concerns the value to be placed on access to information about genetic parentage and the second is the importance that information should have in parent–child legal relationships.
- 2.6 In relation to the first, there is evidence that knowledge of the existence of a genetic parent is of huge importance to some donor-conceived children and children raised by non-genetic parents in closed stranger adoptions.<sup>38</sup> At the most extreme end of the spectrum there have been calls by some donor-conceived children for the abolition of the use of donor conception, because of the friction it creates.<sup>39</sup> But many others have called for the removal of anonymous donations and for systems of retention of donor information, rather than abolition of the practice itself. Many submissions and consultees addressed this issue, and there was a near consensus that it was extremely important for the law to facilitate people's access to this information.
- 2.7 In relation to the second, differing views were expressed and often reflected an individual's relationship to a child. In fathers' groups where the men were legal parents but had grievances about their inability to continue effective parenting upon separation, genetics was very important and they considered the fact of a genetic link should elevate their status above that of a step-parent. Another view held by others representing fathers' interests, however, was that social parenthood and not genetic parenthood should determine parental financial liability.
- 2.8 Most of the couples who had conceived with donated gametes downplayed genetics and maintained that parenting was more to do with love and commitment to a child than genetic connection. A non-genetic parent could love and parent a child just as well as a genetic parent. For gamete donors, legal parenthood was also a status to be conferred by agreement and intention and not genetics. In line with this, the known donors who met with us or made submissions and who were social as well as genetic parents to their children wanted the law to recognise their legal parenthood on the basis of their intention to parent as well as their genetic link with the child.

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<sup>36</sup> Ministerial Committee on Assisted Reproductive Technologies, *Assisted Human Reproduction: Navigating our Future* ([Department of Justice], Wellington, 1994) 109, 118. See also New Zealand Law Commission *New Issues in Legal Parenthood* (NZLC PP54, Wellington, 2004) 49.

<sup>37</sup> The importance of genetic connection in the law is discussed at para 3.18.

<sup>38</sup> Infertility Network *Report to Health Canada on The Offspring Speak – An International Conference of Donor Offspring* (Toronto, 2000). See also chapter 10, Identity, of this report.

<sup>39</sup> See chapter 10, Identity, paras 10.23–10.34 where we discuss the importance of genetic identity.

- 2.9 Some submitters sought to reclaim parenting as a genetic only status and suggested only genetic parents should have the name “parent”. Much literature in this area emphasises the importance of genetics as being grounded in nature, unbreakable in its linkage between parent and child and impacting on the child throughout life, especially in relation to medical matters and relationships. At the same time, there was general acceptance that there will not always be a genetic connection in parent–child relationships. Non-genetic parents have always taken on parenting of children in a variety of circumstances throughout history, many of them culturally defined. Non-genetic parents can have deep loving parental relationships with their children.

## BEST FAMILIES FOR CHILDREN

- 2.10 There is now a wealth of commentary available from research and literature indicating that the best parents and families are those characterised by loving, committed and stable parent–child relationships. Factors such as family cohesion, conflict, quality of parental and parent–child relationships, parenting style and intergenerational family roles have the most significant effect on child outcomes.<sup>40</sup> As a rule children fare better in two-parent families than one-parent families, but for each child the outcome will nevertheless depend upon these other factors. Family structure in itself is not predictive of parenting quality, and it is an inadequate proxy measure for child outcomes due to the huge variation in levels of functioning within any one family form.<sup>41</sup>
- 2.11 A small but strongly expressed number of submissions argued, however, that there is one family form that is superior to others and as such should be promoted by government ahead of others: that is, the married two-parent family.<sup>42</sup>
- 2.12 These same submitters, also usually expressed concern about the impact of social change and human reproductive technological changes on families. To them, diversity of family form was synonymous with broken families, which were destructive to society and to children. It was suggested by some that there are serious dangers to children conceived via fertility treatment techniques, and that families created by donor gametes or with same-sex parents were defying the laws of nature and/or God.
- 2.13 In light of these statements, we reviewed the current research regarding outcomes for children who are donor-conceived, born into surrogacy arrangements, or being

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<sup>40</sup> R McNair *Outcomes for Children Born of ART in a Diverse Range of Families* (Victorian Law Reform Commission Occasional Paper, Melbourne, 2004) 18.

<sup>41</sup> J Pryor “Parenting in Reconstituted and Surrogate Families” in M Hoghughi and N Long (eds) *Handbook of Parenting: Theory and Research for Practice* (SAGE Publications, London, 2004) 110. See also comments by Dr Rajen Prasad, Chief Commissioner, Families Commission: “[C]hildren are better off with two parents committed to each other – we don’t dispute that. But there are a good number of two-parent families making a mess of it and there are any number of single-parent families doing exceptionally well ... . Whatever the family is, it needs to be supported” and former Children’s Commissioner Roger McClay who was reported as saying that debate needed to focus on the ability of families to care for children, rather than who was in the family. Changing family structures were not to blame for child maltreatment: “It’s not to do with the makeup of those families, it’s the people within those families” – “More Couples Say ‘I Don’t’ After 30 Years of Marriage” (2 January 2005) *Sunday Star Times* A5.

<sup>42</sup> The predominant organisation taking this view was the Maxim Institute. Literature cited in support of its premise included G Stanton *Why Marriage Matters* (Pinon Press, Colorado Springs, 1997).

raised in lesbian or gay families. There is an ongoing accumulation of knowledge about outcomes for children in these families, as in all families.

- 2.14 Longitudinal studies are clearly the most reliable means of determining child outcomes against tested factors, including family structure. The families considered in our review have, however, usually only recently been the subject of authoritative research. Nevertheless, there appears to be a reliable body of research that suggests that good or bad outcomes for the children in these families cannot be linked to the method of conception or family form itself.<sup>43</sup>
- 2.15 Parenthood by donor gamete conception has been carefully planned, usually over many years. The implications of becoming a parent have been thought through long before conception, and because conception cannot occur by sexual intercourse, the process has had to be deliberative.
- 2.16 We note that those who deal with the results of family breakdown on a regular basis would seem to support the view that family functioning and not form is determinative of child outcome. Former Chief Justice Nicholson of the Family Court of Australia said in relation to criticisms of same-sex parent families:
- One of the fundamental misconceptions which plagues me is the failure to understand that heterosexual family life in no way gains stature, security and respect by the denigration or refusal to acknowledge same-sex families ... Sexual orientation is no basis upon which to make assumptions about the quality of an individual's relationship or parenting capacities of a person. That is why sexual orientation in and of itself, has been held to be an irrelevant matter in disputes about children under the Family Law Act, unless it somehow impinges upon the best interests of a child.<sup>44</sup>
- 2.17 This view was repeated in New Zealand last year by the Principal Family Court Judge who stated, "If we can concentrate as a society, on providing love and security to our littlies, then I don't mind much how the family is constituted. Can we make that our prime focus?"<sup>45</sup>

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<sup>43</sup> See, for example: R McNair *Outcomes for Children Born of ART in a Diverse Range of Families* (Victorian Law Reform Commission Occasional Paper, Melbourne, 2004); A Brewaeys "Review: Parent-Child Relationships and Child Development in Donor Insemination Families" (2001) 7 *Human Reproduction* 38; S Golombok et al "Social versus Biological Parenting: Family Functioning and the Socioemotional Development of Children Conceived by Egg or Sperm Donation" (1999) 40 *Journal of Child Psychology and Psychiatry* 519; S Golombok et al "The European Study of Assisted Reproduction Families" (1996) 11 *Human Reproduction* 2324; S Golombok et al "The European Study of Assisted Reproduction Families: The Transition to Adolescence" (2002) 17 *Human Reproduction* 830; S Golombok and F Tasker "Donor Insemination for Single Heterosexual and Lesbian Women: Issues Concerning the Welfare of the Child" (1994) 9(11) *Human Reproduction* 1972; P Baetens et al "Lesbian Couples Requesting Donor Insemination: An Update of the Knowledge with Regard to Lesbian Mother Families" (2001) 7 *Human Reproduction* 512; R Chan et al "Psychosocial Adjustment among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers" (1998) 69 *Child Development* 443; S Golombok et al "Families Created Through Surrogacy Arrangements: Parenting Relationships in the First Year of Life" (2004) 40 *Developmental Psychology* 400.

<sup>44</sup> Hon A Nicholson CJ "The Changing Concept of Family: The Significance of Recognition and Protection" Conference Papers from "Sexual Orientation and the Law" (1996) 3(3) *E Law: Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/indices/issue/v3n3.html>> (last accessed 16 February 2005) cited in *Re Patrick (An Application Concerning Contact)* [2002] Fam CA 193, 324.

<sup>45</sup> Principal Family Court Judge Boshier as reported in H Tunnah "Judge Urges Revealing Ugly Truths" (2 September 2004) *New Zealand Herald* Auckland A6. See also footnote 41 for similar comments by Dr Rajen Prasad, Chief Commissioner, Families Commission.

- 2.18 It seems that New Zealand children and young people themselves take a flexible and open approach to whom they view as a family. A study of 232 young persons aged between 16 and 20 years found that young people recognise a wide variety of groups of persons living together as family, with 80 per cent or more recognising single parent, cohabiting parents, same-sex parents and extended family members as families.<sup>46</sup> The common factor they saw as delineating family was the existence of love, caring and support between family members.

## THE APPROACH OF THE COMMISSION

- 2.19 There are legal responsibilities and duties that parenthood places upon adults in relation to the children they have brought into the world. The “status” or powers and rights that go with parenthood are not “benefits”, but are the means by which parents’ responsibilities to children can be exercised, so as to provide the security and protection that children, as vulnerable members of our society, need. In order to exercise the full range of parental responsibilities, the relevant adults need to have the full powers and rights of parenthood.
- 2.20 Much can and should be done to encourage good parenting and healthy families for children to be raised in. However, that is not able to be done, nor should it be done, in the context of laws as to parenthood. Those arguing for laws which recognise parenthood only in a particular family structure or form misunderstand the purpose and function of parenthood laws. Their primary purpose is to provide important protections to children – not to “give rights” to parents or as a means by which society can encourage a particular family form.<sup>47</sup> Support for the approach we have taken came through repeatedly in the majority of submissions.
- 2.21 Our role relating to the ethical issues that arise as a result of new birth technologies and changing family structures needs clarification. We have not assessed and evaluated the ethical issues surrounding the use of various birth technologies to create children. That role sits with the government and its advisory ethics committees.<sup>48</sup> We seek to ensure the law provides adequately and appropriately for all the families into which children are born. Our approach is encapsulated in the words of Australian Judge, Fogarty J:

It is a reality of life children are born as a result of a variety of artificial conception procedures, out of non-traditional circumstances, and into non-traditional families. Legislation which deals with the personal and financial responsibility for such children should be clear and exhaustive and should recognise the reality of these situations.<sup>49</sup>

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<sup>46</sup> S Anyan and J Pryor “What is in a Family? Adolescent Perceptions” (2002) 16 *Children and Society* 306, 312.

<sup>47</sup> Indeed, the devastating consequences for many children of the former legal regime that created legitimate and illegitimate children, based on whether parents were married, is an indicator of the dangers of following that pathway.

<sup>48</sup> Currently, the committee advising government is the National Ethics Committee on Assisted Human Reproduction (NECAHR). In July it will be replaced by two separate committees which will operate under the Human Assisted Reproductive Technology Act 2004. For further detail see the Glossary at the beginning of this report.

<sup>49</sup> *Re B and J* (1996) 135 FLR 472.

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### 3

## Legal parenthood and why it is important

### LEGAL PARENTS AND LEGAL PARENTHOOD

- 3.1 **W**E USE the term “legal parents” to describe the persons who are recognised in law as the mother and father of a particular child and the term “legal parenthood” to define the powers, duties, rights and responsibilities that flow from that status.
- 3.2 A legal parent is to be differentiated from the general use of the word “parent”, which may refer to the genetic, biological or social relationship a person has with a child.<sup>50</sup> At present, a child can have only two genetic parents, a genetic mother and genetic father, and the law has only ever recognised two legal parents for a child. Surrogacy techniques, however, mean that a child can have three “biological parents”,<sup>51</sup> and recent technological developments mean that it may soon be possible for a child to have two genetic mothers plus a gestational one as well as a genetic father.<sup>52</sup>
- 3.3 The rules determining the legal status of New Zealand children in relation to their parents are set out in the Status of Children legislation.<sup>53</sup> The majority of children have their status determined according to the general rules in the Status of Children Act 1969. Although there is no explicit statutory definition, the combined effect of the Act is that the legal father of a child is his or her genetic father.<sup>54</sup> Similarly, there is no express statutory definition of who is a legal mother, although there is a long-existing common law rule that a mother is the woman who has given birth to the child.<sup>55</sup> This undoubtedly includes both genetic and gestational components of

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<sup>50</sup> Even in the law itself, references to parenting, such as in the new “parenting orders” under the Care of Children Act 2004, can refer to persons who are neither genetic, biological nor legal parents.

<sup>51</sup> The genetic and gestational functions of motherhood can now be divided between two women.

<sup>52</sup> A technique is being developed to enable the implantation of the nuclei of one egg into another egg whose nuclei has been removed. The result is that a child created in this way would have a genetic link to both “mothers”. See A Barnett and R McKie “Babies with Three Parents Ahead” (17 October 2004) *The Observer* London 1.

<sup>53</sup> The only way this status can be altered in law is by the Adoption Act 1955, which reallocates legal parenthood further to a specified statutory scheme.

<sup>54</sup> Status of Children Act 1969, s 7, s 8, and s 10; Family Proceedings Act 1980, s 2 as amended by schedule 3 of the Care of Children Act 2004.

<sup>55</sup> As evidenced in the latin maxims: *mater est quam gestation demonstrate* (by gestation the mother is demonstrated) and *mater semper certa est* (motherhood is certain).

motherhood as, until the advent of donor egg conceptions in recent decades, the birth-giving mother was always the genetic mother of the child.

- 3.4 The small minority of children who are conceived as a result of specified assisted human reproduction (AHR) procedures involving the use of donated gametes have their status determined under the AHR rules in the Status of Children Amendment Act 1987. As of 1 July 2005 these enactments, with some amendments, will be incorporated into one statute – the Status of Children Act 1969.<sup>56</sup>

### The view of the Commission

- 3.5 We consider that legal parenthood, as it operates under the general rules, should be explicitly defined in law, so that a father is defined as being the genetic father of a particular child and a mother is defined as being the genetic and birth-giving mother of a particular child, subject to the adoption and AHR rules. How genetic parenthood is proven is another matter.<sup>57</sup>

#### Recommendation

**R1** The general rules in the Status of Children Act 1969 should make explicit that, unless any other provision of that or any other enactment identifies another person as a mother, father or parent, a legal father of a child is the genetic father of that child and a legal mother of a child is the genetic and birth-giving mother of that child.

## WHY IS LEGAL PARENTHOOD IMPORTANT?

### Parenthood and guardianship

- 3.6 Most parental duties, powers, rights and responsibilities do not flow from legal parenthood itself, but from guardianship,<sup>58</sup> which is accorded to most legal parents automatically upon the birth of the child. However, some rights and liabilities do flow from the fact of “parenthood” itself, and certain statutory provisions recognise the parent–child relationship above the guardian–child relationship.

#### *Guardianship*

- 3.7 Most legal parents automatically become guardians of their child at birth.<sup>59</sup> Adoptive parents and parents deemed by the Status of Children Amendment Act 1987 to be parents are automatically made legal guardians also.

<sup>56</sup> The Status of Children Amendment Act 2004, which comes into effect on 1 July 2005 also amends the Status of Children Act 1969.

<sup>57</sup> The presumptions of paternity and maternity are discussed in chapter 4. How genetic parenthood is proven by DNA evidence is discussed in chapter 5.

<sup>58</sup> Care of Children Act 2004, s 15(a).

<sup>59</sup> Guardianship Act 1968, s 6, and Care of Children Act 2004, s 17. Also, section 18 of the Care of Children Act 2004 provides that a father becomes a guardian when his details are registered with the Registrar-General of Births, Deaths and Marriages.



- 3.8 Parents who do not automatically become guardians, namely men who were not in a relationship with the mother at any time between conception or birth, or those who are not identified as the father on the birth certificate, may apply to the court to be appointed a guardian. The fact of their parenthood gives them elevated standing in the Family Court when they apply for court-appointed guardianship.<sup>60</sup> However, applications for guardianship orders can be made by anyone, not just genetic fathers.<sup>61</sup>
- 3.9 The duties of a guardian are explicitly stated in the Care of Children Act 2004. Section 15 defines the exercise of guardianship to be:
- having the role of providing day-to-day care for the child;
  - contributing to the child’s intellectual, emotional, physical, social, cultural, and other personal development; and
  - determining for or with the child, or helping the child to determine, questions about important matters affecting the child.
- 3.10 “Important matters” affecting the child include:<sup>62</sup>
- the child’s name (and any changes to it);
  - changes to the child’s place of residence (including changes of that kind arising from travel by the child) that may affect the child’s relationship with his or her parents and guardians;
  - medical treatment for the child (if that medical treatment is not routine in nature);
  - where, and how, the child is to be educated; and
  - the child’s culture, language, and religious denomination and practice.
- 3.11 A guardian of a child may exercise the duties, powers, rights, and responsibilities of a guardian, whether or not the child lives with the guardian, unless a court order provides otherwise.
- 3.12 Guardianship alone (without parenthood) creates a legal relationship lasting only for the duration of childhood. It does not endure for life as parenthood does, and some vital entitlements for children and parental responsibilities do not flow from guardianship but from the fact of parenthood itself.

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<sup>60</sup> Section 19(4)(a) of the Care of Children Act 2004 provides that where a father who was not the spouse or de facto partner of the mother applies to be appointed a guardian, “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”. This reflects statements of the Family Court that a natural father whose relationship with the mother “has been more than fleeting and who wishes to play a part in the child’s life can ordinarily be expected to be appointed as a guardian unless he is for some grave reason unfit to be a guardian or unless he is unwilling to exercise the responsibilities of a guardian and subject to the paramount considerations of the welfare of the child” – *W v R* (5 April 1989) FC NAP FP 041/055/89 Inglis J. See also *V v PM* [2004] NZFLR 737 and *Family Law in New Zealand* (11 ed, LexisNexis NZ, Wellington, 2003) vol 1, Natural Guardianship, 657, para 6.202.

<sup>61</sup> Care of Children Act 2004, s 27(1)(a): “The Court may appoint a person as a guardian of a child, either in addition to any other guardian or as sole guardian ... on an application for the purpose by any person ...”.

<sup>62</sup> Care of Children Act 2004, s 16(2).

### *Legal consequences of “parenthood”*

- 3.13 The rules regulating succession on intestacy,<sup>63</sup> family protection,<sup>64</sup> citizenship,<sup>65</sup> and child support<sup>66</sup> stem first and foremost from the status of “legal parent”, not from guardianship.
- 3.14 A person who is deemed by the law to be a parent has significant financial liabilities until the child becomes an adult. Where parents separate, the Child Support Act 1991 may place an ongoing obligation of financial support upon the parent who does not live with the child.<sup>67</sup> The government enforces this legislation on behalf of the custodial parent. Child support liabilities flow primarily from parenthood, although the Act may impose them on a person who is not a parent but has assumed a “step-parent” role.<sup>68</sup> This, however, will only occur after a court process and not automatically. This provision has been used by the court to order the former female partner of a mother of children conceived by donor insemination to pay child support.<sup>69</sup>
- 3.15 If a parent dies intestate, their child is entitled to succeed to a statutorily defined proportion of the parent’s property.<sup>70</sup> The Family Protection Act 1955 provides further protection to a child by allowing him or her to make a claim<sup>71</sup> against the estate of a deceased parent for maintenance and support.<sup>72</sup> In considering any application, the court will have regard to the “moral duty” of the deceased to provide for his or her children. However, if the “parent” is not recognised in law as a parent, then the child has no such rights. The starkness of this position is illustrated by *Keelan v Peach*<sup>73</sup> where the court found a child, who was adopted as whāngai according to Māori custom but not formally adopted under the law, could not be considered a child of the deceased adoptive parent under the maintenance provisions of the Family Protection Act 1955.
- 3.16 New Zealand citizenship is accorded either because a child is born in New Zealand or by descent because one of his or her parents has New Zealand citizenship.<sup>74</sup> Section 3(1) of the Citizenship Act 1977 states that a person is a father if he is, or

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<sup>63</sup> Administration Act 1969, s 77.

<sup>64</sup> Family Protection Act 1955, s 3.

<sup>65</sup> Citizenship Act 1977, s 3.

<sup>66</sup> Child Support Act 1991, s 7. Although, under section 7(1)(h) of the Child Support Act 1991, a guardian may become liable for child support on the basis of their taking on a role as a step-parent. However, this does not occur automatically and only after a hearing of the evidence.

<sup>67</sup> Child Support Act 1991, s 6.

<sup>68</sup> Child Support Act 1991, s 6, s 7 and s 99.

<sup>69</sup> *A v R* [1999] NZFLR 249 and *T v T* [1998] NZFLR 776.

<sup>70</sup> The Administration Act 1969 creates a statutory scheme setting out who should benefit (and in what proportion) when a person dies without adequately disposing of his or her real or personal property.

<sup>71</sup> Family Protection Act 1955, s 3(1)(b).

<sup>72</sup> Family Protection Act 1955, s 4.

<sup>73</sup> *Keelan v Peach* [2002] NZFLR 481.

<sup>74</sup> Citizenship Act 1977, s 7(1).



was, married to the child's mother at the time of the child's conception or birth; or if his paternity has been established under section 8 of the Status of Children Act 1969. Under section 3(2) of the Citizenship Act 1977, a child can obtain New Zealand citizenship from his or her adopted parents. The Act is silent on donor gamete conception; however, the AHR rules that allocate parenthood in those circumstances, and which were enacted after the Citizenship Act, provide that the non-genetic parent becomes a parent of the child "for all purposes". We can conclude that this includes citizenship.

- 3.17 In less significant areas, the fact of legal parenthood provides legal rights to make parenting decisions in relation to the child, over and above others. For example, the Deaths by Accidents Compensation Act 1952, which relates to actions for damages on behalf of the families of persons killed by accident, defines a child as a "son, daughter, grandson, granddaughter, stepson, or stepdaughter".<sup>75</sup> Thus actions cannot be taken for the benefit of a child in relation to the death of his or her guardian, unless the guardian is also the child's parent or step-parent. Section 18(2) of the Marriage Act 1955 places parents in an elevated position in relation to guardians in consenting to the marriage of their child if he or she is a minor. Also, if a parent is buried in a cemetery or burial ground that has since been closed, children may still be buried in the same plot as their parents.<sup>76</sup> The same is not true if the child's social parent only has the status of guardian.

### **Legal parenthood and genetics**

- 3.18 Genetic connection is a value underlying legal parenthood laws, although the law has never created an exclusivity between parenthood and genetics. Rather it has formulated reallocation rules based on the degree of genetic connection between the child and the intending parents. Where neither intending parent will be the genetic parent of the child the state screens the parents to ensure their suitability. It is protective of the child's vulnerability in the absence of a genetic connection. Where there is a genetic connection between both parents and the child, the law allocates parenthood automatically. Where one of the intending parents is the genetic parent of the child, the law transfers parenthood to the non-genetic partner under a specific legislative scheme that also does not require screening for parental suitability.

### **Children's interest in legal parenthood rules**

- 3.19 Children have several interests in the law determining legal parenthood. The rules allocating parenthood protect the child by ensuring that, from the moment of birth, identified adults have legal responsibility for the child and have the necessary authority to protect and care for him or her. Having a legal parent ensures the child's ongoing financial support, which becomes critical where there is a relationship breakdown between parents or should a parent die.
- 3.20 Disputes about inheritance, citizenship and child support can turn on the interpretation of these rules. Where disputes between the child's parents arise, the law should facilitate their resolution. If each adult has a clear understanding of what legal rights and responsibilities they have towards the child and each other, we

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<sup>75</sup> Deaths by Accidents Compensation Act 1952, s 2(1).

<sup>76</sup> Burial and Cremation Act 1964, s 42(2).

would hope they would be more likely to be able to resolve them on a conciliatory basis. Where they operate effectively, the rules also ensure legal equality between classes of children.

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## 4

# Establishing parenthood by presumption

### PRESUMPTION OF PATERNITY

- 4.1 **P**ROVING THE IDENTITY of a father is more difficult than proving who the mother of a child is, as giving birth is more readily verifiable than the event and time of conception. Lawmakers have responded to this by creating a “presumption of paternity” that identifies a father until, or unless, rebutted by the identification of someone else. The presumption is made on the basis of the father’s marital relationship to the birth mother and operates in a number of enactments.<sup>77</sup> It is articulated in section 5(1) of the Status of Children Act 1969:

Presumptions as to parenthood

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 her husband, or former husband, as the case may be.

- 4.2 Opinion is divided whether the presumption of paternity in the Status of Children Act 1969 extends to de facto relationships as well as marriages.<sup>78</sup> 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 Status of Children Act 1969,<sup>79</sup> the majority do not.<sup>80</sup> In the Discussion Paper we asked whether the presumption should be retained or abolished; if retained we asked whether it should be extended to de facto relationships, and if so, on what basis.
- 4.3 Since then, the Care of Children Act 2004 has been enacted. Schedule 4 of that Act amends section 15(1) of the Births, Deaths, and Marriages Registration Act 1995 with the effect that a de facto partner who is the father of the child or the mother can register the child’s birth details including who the named father is, without requiring the consent of the other partner. This, in effect, has

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<sup>77</sup> Child Support Act 1991, s 7(1)(b); Births, Deaths, and Marriages Registration Act 1995, s 15 (is to be amended to include de facto partners from 1 July 2005); and Status of Children Act 1969, s 7(1)(a).

<sup>78</sup> The issue turns on the interpretation of section 5(1) of the Status of Children Act 1969 and sections 1 and 2 of the Status of Children Amendment Act 1987.

<sup>79</sup> *Family Law in New Zealand* (11ed, LexisNexis NZ, Wellington, 2003) vol 1, Presumptions as to Paternity, 792, para 6.504.

<sup>80</sup> *The Laws of New Zealand* (Butterworths, Wellington, 2001) Husband and Wife/De Facto Relationships, 85, para 111.

extended the presumption of paternity to de facto partners for the purposes of birth registration.<sup>81</sup>

- 4.4 However, consequential amendments have not been made to section 5 of the Status of Children Act 1969. Thus for general purposes, the presumption remains limited in application to married men.
- 4.5 There are other legal means of recognising paternity in law besides reliance on the operation of the presumption. The most typical is where the mother and father jointly acknowledge that the named man is the father of the child. They can do this by signing the birth certificate or signing an instrument that is executed as a deed. If paternity is acknowledged in the latter way, the man's name is able to be entered on the birth certificate as the father, even if he was not living with the mother in a marriage or de facto relationship at the time of the child's birth. He can be declared a parent for the purposes of child support;<sup>82</sup> and a father-child relationship is held to exist for purposes relating to succession to property, the construction of a will or testamentary disposition or any instrument creating a trust, or for the purposes of a claim under the Family Protection Act 1955. Acknowledging paternity in this way or being named as the father on the birth certificate is prima facie evidence of paternity.<sup>83</sup>
- 4.6 Where there is no agreement between the unmarried mother and person she has identified as the father that he is the father of the child, then other means of proof of paternity must be resorted to. Either of them can seek a declaration of paternity from the Family or High Court. The same courts will also, from 1 July 2005, be able to make a declaration of non-paternity.<sup>84</sup> The courts determine paternity by hearing all relevant evidence, including both DNA evidence and evidence of the parties' sexual relationships around the time of conception. Once a declaration is made by the court, "conclusive evidence of paternity" is established.<sup>85</sup>

### Historical purposes for the presumption

- 4.7 Historically, the presumption has been a means by which paternity could be determined when there were no other reliable ways of doing so. It also protected children born into a marriage from the stigma and legal disabilities of illegitimacy.<sup>86</sup> Some argue that it could also be seen as protecting the integrity of the family unit from interference from a genetic father, although this carries less weight in New

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<sup>81</sup> Section 17 of the Care of Children Act 2004 gives automatic guardianship to fathers who are living with the mother as a de facto partner during the period beginning with the conception of the child and ending with the birth of the child.

<sup>82</sup> Section 7(1)(a) of the Child Support Act 1991 provides that a person is a parent of a child if the person's name is entered in the register of births and section 7(1)(b) provides that he is a parent if he was a party to a legal marriage and the child was conceived by or born to the person during the legal marriage.

<sup>83</sup> Status of Children Act 1969, s 8(1) and (2).

<sup>84</sup> Status of Children Act 1969, s 10(3), as amended by the Status of Children Amendment Act 2004, s 12. The amendment will come into force on 1 July 2005.

<sup>85</sup> Status of Children Act 1969, s 8(4).

<sup>86</sup> These disabilities were removed through the operation of section 3 of the Status of Children Act 1969, which declares that all children are equal, whether or not their parents are married to each other.

Zealand where the presumption is able to be rebutted by evidence that another man was the biological and hence legal father.

### **Benefits of the presumption**

- 4.8 While there are other ways to establish paternity, the presumption has the benefit of convenience and ease. Where applicable, it operates in an automatic way for statutory purposes, such as enabling a child to have legal rights to property for succession purposes.
- 4.9 Because of the additional action that would always be required if the presumption did not apply, it is likely that without it there would be fewer fathers named on birth certificates. Some fathers are likely to neglect to sign the form for various reasons: they may be unavailable when the mother signs or simply may not get around to it. In some cases, where there has been a separation sometime after conception, one parent may wish to deny paternity with no cause other than to deny the other parent a role in the child's life or to resist liability for the child. In such cases, the other parent must undertake court proceedings if they wish to establish paternity. This creates additional costs and stress for the applicant.
- 4.10 There are also situations where, if the father dies after the child's conception, the mother may face evidential difficulties if she is unable to rely on the presumption. She would need to either persuade the Registrar-General of Births, Deaths and Marriages that the deceased was the father or seek a declaration of paternity from the High Court or Family Court. Legally recognised fatherhood enables considerable statutory advantages to flow to the child. The presumption enables automatic legal recognition of the father-child relationship and so automatic access to these legal rights.

### **Issues with the presumption**

- 4.11 Social change, the enactment of new legal principles, and major scientific advances in parentage testing each raise the question as to whether the presumption continues to have a place in the allocation of legal paternity. Also, as currently expressed, the presumption has the potential to assist in the creation of legal fictions.

#### *Social change and the prohibition against marital status discrimination*

- 4.12 In 2000, almost 60 per cent of first-born New Zealand children were born outside marriage and 42 per cent of all births took place outside marriage.<sup>87</sup> We note that the effect of the presumption may account, at least in part, for the number of children born in recent decades who have no father named on their birth certificate.<sup>88</sup>
- 4.13 As noted above, changes made in the Care of Children Act 2004 mean that from 1 July 2005 a father in a de facto relationship with the mother will be an automatic

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<sup>87</sup> Statistics New Zealand *Socio-economic Factors and the Fertility of New Zealand Woman* (Statistics New Zealand, Wellington, 2001) 31. See also A Dharmalingam et al *Patterns of Family Formation and Change in New Zealand* (Ministry of Social Development, Wellington, 2004).

<sup>88</sup> 6.76 per cent of births registered in 2001 did not have a father's name recorded on the birth certificate – information provided by the Registrar-General, Births, Deaths and Marriages to the Law Commission (18 February 2005) email. See also chapter 10, paras 10.115–10.135.

guardian of the child. This is one of the central advantages the presumption currently gives to a man who is married to the child's mother. As Parliament has so recently enabled fathers in de facto relationships to become automatic guardians, there would need to be clear justification for not extending the presumption in section 5 of the Status of Children Act 1969 to a man in a civil union or a de facto relationship with the child's mother. The prohibition on marital status discrimination also requires justification before a differentiation is made.

- 4.14 Given the breadth and diversity of relationships within both marriages and de facto relationships, and Parliament's recent steps to recognise fathers in de facto relationships, we consider the focus of the law should not be on maintaining a marriage-based distinction between these groups but on ensuring the greatest accuracy possible in establishing paternity of all children.
- 4.15 However, a distinction between a man in an ongoing relationship with the mother and a man not in such a relationship should be continued. It would be both unreliable and unsatisfactory to enable a father to be named in the birth details on the word of either the mother or any man who claims to have had sexual relations with her around the time the child was conceived.

#### *DNA testing*

- 4.16 DNA testing now enables genetic parentage to be conclusively determined to a very high degree of reliability. This is most commonly done by taking a buccal or blood sample from father and child, although it can be done on any number of other body parts such as hair follicles.<sup>89</sup>

#### *Misattribution of paternity*

- 4.17 There is now much discussion of wrongly attributed paternity in the Western world and there are frequent estimates in the media of the numbers of children whose legal fathers are not their genetic fathers. Alleged rates range from 1 per cent to over 30 per cent, with 9 or 10 per cent being commonly cited. The speculation has been heightened by high profile cases of paternity fraud, which have been reported in the media in recent years. However, hard data to back up claims as to what the rate is are much harder to come by.<sup>90</sup> There is no New Zealand research on this matter. However, in 2003 Dr Richard Fisher estimated that 1000–5000 New Zealand children have a man other than their genetic father recorded on their birth certificate, based on what overseas research there is. This would constitute a 1.8–9 per cent misattribution rate.<sup>91</sup> What literature there is suggests varying rates of misattribution occur across races, cultures, nations and different socio-economic groups and have done so for generations.

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<sup>89</sup> See further discussion on this issue at chapter 5, paras 5.30–5.32.

<sup>90</sup> S Macintyre and A Sooman "Non-Paternity and Prenatal Genetic Screening" (1991) 338 *Lancet* 869 state that: "[R]eliable estimates of the incidence of non-paternity are few and far between, although various rates are quoted in an authoritative manner by several sources ... but if one attempts to trace the source of such estimates they often appear to be based on hearsay, anecdote or unpublished or unevaluable findings".

<sup>91</sup> This assumes an average of 55 000 New Zealand children born each year – R Fisher "When Biotechnology and Law Collide: Assisted Human Reproduction and the Law: Part 1 – The Medical Perspective" (2003) 4(6) *BFLJ* 140.

- 4.18 Statistics from testing laboratories and government agencies using DNA paternity tests are not an indicator of misattributions caused by the presumption of paternity or of the rate of misattribution in the general population.<sup>92</sup> The figures will include men who were not living with the mother at the time of conception or birth and have never lived with mother and child as a family, but who have been named by the mother under child support legislation requirements. The mother herself may not have been certain of paternity and the tests were to determine the issue. No misattributed paternity has necessarily occurred at all.<sup>93</sup>
- 4.19 Any misattribution of paternity is a concern for the law, which should facilitate an accurate determination of paternity. Misattribution opens the possibility for considerable distress and negative effect at a future time. The child and father are under a misapprehension which may often be the result of deception. If the parents separate and the mother has care of the child, the father may be liable to pay regular and ongoing maintenance in the form of Child Support. The underlying social policy is that both parents should continue to support their child, and the taxpayer should not have to pick up the bill. Ongoing financial support required by both parents until children are adults is a significant but necessary long-term restraint on the use of their resources. If a man is not the genetic father, and has never known this, he is suffering a serious injustice.
- 4.20 Where the child is born into an existing marriage but is not the genetic child of the husband, the presumption of paternity is likely to reinforce the man's and child's lack of awareness of this. While, on the one hand, the child may possibly have the benefit of a stable family life and a good paternal relationship that might not exist if the misattribution were known, on the other, the father and child are deceived as to the true nature of their relationship and the child is prevented from knowing her or his true genetic origins. It is clearly undesirable that paternity is misattributed, and the law's role should be to minimise the risk of this occurring.

### *Legal fictions*

- 4.21 The presumption, as currently expressed, has the potential to create legal fictions as follows:
- A child conceived prior to a marriage and born afterwards is presumed to be the child of the husband, regardless of whether the couple had sexual relations prior to marriage or at the time of conception.
  - A child born after the husband and wife have separated and up to 10 months after dissolution (there being a minimum period of two years separation before

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<sup>92</sup> General statements to the media and in advertising by unaccredited laboratories who are touting for business must also be treated with great caution.

<sup>93</sup> Approximate figures given by the only New Zealand accredited laboratory undertaking DNA parentage testing are that approximately 80 per cent of paternity testing results are positive and 20 per cent negative. Information provided by Dr Patricia Stapleton, DNA Diagnostics, to the Law Commission (2 March 2005) telephone conversation. Figures are not available from the New Zealand Child Support Agency. The 1997/98 annual report of the United Kingdom Child Support Agency reports the percentages as 90 per cent positive, 10 per cent negative. The American Association of Blood Banks calculated in 2003 that of the 340 798 paternity tests carried out by accredited paternity testing laboratories in 2002, 97 681 (28.70 per cent) resulted in the putative father being excluded – American Association of Blood Banks *Annual Report Summary for Testing in 2002* (St Louis, 2003) available at: <<http://www.aabb.org/abouttheaabb/stdsandaccred/ptannrpt02.pdf>> (last accessed 17 February 2005).



dissolution is allowed) will be presumed to be the child of the husband, even if the wife is engaged in a de facto relationship with someone else.

### **Views from submissions and consultations**

- 4.22 No submitters favoured retaining the presumption for married persons only, in light of the numbers of children born outside marriage and marriage breakdown rates. Some held the view that the presumption should be abolished. The Salvation Army argued for this on the basis that the transient nature of many relationships made it inappropriate to presume any father. Its favoured approach was to require that the father sign the birth certificate with the mother's consent or obtain a declaration of paternity from the courts.
- 4.23 Some of those representing fathers' groups suggested that there should be mandatory genetic testing at birth for every child as this would allow men to accurately establish whether they fathered the child as the mother alleged. Should the tests disprove paternity, the man in question could then make an informed decision as to whether to support the child.
- 4.24 The majority of submitters and consultees, though, were in favour of retaining the presumption but amending and extending it to children born into stable marriage-type relationships. This ensures that fathers are legally attributed to their children in the most straightforward manner and that children obtain the benefits that flow from having a legally identified father. Because it is only a "presumption" and can be rebutted, it was not seen as creating an undesirable legal fiction.

### **Civil Union Act 2004**

- 4.25 The Civil Union Act 2004 has been passed since the publication of our discussion paper.<sup>94</sup> This enables same- and opposite-sex couples to register a civil union and have their relationship recognised in law. This is an alternative process to marriage for opposite-sex couples but the only available formal option for same-sex couples. In considering options for amending the presumption of paternity, we have taken account of this legislation as it affects opposite-sex couples.<sup>95</sup>

### **Options for reform**

- 4.26 We consider reform of the law is required. As currently worded, the presumption gives too much opportunity for misattribution to occur. Also, its effect is to discriminate on the grounds of marital status against children born to parents in opposite-sex de facto relationships and opposite-sex civil unions. All children should be treated equally, regardless of their parents' relationship to each other. All children and parents in analogous family situations should be subject to the same regime for determining paternity. Either the presumption should be abolished and all paternity established by acknowledgment or other means, or it should be extended to include all relationships in the nature of marriage and amended so as to minimise, to the extent possible, the risk of misattributions of paternity.

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<sup>94</sup> The Civil Union Act 2004 comes into force on 26 April 2005.

<sup>95</sup> Same-sex couples are covered under the assisted human reproduction rules for determining parenthood and are discussed at chapter 6, paras 6.2–6.8.



### *Removing the presumption*

- 4.27 Removing the presumption would require all fathers to consciously acknowledge their paternity. It could have the advantage of reinforcing their commitment to parenting. Also, because it requires an affirmative act of acknowledgment, it might act as an incentive to putative fathers to consider the likelihood of their paternity and, if need be, to request genetic tests from the outset. In doing so, it may reduce disruptive court challenges to paternity being made later in time.
- 4.28 However, it is uncertain whether men would necessarily challenge their paternity in the early weeks after birth. If paternity is to become an issue between the mother and father, this is likely to be when the relationship breaks down or comes under serious strain, rather than prior to registration of the birth. Also, it is likely that some mothers and fathers in committed marital or marital-type relationships would consider it insulting and even offensive if the paternity of the father were not accepted on the word of one of them. Acknowledgment will not guarantee accurate determination of paternity, in any event.
- 4.29 There are other problems with removing the presumption. Unreasonable refusal by one parent to attest to the father's paternity, where there was a break-up shortly after birth, would create additional costs and stress for the applicant. There would also be difficulties in a situation where the mother's husband died after conception and she could not rely on the presumption to have the father on the birth certificate.
- 4.30 While there are other ways to prove paternity, there are benefits of ease and convenience with the presumption. Legally recognised parenthood enables considerable statutory advantages to flow to the child. The absence of the presumption would result in fewer children with named fathers and so with less likelihood of accessing these advantages. This is undesirable. For these reasons we do not recommend abolishing the presumption of paternity.

### *Mandatory genetic testing*

- 4.31 If ascertainment of all children's accurate genetic parentage were the paramount value, then mandatory genetic testing at birth would be the best means of doing so, and the presumption would be abolished. However, we consider this a disproportionate response to the problems of misattribution of paternity. We consider most New Zealanders would be deeply uncomfortable with a mandatory genetic testing regime, which operated regardless of whether there is consent of all parties. Such a regime would involve the violation of bodily integrity and the collection of highly personal and sensitive information. It would also require an investment of considerable resources.
- 4.32 One academic commentary has recommended abolishing the presumption and replacing it with a legislative scheme where, if the named father did not confirm his genetic parenthood by a test, he would be required to sign a declaration that he acknowledged the possibility he may not be the father but was nevertheless assuming full parental rights and responsibilities for the child.<sup>96</sup> The mother would be required to sign the declaration that she recognised the named father as the

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<sup>96</sup> J Carbone "Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty" (2003) 11 *Wm & Mary Bill Rts J* 1011.

child's father. However, we consider it similarly disproportionate and unreasonable to impose a regime on all parents requiring them to authenticate paternity by DNA testing on birth or to sign away a right to raise the issue later. In any discussion on this matter, it is also important to remember that the very large majority of attributions of paternity are accurate.

### **The view of the Commission**

- 4.33 On balance, we consider the presumption should be maintained. In those cases where there is doubt whether the presumption reflects genetic realities, the presumed father, the mother, the child or the genetic father can rebut the presumption by obtaining a declaration of paternity under section 10 of the Status of Children Act 1969. From 1 July 2005 it will be possible to obtain a declaration of non-paternity, which enables the presumption to be rebutted in cases where a presumed father is not the genetic father but the genetic father cannot be identified. This ability strengthens the case for maintaining the presumption.
- 4.34 We consider that the law should facilitate paternity testing where it is sought by clear protocols ensuring ethical, reliable and accurate testing in an economical and timely manner.<sup>97</sup>

#### *Extending the presumption*

- 4.35 We consider the presumption should be extended to situations where children are conceived outside a legal marriage but within an opposite-sex de facto relationship or civil union. This is consistent with ongoing legislative trends over the past 20 years, recent examples being the Property (Relationships) Act 1976 and the Civil Union Act 2004, which recognise for legal purposes de facto relationships which are characterised by many, if not all, of the aspects traditionally accorded to married relationships.

#### *Amending the presumption to minimise misattributions*

- 4.36 We also recommend that steps be put in place to ensure that the application of the presumption provides the most reliable assessment of paternity possible. Essentially this requires that the presumption should apply only if the parties were cohabitating between the times of possible conception, regardless of whether they are in a marriage, civil union or de facto relationship.
- 4.37 The present operation of the presumption provides that the child is presumed to be the child of the husband if he or she was "born" not "conceived" during the marriage.
- 4.38 Alternatively, the presumption could apply to a child born no earlier than 20 weeks after marriage or civil union, as occurs in some Australian jurisdictions. However, as some children are born prematurely and others late, we consider the definition needs to be more general. Where there is a dispute in any particular case as to whether the child was conceived in the relationship, birth records will indicate if the child was born prematurely or later, and so the time of conception can be determined. It would be better to have general wording to cover all children

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<sup>97</sup> See our discussion on this issue at chapter 5, paras 5.11–5.29.

“conceived” within the stated relationships, as has been done under the Care of Children Act 2004.<sup>98</sup>

- 4.39 With regard to the end date for the operation of the presumption, it currently applies to the marriage and within “ten months after the marriage has been dissolved by death or otherwise”. Formal dissolution of a marriage or civil union is not a reliable criterion to use when making a presumption of paternity, as it can occur years after separation, and in the time between separation and divorce the mother may have conceived a child to another man.
- 4.40 An alternative would be to express the end date as being 10 months from separation date. That would be an improvement upon the present wording but still creates potential unreliability. Obvious inaccuracies will occur. A premature child born at say 26 weeks would have been conceived after separation.
- 4.41 We have concluded that the presumption should only operate during the period of cohabitation. We acknowledge that a date of separation is not as readily verifiable as is a date of dissolution. However, using dissolution dates as a yardstick leads to unacceptable unreliability in presuming paternity. If there is a dispute as to whether the presumption applies, then the matter will have to be resolved by the disputing party in court upon the evidence.

#### *Defining a relationship in the nature of a marriage*

- 4.42 De facto relationships lack the clear verifiable proof of relationship that a marriage or civil union certificate provides. For the sake of consistency in the law we consider a relationship to which the presumption applies should meet the definition of a de facto relationship that is contained in section 2D of the Property (Relationships) Act 1976.<sup>99</sup> We are mindful that the explicit statutory definition in section 10 of the Care of Children Act 2004 has, recently, been repealed.<sup>100</sup> However, for the operation of the presumption we consider an explicit definition will play an important role in differentiating stable de facto relationships from those in the nature of transient cohabitation, to which the presumption should not apply. Section 2D(2) determines this by assessing the relationship against “all the circumstances” including nine listed factors. However, for the purposes of the presumption, the existence of a sexual relationship should be a requisite criterion before a relationship can be found to have existed. The factors are:

- (a) the duration of the relationship;
- (b) the nature and extent of common residence;
- (c) whether or not a sexual relationship exists;
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
- (e) the ownership, use, and acquisition of property;
- (f) the degree of mutual commitment to a shared life;
- (g) the care and support of children;

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<sup>98</sup> It may well be that the child is conceived by the couple prior to the marriage or civil union. If the parties had been cohabiting, the same presumption would apply by reason of their being in a de facto relationship. If they had not been living in a de facto relationship, no presumption would apply; the parties would simply have to sign an acknowledgment that the husband was the father.

<sup>99</sup> Section 2D of the Property (Relationships) Act 1976, as inserted by the Property (Relationships) Amendment Act 2001.

<sup>100</sup> Care of Children Amendment Act 2005.

- (h) the performance of household duties;
- (i) the reputation and public aspects of the relationship.<sup>101</sup>

- 4.43 A marriage, civil union or a statutorily defined de facto relationship has a level of commitment assumed within it, which distinguishes it from other sexual relationships. Their greater permanence suggests more commitment and fidelity, and hence reliance can be placed on a presumption. A similar approach is adopted in the Australian Capital Territory where section 169(2) of the Legislation Act 2001 (ACT) provides a non-exhaustive list of examples of indicators to decide whether two people are in a domestic partnership.<sup>102</sup>
- 4.44 This multi-factor approach creates some uncertainty, there being relationships that fall between those that clearly do and clearly do not satisfy the standard. This is inevitable. Unless the couple acknowledge paternity, the contesting partner in a borderline case would need to institute court proceedings to determine paternity.

#### *Subsequent amendments*

- 4.45 The presumption based on marriage as expressed in section 5 of the Status of Children Act 1969 or some similar marital based form of it has been incorporated into other legislative provisions. One example is section 7(1)(a) of the Status of Children Act 1969. Another is section 7(1)(b) of the Child Support Act 1991. These and other enactments should be amended to ensure fathers and children in opposite-sex de facto relationships and civil unions have the benefits and advantages that the presumption provides, while ensuring that it always remains open to rebuttal.

#### *Consequence of proof of non-paternity*

- 4.46 Difficult issues arise subsequent to a negative paternity test as to the presumed father's status and ongoing financial liability. Clearly he can obtain a declaration of non-paternity and free himself from the financial liability for the child that arises from his parental status. If he does not have an established parental relationship with the child that will be the end of the matter.
- 4.47 However, if an ongoing loving relationship between father and child is established, he may wish to continue with that relationship. Certainly it will be damaging to the child should it be cut off. Can he secure a legal right to a parental relationship with the child? He will still have legal standing to seek guardianship status and apply for parenting orders under the Care of Children Act 2004. In each case, they can be issued without the consent of the genetic parent(s), unlike adoption. If he does have an ongoing parental relationship with the child after learning that he

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<sup>101</sup> Property (Relationships) Act 1976, s 2D(2).

<sup>102</sup> These are: (1) the length of their relationship; (2) whether they are living together; (3) if they are living together—how long and under what circumstances they have lived together; (4) whether there is a sexual relationship between them; (5) their degree of financial dependence or interdependence, and any arrangements for financial support, between or by them; (6) the ownership, use and acquisition of their property, including any property that they own individually; (7) their degree of mutual commitment to a shared life; (8) whether they mutually care for and support children; (9) the performance of household duties; (10) the reputation, and public aspects, of the relationship between them.

is not the genetic father, then he might be liable for child support under the step-parent provisions in the Child Support Act 1991 depending upon the extent of his parenting. This seems appropriate.

## PRESUMPTION OF MATERNITY

- 4.48 Section 5(1) of the Status of Children Act 1969 provides for a presumption of maternity within the generally headed presumptions of parenthood:

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 her husband, or former husband, as the case may be.

### Issues with the presumption of maternity

- 4.49 A presumption exists where conclusive proof is not readily available.<sup>103</sup> Apart from when AHR is used, maternity can be conclusively demonstrated with evidence of birth giving. The birth-giving mother will always be the genetic mother where the child has been conceived by natural means. It seems that a presumption of maternity was added into section 5 for the sake of uniformity with the presumption of paternity; the law makes no provision for a declaration of maternity to be made or for the need for “conclusive proof” of maternity.
- 4.50 At paragraph 3.5 we have recommended that there be an explicit definition of who constitutes a mother in the Status of Children Act 1969. We do not see that there is any further role for the presumption of maternity and recommend its abolition.
- 4.51 Before concluding, we make a final comment on the title of the Status of Children Act 1969. Although it deals with the status of children in relation to their parents it refers only to children. In the interests of making the law more transparent, accessible and clear, it may be preferable when amendments are made, that the title more accurately describes its contents by becoming the “Status of Children and Parents Act”.

### Recommendation

- R2** There should be an explicit provision that evidence of birth constitutes proof of maternity unless any other provision of that or any other enactment applies. The presumption of maternity should be abolished.

<sup>103</sup> “A presumption is the evidence of things not seen, where, from an apparent effect, you may infer a probable cause” – D Greenberg and A Millbrook Stroud’s *Judicial Dictionary of Words and Phrases* (vol 4, 5 ed, Sweet and Maxwell, London, 2000) 2008.

### Recommendation

R3 Section 5 of the Status of Children Act 1969 should be amended to read:

- “(1) A child conceived during cohabitation of spouses or partners to an opposite-sex civil union or opposite-sex de facto relationship shall, in the absence of evidence to the contrary, be presumed to be the child of the husband of the marriage, male partner of the civil union or male partner of the de facto relationship as the case may be.
- (2) A de facto relationship has the meaning given to it in section 2D of the Property (Relationships) Act 1976 except that a de facto relationship shall not exist unless there is a sexual relationship between the parties.”

Consequential amendments to the presumption of paternity should be made to other legislation which imports the presumption in whole or in part to include opposite-sex civil unions and de facto relationships and to specifically provide that the presumption can be rebutted.

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## 5

# Proving parenthood by DNA testing

### BACKGROUND

- 5.1 SINCE 1985, DNA TESTING has superseded blood testing as the primary means of verifying parenthood. With DNA testing, scientists are not only able to exclude people as parents conclusively, but also to calculate the probability of parenthood with close to absolute certainty.
- 5.2 DNA testing has become simple and readily available, so that rapid and relatively inexpensive genetic checks are a reality. They do not require referral by a medical practitioner, and commercial firms are marketing paternity testing services through mail order and the Internet. The Family Court made only 32 recommendations for DNA parentage testing last year, but New Zealanders sought well over that number in that period according to comment from DNA parentage testing providers.<sup>104</sup> These figures suggest the observation made by the Australian Law Reform Commission, that a large number of tests take place outside the court system altogether and couples resolve paternity issues by themselves, is also accurate for New Zealand.<sup>105</sup> Elsewhere overseas, there has been a significant increase in the use of paternity tests, of which only a very small percentage are eventually used in legal proceedings.<sup>106</sup>
- 5.3 Testing can be carried out at any age and the results may have lifelong repercussions. It may affect a child's rights to economic support and inheritance, and his or her sense of psychological identity. The results may disrupt family relationships by altering the position of the key people in a child's life, such as father, brothers, sisters and grandparents. The context of testing is often highly emotional.
- 5.4 Reasons for seeking parentage tests include allocation of parental responsibilities (appointment of guardians, custody, access and child support), amendment of birth certificates, inheritance, formal declarations of paternity, immigration applications,

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<sup>104</sup> T Hume "Sly DNA Tests Show 1 in 3 Dads Duped" (30 January 2005) *Sunday Star Times* Auckland A1: "DNA solutions, the only [overseas] company to directly market its services to New Zealand men, says it tests about 15 kiwi men a month".

<sup>105</sup> In Australia, it has been estimated that 3000 paternity tests are carried out annually, but in one year, namely the 2000/2001 financial year, parentage testing orders were made in a total of only 103 matters before the court – Australian Law Reform Commission and Australian Health Ethics Committee *Essentially Yours: The Protection of Human Genetic Information in Australia* (Australian Law Reform Commission Report 96, Sydney, 2003) para 35.44.

<sup>106</sup> As early as 1991, Collins and MacLeod observed that "the issue of disputed paternity is now being unequivocally resolved out of court, leaving magistrates free to effectively deal with the resultant issues of maintenance, access and custody" – R Collins and A MacLeod "Denials of Paternity: The Impact of DNA Tests on Court Proceedings" (1991) *J Soc Welfare & Fam* 209, 217. See chapter 4, paras 4.15–4.20, for a discussion on misattributed paternity rates.



identification of human remains, civil proceedings for “paternity fraud”, and personal interest.

- 5.5 The principal legislative provisions on parentage testing are in Part 5 of the Family Proceedings Act 1980, headed Welfare of Children. The court has power to recommend, but not to order, parentage tests by way of blood or, as recently amended, buccal (cheek tissue) samples.<sup>107</sup> Sections 54 to 59 set out the protocol relating to court proceedings, but there is no specific regulation of DNA parentage testing laboratories in New Zealand at present. The age when a child is treated as an adult in relation to consent to parentage testing is 16 years.<sup>108</sup> Under that age the child or young person’s guardian gives consent for them.<sup>109</sup>
- 5.6 A number of questions need to be addressed, some controversial. How should the quality of parentage testing available in New Zealand be regulated, both as regards technical standards and ethical considerations? Who should be able to give consent for a child to be tested? When should a child or young person be able to give consent? Should one parent be able to act unilaterally to obtain a parentage test? Should the other be able to prevent parentage testing?
- 5.7 Our recommendations have been formulated with particular regard to the interests of children, parents, and putative parents in having accurate information about their genetic relationships. However, government agencies and private persons outside the immediate family (such as guardians, trustees, and executors) also have legitimate interests in the genetic parentage of children or young persons.
- 5.8 People with a proper interest, apart from parents, such as men claiming paternity, social workers, government agencies, trustees and executors, are entitled to apply to the Family or High Court for a declaration of paternity.<sup>110</sup> The Child Support Act 1991 has its own statutory framework and lists the kinds of evidence of paternity that will be relied on to determine liability under the Act. The Commissioner of Inland Revenue also has some discretion to make a determination that someone is not a parent.<sup>111</sup>
- 5.9 Our objectives in proposing specific recommendations are to ensure that:
- the readily accessible advances in DNA technology are used to assist in proving or disproving parentage;
  - parents who agree on the need for parentage testing have straightforward access to accurate DNA parentage testing;
  - where parents do not agree, testing can proceed independently, but with safeguards to protect the interests of all parties, including the children or young persons; and

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<sup>107</sup> See Family Proceedings Act 1980, s 54(1), and Care of Children Act 2004, sch 3.

<sup>108</sup> Family Proceedings Act 1980, s 54(2)(b): “the consent of a minor who has attained the age of 16 years to submit to blood tests shall have the same effect as the consent of a person of full age”.

<sup>109</sup> Section 16(1) and (2) of the Care of Children Act 2004 provides that the guardian or guardians may determine, or help the child to determine, questions about important matters affecting them.

<sup>110</sup> Status of Children Act 1969, s 10, as amended by the Status of Children Amendment Act 2004, s 12. This amendment will come into force on 1 July 2005.

<sup>111</sup> Child Support Act 1991, s 7.



- disputes about DNA parentage testing are resolved by the court, which shall order testing unless there are compelling reasons why it would not be in the interests of justice, including the best interests of the child.
- 5.10 For accessibility and clarity, we suggest the framework for DNA parentage testing should be set out in one part of one Act so people can easily access the information relevant to them. The current section on parentage testing in the Family Proceedings Act 1980 seems to be the obvious place.

## REGULATION OF DNA PARENTAGE TESTING

- 5.11 There are no specific legal requirements in New Zealand about who may supply and order DNA parentage tests, how tests can be conducted, laboratory protocols, or protocols on disclosure to the client, and no professional qualifications are specified.
- 5.12 DNA evidence is highly reliable, but the testing procedure is fraught with the potential for error.<sup>112</sup> It involves complex mathematics and “the lab work involved can be exacting, and opens a number of avenues for error, even clerical errors”.<sup>113</sup> Other risks include the following: sample mishandling and data-recording error; faulty reagents, equipment, and controls on techniques; evidence contamination (accidental contamination, mixed samples and carry-over contamination); and analyst bias.<sup>114</sup> There is also obvious room for fraud or mistakes with unsupervised sample collection using home kits, as well as questions about custody and contamination during shipment to the laboratory.
- 5.13 The main New Zealand-based private DNA parentage testing provider, DNA Diagnostics, is accredited by International Accreditation New Zealand, which applies the *Medical Laboratories – Particular Requirements for Quality and Competence*<sup>115</sup> developed by the International Organization for Standardization (ISO). These requirements are for medical laboratories generally and do not specifically deal with parentage testing providers, so they do not include standards relating to the particular family context of such testing. At least one overseas company, DNA Solutions,<sup>116</sup> is marketing paternity tests to New Zealanders over the Internet and offers two types of tests: those conducted in accordance with Australian accreditation guidelines and those using samples people have collected themselves and sent to the laboratory in Australia. In contrast, DNA Diagnostics does not accept self-collected samples.

<sup>112</sup> C Blakesley “Scientific Testing and Proof of Paternity: Some Controversy and Key Issues for Family Law Counsel” (1997) 57 La L Rev 379, 394.

<sup>113</sup> *Director of Parentage and Maintenance Act v H* (1993) 104 DLR 73, 95 Cote J.

<sup>114</sup> National Research Council Committee on DNA Forensic Science *The Evaluation of Forensic DNA Evidence: Update on Evaluating DNA Evidence* (National Academy Press, Washington DC, 1996) 80–85.

<sup>115</sup> Standards New Zealand *Medical Laboratories – Particular Requirements for Quality and Competence: NZS/ISO/15189:2003* (Standards New Zealand, Wellington, 2003).

<sup>116</sup> See DNA Solutions <<http://www.dnanow.com>> (last accessed 24 February 2005).

- 5.14 The Australian Law Reform Commission expressed concern as to whether, in cases of home collection, informed consent would be given and counselling offered.<sup>117</sup>

### Options

- 5.15 All submissions recognised the need to regulate DNA parentage testing providers, but there was no consensus as to the form. We considered the following options.

#### *No specific regulation*

- 5.16 The current absence of specific regulation in New Zealand could continue with market forces alone determining quality. Existing general controls on the supply and advertising of goods and services, such as the Fair Trading Act 1986 and the Consumer Guarantees Act 1993, would protect consumers' rights.

#### *Voluntary regulation*

- 5.17 Parentage testing providers could be governed by a voluntary code of practice covering matters such as consent, procedures for taking and testing of bodily samples, standards in conducting the testing, and the provision of counselling. A voluntary code might be promoted by the Ministry of Health, the Health and Disability Commissioner, or an industry body. In the United Kingdom, there is a voluntary code but concerns about compliance have led the Human Genetics Commission to recommend a review of its effectiveness and relevance.<sup>118</sup>

#### *Court supervision*

- 5.18 Access to parentage testing could be made subject in all cases to a court order authorising the testing. The court could provide independent oversight of the testing and the validity of consent, as well as a mechanism to address issues arising from the test results. However, the costs of obtaining a court order would make parentage testing prohibitively expensive and also slow and inconvenient.

#### *Medical practitioner supervision*

- 5.19 The Australian Law Reform Commission floated the idea that medical practitioners could be made "gatekeepers". However, it subsequently rejected this option, on the basis that parentage testing was not directly linked to health and involving doctors could result in the diversion of expert resources to a social service more appropriately provided by others.<sup>119</sup>

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<sup>117</sup> Australian Law Reform Commission and Australian Health Ethics Committee *Essentially Yours: The Protection of Human Genetic Information in Australia* (Australian Law Reform Commission Report 96, Sydney, 2003) para 35.94.

<sup>118</sup> Human Genetics Commission *Inside Information: Balancing Interests in the Use of Personal Genetic Data* (Human Genetics Commission, London, 2002) 166.

<sup>119</sup> Australian Law Reform Commission and Australian Health Ethics Committee *Essentially Yours: The Protection of Human Genetic Information in Australia* (Australian Law Reform Commission Report 96, Sydney, 2003) para 35.69.

## Accreditation

- 5.20 Accreditation is an option that would build on current procedures in New Zealand. Under an accreditation system, parentage testing standards are set and monitored by an independent body with specialist knowledge. The body assesses whether a provider adheres to certain technical and ethical standards on sample collection, custody, laboratory protocols, reporting protocols, storage of specimens and record keeping.
- 5.21 In New Zealand, medical laboratories are required to meet accreditation standards as a condition of their supply contracts with the Ministry of Health, but accreditation is not generally mandatory in law. The existing framework, which includes standard-setting by Standards New Zealand and accreditation by International Accreditation New Zealand, could be extended to cover DNA parentage testing laboratories. There are also reputable international organisations that provide accreditation to parentage testing providers, such as the National Association of Testing Authorities (Australia) (NATA), the American Association of Blood Banks,<sup>120</sup> or the College of American Pathologists.
- 5.22 It is important that an accreditation system incorporates protocols for the verification of samples and consents and for retention of records. One procedure adopted elsewhere to verify that samples are from the right person is to require a passport photograph plus a certificate from the laboratory that the person in the photograph is the person from whom the sample was taken. Parental consent in writing is more difficult to verify. However, it is an offence to impersonate another person in relation to parentage testing and any fraudulent behaviour is likely to come to light, for example if the results were used to seek a formal change to existing guardianship arrangements.<sup>121</sup>
- 5.23 In Australia, NATA operates a national system of accreditation for laboratories conducting parentage testing. The Family Court will only admit in evidence the results of a test that has been carried out under NATA accreditation.<sup>122</sup> The Australian Family Law Regulations address two main aspects of reliability in parentage testing – the protection of the integrity of bodily samples and the technical accuracy of the testing process.<sup>123</sup>
- 5.24 Accreditation could be mandatory for all parentage testing providers operating in New Zealand. Alternatively, only tests conducted by accredited parentage testing providers would be accepted in court proceedings or dealings with government agencies where paternity is an issue. This would not prevent providers from operating without accreditation, but the results would have no legal standing.

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<sup>120</sup> In the United States, the National Research Council's Committee on DNA Technology in Forensic Science issued a report in 1992 which outlined the features of desirable quality control and quality assurance expected of laboratories to ensure they delivered a quality product – National Research Council Committee on DNA Technology in Forensic Science *The Evaluation of Forensic DNA Evidence: Update on Evaluating DNA Evidence* (National Academy Press, Washington DC, 1996) 76–77.

<sup>121</sup> Family Proceedings Act 1980, s 59.

<sup>122</sup> *Re C (No 1)* (1991) 15 Fam LR 350.

<sup>123</sup> The Regulations provide in considerable detail the procedures for: the collection of bodily samples; the storage of samples and their transport to the laboratory; the timeframe for testing samples; and the format of the parentage testing report.

## The view of the Commission

- 5.25 We do not consider that the present lack of regulation should continue. The number of providers operating in the New Zealand market is very small, yet they operate under different quality standards. Further market expansion is certainly a possibility.<sup>124</sup>
- 5.26 We reject the option of mandatory court involvement. The potential costs, delay and intrusion into privacy of legal proceedings could mean that important decisions are made outside the court without the best information available. People would use overseas paternity testing services instead. We also consider that a voluntary code of practice would be insufficient. There would be no means of preventing parentage testing that does not satisfy the standards in the code, with the associated risks of errors and tests being conducted without regard for the well-being and rights of others.
- 5.27 We consider that accreditation of laboratories would best ensure that parentage tests are accurate and ethically conducted and that the use of accredited laboratories should be mandatory for parentage tests relied on in court proceedings and dealings with government agencies.<sup>125</sup> Although most parentage tests in New Zealand are likely to be undertaken privately and used to make private decisions, legal proceedings or official recognition might follow. The standards should include any legislative requirements for acceptance of the test by the court or government agencies, such as that all parents must be informed or what a verifiable agreement by both parents entails. Implementation of standards and an accreditation system should be aligned with the timing of related legislative amendments.
- 5.28 We considered whether to go further and prohibit the operation of DNA parentage testing in New Zealand except in accredited laboratories. This would be out of step with the current regulatory framework for medical laboratories, and we do not believe this degree of intervention is necessary, provided the results of tests in unaccredited laboratories carry no weight for formal purposes, such as establishing parental status. In any case, mandatory regulation of all providers in New Zealand would not prevent easy access to testing facilities overseas through the Internet.
- 5.29 However, the ability of accreditation to protect individual consumers depends to a large degree on the extent that people are informed both about the system and the importance of using an accredited provider. There needs to be a reasonably high level of consumer awareness among social workers, medical practitioners, fathers' groups, citizens' advice groups and the public generally. We consider the state has some responsibility to ensure that information about parentage testing and

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<sup>124</sup> M Gilding "DNA Paternity Testing without the Knowledge or Consent of the Mother" (2004) 68 *Family Matters* 60, 62. Gilding observes: "There are no public records concerning the scale of the parentage-testing market in Australia. Nonetheless informants generally agree that there are now about four to five thousand parentage tests conducted each year in Australia, that is about 0.25 tests per 1000 persons (at the most). This compares with 340 798 accredited parentage tests in the United States for 2002 (AABB 2002), or almost 1.2 tests per 1000 persons. This figure does not include tests by non-accredited services, so the United States per capita rate could be much higher. In other words, there is scope for substantial growth in the Australian market".

<sup>125</sup> Amendment could be made to section 7 of the Child Support Act 1991 to allow parentage to be proved by the result of DNA parentage testing in an accredited laboratory without the need for a paternity order.

related issues, such as the need to protect children's interests, is easily available at the places where inquiries will be made, such as the Family Court and the Child Support section of the Inland Revenue Department.

### **Samples other than blood**

- 5.30 DNA is present in almost all of a person's cells and analysis is possible on a wide range of tissue samples including hair follicles, buccal (cheek cell) samples and urine sediments.<sup>126</sup> Buccal samples are usually obtained by taking a mouth swab. This is generally considered to be less invasive and cheaper than blood sampling.<sup>127</sup>
- 5.31 The Family Proceedings Act 1980, as recently amended, provides for DNA testing of buccal samples. The United Kingdom, Australia and the United States have also amended their legislation to enable parentage testing to be carried out on tissue samples other than blood. In Australia, regulations, rather than the statute, prescribe which samples can be used.<sup>128</sup>
- 5.32 While it is not yet clear that DNA profiling techniques can obtain the same degree of accuracy with all types of body samples, scientific accuracy in testing other types of tissue is advancing rapidly. Testing providers need to be able to use the best sample for the particular situation. At present this will generally be buccal samples but not invariably so. We believe that the technology is advancing so rapidly that, provided there is an accreditation scheme in place, there is no need for the law to limit the samples to blood or buccal only.

#### **Recommendation**

- R4** The government should ensure accessible, efficient, accurate and ethical DNA parentage testing services are available in New Zealand by:
- undertaking work to develop standards and accreditation of laboratories offering DNA parentage testing in New Zealand, with particular attention to the accuracy of testing and verification of the identity of samples and persons;

<sup>126</sup> M Rios et al "DNA from Urine Sediment or Buccal Cells Can Be Used for Blood Group Molecular Genotyping" (1999) 15(2) *Immunohematology Journal of Blood Group Serology and Education* 5 available at: <<http://www.redcross.org/pubs/immuno/15.2sm.pdf>> (last accessed 24 February 2005).

<sup>127</sup> Law and Order Committee "Criminal Investigations (Bodily Samples) Amendment Bill" [2003] 3 AJHR I 22B 777, 778.

<sup>128</sup> This approach was also taken in New Zealand in the Domestic Proceedings Act 1968, which never came into force. The Act empowered the courts to direct the undergoing of "genetic tests" in proceedings for a paternity order. Section 50(8) provided that "the Governor-General may, by Order in Council, prescribe the nature of the tests to be made for the purposes of this section, the manner in which and the classes of persons by whom they shall be made, and the mode of identification of the persons in respect of whom the tests are made".

- ensuring that such standards incorporate all relevant legislative requirements, such as a prohibition against testing of children without the other parent being informed;
- ensuring that information about DNA parentage testing, such as the benefits of using accredited providers and issues relating to the interests of children, is accessible to the public and the professionals who are involved; and
- ensuring that parentage tests can be conducted on any sample able to produce DNA of sufficient quality and quantity.

## VOLUNTARY TESTING

- 5.33 As with any invasive medical treatment, the person being tested has to permit the sample to be taken or, in the case of a child, someone has to agree or organise it on their behalf unless they are able to do so themselves. Although the collection of non-blood samples is usually less invasive than blood collection, taking any sample is an intrusion on bodily integrity, dignity and privacy, and important consent issues arise.
- 5.34 The issue of who should be entitled to give consent for the child is contentious.<sup>129</sup> A frequent scenario is where one parent wants parentage testing (often the father) and the other parent refuses this (often the mother). The Australian Family Law Regulations require the consent of only one parent, guardian or carer for tests on a child under 18 years, but the Australian Law Reform Commission has recommended that two parents be required to consent, with provision for the matter to go to court if one parent refuses.<sup>130</sup>
- 5.35 The overwhelming majority of tests in Australia are paternity tests, arising from conflict between couples, and they are mostly conducted outside the court system but with an eye to legal proceedings. It is estimated that somewhere between one-half and two-thirds are originated by men or those acting on their behalf (the man's parents or his new wife). Women who want to enforce child support are the main initiators of the remainder. It has been reported that paternity testing laboratories in Australia are routinely analysing children's DNA without their mothers' knowledge or approval.<sup>131</sup> Some laboratories that conduct tests without

<sup>129</sup> In Australia, in at least 80 per cent of one non-accredited laboratory's paternity tests, the father had requested the test and it had been conducted without the mother's permission – D Smith "Mothers Kept in the Dark on Paternity Tests" (27 March 2000) *The Sydney Morning Herald*, cited in Australian Law Reform Commission and Australian Health Ethics Committee *Essentially Yours: The Protection of Human Genetic Information in Australia* (Australian Law Reform Commission Report 96, Sydney, 2003) para 35.159. See also paras 35.113–35.126 and 35.157–35.181 of the same report for a discussion on consent.

<sup>130</sup> Australian Law Reform Commission and Australian Health Ethics Committee *Essentially Yours: The Protection of Human Genetic Information in Australia* (Australian Law Reform Commission Report 96, Sydney, 2003) recommendation 35-9.

<sup>131</sup> It seems that in Australia, accredited laboratories tend to require evidence that the mother consented while unaccredited laboratories do not – Australian Law Reform Commission and Australian Health Ethics Committee *Essentially Yours: The Protection of Human Genetic Information in Australia* (Australian Law Reform Commission Report 96, Sydney, 2003) paras 35.158 – 35.160.



the mother's consent do so on the understanding that the results have no legal standing.<sup>132</sup>

- 5.36 In New Zealand, the practice of DNA Diagnostics is to require the mother's consent, or the consent of the guardian and proof of guardianship where that person has replaced the mother.<sup>133</sup> DNA Solutions requires the mother's consent for a "court approved" test, but does not appear to require it for home sample tests.

### **Knowledge of test and consent – one or both parents**<sup>134</sup>

- 5.37 Those who support one parent being able to have a child under 16 parentage tested without the other parent's knowledge and consent are often concerned at the possibility of "paternity fraud".<sup>135</sup> They argue that a man has an inherent right to test the paternity of his child, particularly when liable for child support, since a man does not have definite proof he is the father without scientific confirmation.<sup>136</sup> Australian parentage-testing providers that do not require the mother's consent have argued that many men use their services to gain peace of mind, and give figures that in 90 per cent of cases the presumption of the man's paternity is confirmed.<sup>137</sup> This suggests there are benefits in allowing men to test their paternity discreetly and have their doubts resolved accurately and quickly.<sup>138</sup>
- 5.38 It is also argued that to require a man to go to court in order to have paternity testing conducted would be unreasonable because of the cost and intrusion on privacy. Even if it were required, a parent could still make surreptitious use of parentage-testing services where quality could not be guaranteed, which would greatly increase the risk of erroneous tests.<sup>139</sup>
- 5.39 There has been equally vocal opposition. Paternity tests can have serious consequences for mothers, including physical and emotional violence from angry fathers directed at former partners and children.<sup>140</sup> Some women have accepted that there

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<sup>132</sup> M Gilding "DNA Paternity Testing without the Knowledge or Consent of the Mother" (2004) 68 Family Matters 60, 63.

<sup>133</sup> DNA Diagnostics <<http://www.dnadiagnostics.co.nz>> (last accessed 24 February 2005) FAQ 5.

<sup>134</sup> For ease of reading we use the word parents here, but in New Zealand law it is the guardianship component of parenthood where the powers of consent on behalf of a child are contained. Most parents are also automatically guardians, see the discussion of the difference between parenthood and guardianship at chapter 3, paras 3.6–3.7.

<sup>135</sup> M Gilding "DNA Paternity Testing without the Knowledge or Consent of the Mother" (2004) 68 Family Matters 60, 63.

<sup>136</sup> M Gilding "DNA Paternity Testing without the Knowledge or Consent of the Mother" (2004) 68 Family Matters 60, 65.

<sup>137</sup> See Genetic Technologies Pty quoted in Australian Law Reform Commission and Australian Health Ethics Committee *Essentially Yours: The Protection of Human Genetic Information in Australia* (Australian Law Reform Commission Report 96, Sydney, 2003) para 35.166, n 158.

<sup>138</sup> A Newson quoted in M Gilding "DNA Paternity Testing without the Knowledge or Consent of the Mother" (2004) 68 Family Matters 60, 66.

<sup>139</sup> B Pearson "The Truth is Out There – Commentary on 'Move to Outlaw Secret DNA Testing by Fathers'" A Submission to the Human Genetics Commission (Child Support Analysis, 7 July 2004) <<http://www.childsupportanalysis.co.uk/papers>> (last accessed 24 February 2005).

<sup>140</sup> See A Newson quoted in M Gilding "DNA Paternity Testing without the Knowledge or Consent of the Mother" (2004) 68 Family Matters 60, 66.

is a place for tests where paternity is uncertain, but strongly opposed men's right to conduct paternity tests without the knowledge or consent of the mother.<sup>141</sup>

- 5.40 It can also be argued that parentage testing without the consent of both parents is inherently not in the best interests of the child. It is better for both parents to be involved, as it gives a more informed assessment as to the interests of the child and how these can be protected, if necessary, after the result is known.
- 5.41 In the United Kingdom, the voluntary Code of Practice on Genetic Paternity Testing Services (2001) requires that "motherless testing" can only be conducted where the mother consents or where the father has care and control and is able to give consent for the child. It may be necessary for a solicitor to provide written confirmation that the latter is the case. (As indicated earlier, this Code is under review.)

### Consent of children and young persons

- 5.42 The Family Proceedings Act 1980 provides that, where a court has recommended blood tests, the consent of a minor who has attained the age of 16 years has the same effect as the consent of a person of full age. This is inconsistent with article 12(1) of the United Nations Convention on the Rights of the Child (UNCROC)<sup>142</sup> and is not the approach that the House of Lords adopted in *Gillick*.<sup>143</sup> In that case there was a developmental concept of consent, which is now reflected in the United Kingdom Human Tissue Act 2004.<sup>144</sup>
- 5.43 The Code of Health and Disability Services Consumer Rights in New Zealand adopts a similar approach to these issues. The Australian Law Reform Commission has recommended an option that includes both age and capacity criteria.<sup>145</sup> That approach was supported by the Auckland District Law Society in its submissions to us, although it considered that the court should retain jurisdiction to assess whether the child's consent or refusal of consent should be determinative.
- 5.44 It is of critical importance that DNA testing provider protocols are developed to ensure that children and young persons, as well as their parents, understand the nature and implications of the testing and consent to it. In the absence of proper consent, no person should be required to undergo a test unless there is a court

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<sup>141</sup> L Turney et al "DNA Paternity Testing: Public Perceptions and the Influence of Gender" (2003) 1(1) Australian Journal of Emerging Technologies and Society <<http://www.swin.edu.au/sbs/ajets/journal/issue1/paternity.pdf>> (last accessed 24 February 2005) 14.

<sup>142</sup> United Nations Convention on the Rights of the Child (20 November 1989) [1993] NZTS No 3, art 12(1): "State 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".

<sup>143</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 (HL).

<sup>144</sup> See the Human Tissue Act 2004 (UK), s 45 regarding non-consensual analysis of DNA. Schedule 4 of the Act enables "qualifying consent" to be given on behalf of a child. The explanatory note states that "Appropriate consent" is when a child is competent and has given their own consent or if they are not competent or choose not to decide, appropriate consent will be that of a person with parental responsibility for them. Competence is not defined in the Act, but will be established according to common law principles (the "Gillick test").

<sup>145</sup> Australian Law Reform Commission and Australian Health Ethics Committee *Essentially Yours: The Protection of Human Genetic Information in Australia* (Australian Law Reform Commission Report 96, Sydney, 2003) recommendation 35-9.



order to that effect. We are not in a position to make recommendations as to the nature of the required protocols. These need to be developed in consultation with those working in this field. We merely note that such protocols would need to cover age and capacity to consent, when a parent could consent on behalf of a child, and whether these consents should be in writing or verified in some other way.

### **Options for a legal scheme for voluntary testing**

- 5.45 Three main options arise with regard to consent of the other parent. In the first option, one parent could be allowed to carry out parentage testing of the child or young person (where the child consented or was not competent by age or maturity to consent) without the other parent's knowledge and consent. In the second option both parents must know and agree before parentage testing of the child or young person can be carried out. If one parent refuses consent, the other parent can apply for a court order that testing can take place.
- 5.46 In the third option, one parent could consent on behalf of the child or young person (where the child was not competent to consent by reason of age and maturity) but that parent must inform the other parent. This option would include a process to enable the informed parent to seek a court order to prevent testing if he or she thought there were compelling reasons to do so.
- 5.47 The arguments for and against option 1 and option 2 have been canvassed above. The third option distinguishes between knowledge and consent. The parent initiating the test would be required to notify the other parent and inform the testing provider.<sup>146</sup> An in-built delay would give the other parent time to apply to the Family Court to stop the testing, and this could also provide an opportunity for mediation.
- 5.48 In other words, parentage testing could occur with the consent of one parent, but not before the other parent was informed about the intention and had a chance to seek legal advice, attempt to mediate with the testing parent, or institute court proceedings if he or she considered there were compelling reasons why testing should not go ahead.

### **The view of the Commission**

- 5.49 We favour the third option, where voluntary testing by one parent is possible, but only with protection of the interests of the other parent and the child or young person. So long as safeguards are in place to ensure the other parent can move into the court system, a parent who wishes to test the paternity of his or her child should not have to start the process in court. Neither should one parent be able to unreasonably prevent parentage testing, possibly as a way of delaying or thwarting the truth from being revealed, although the court may ultimately have to rule whether the test can go ahead.

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<sup>146</sup> M Gilding "DNA Paternity Testing without the Knowledge or Consent of the Mother" (2004) 68 Family Matters 60, 66.

- 5.50 One of the principles of family law is to encourage parents to reach their own decisions about the care of their children, and this is also applicable in determining disputed parentage. It would usually be in the best interests of the child or young person to have the support of both parents in relation to the test and any consequences from it.
- 5.51 We acknowledge that a father cannot be absolutely certain of his paternity save for a DNA test, unlike the mother. Some argue that giving fathers a unilateral right to undertake testing of the child restores this imbalance, but this overlooks the wider context and the possible effects for the child. If there is a reasonable doubt whether a named person is or is not the genetic parent, testing should proceed unless there are compelling reasons otherwise. Such reasons might be where a child is seriously unwell or where there have been credible threats of violence if the results disclose a particular outcome.
- 5.52 The system we propose enables the parent who wishes to undergo parentage testing to approach the laboratory directly. He or she must either provide verifiable agreement by the other parent or proof that the other parent has been notified. The method by which a provider can verify agreement of the other parent should be prescribed in regulations and/or accreditation standards because of the inherent difficulties in verifying a signature and the potential for fraud. The critical issues of when consent of a child or young person under 16 years is required, and verification of his or her consent or a parent's consent on their behalf, should also be prescribed in regulation and/or accreditation standards.
- 5.53 Where consent of one parent has not been given, the provider would be required to wait 28 days from the date the notice was served on the other parent before carrying out the test. If the objecting parent did not proceed with due haste to bring the issue to resolution by court processes, the court should be able to rescind the obligation on the provider to wait. Providers should be required to notify both parents of the test results at the same time.

### **Recommendations**

- R5** Legislation should be enacted to ensure that government agencies requiring proof of parentage and courts dealing with civil proceedings only accept the results of DNA testing of a child under 16 as proof of parentage if the following requirements are met:
- the laboratory undertaking the DNA parentage testing complies with standards developed for New Zealand, as may be required by regulation and/or accreditation;
  - the laboratory has received verifiable agreement of the parents that parentage testing of the child or young person can take place; or
  - where only one parent seeks the test, that parent has served notice of the test on the other parent and provided proof of service to the testing provider; and

- before carrying out the test, the testing provider waited 28 days from the date of the notice to other parents and did not receive notice from the court that an objection had been filed.

**R6** Legislative provisions should be enacted to ensure that:

- a parent served with a notice for parentage testing of their child can file an objection with the Family Court;
- an objection to parentage testing must be filed within 28 days of the date the notice was served on the objector;
- if a valid notice of objection is received, the court must notify the testing provider that they should not proceed with the test until the issue is determined by the court;
- the court can cancel the notice to the provider if the objecting party has unreasonably delayed court determination of the matter;
- the court only intervenes to prevent testing where there are compelling reasons why testing would not be in the interests of justice, including the best interests of the child;
- the results of tests are delivered to each parent by the testing agency at the same time.

**R7** Protocols should be developed and prescribed in regulation and/or the accreditation standards to establish:

- an effective method of verifying the agreement of parents to parentage testing;
- the age and capacity of consent for children and young persons under 16 years, when a parent can consent on behalf of children or young persons, and verification of these consents.

## COURT INTERVENTION

### Current law

- 5.54 At present, courts have the power to recommend that parentage tests be conducted but no power to order them. Section 54 of the Family Proceedings Act 1980 provides that the court may, of its own motion or on the application of a party to the proceedings, recommend that parentage tests be carried out on the child or any person who may be a natural parent of the child. The court may adjourn proceedings to allow for testing to occur.
- 5.55 There is no penalty attached to a refusal to comply with a recommendation. However, section 57(2) of the Family Proceedings Act 1980 provides for the court to draw appropriate inferences from a refusal without explanation. The approach

taken in Australia<sup>147</sup> and the United Kingdom<sup>148</sup> is for court-ordered testing with use of inferences as a sanction. The approach is similar in some parts of the United States, with the additional sanction of contempt of court.<sup>149</sup>

- 5.56 There are two main situations where refusal sometimes leads to a serious dispute – where a putative father refuses to undergo a test or one guardian refuses consent in respect of the child. Where there is refusal to consent, there are likely to be strong emotions behind the refusal. The parent may resent the intrusion into his or her authority and refuse to surrender the child for testing. This inevitably creates a distressing situation for the child if they are old enough to be aware of the tension, which the court should take into account in considering options.
- 5.57 The Family Court registrar would usually refer the case to mediation in the first instance, which should include clarification of why testing is appropriate and how the child's interests would be protected in the process. Where mediation did not resolve the issue, the matter would proceed to court. The court should be able to stop testing altogether, delay it for a certain period or specify how the results are conveyed, such as in a counselling situation.

#### *Consent as a ward of the court*

- 5.58 The Court of Appeal has recently confirmed that the court can order DNA parentage testing on the application of a person claiming to be a natural parent when the parent with sole guardianship refuses to consent to testing for the child. It upheld the earlier decision of the High Court<sup>150</sup> to make the child a guardian of the court further to section 10D of the Guardianship Act 1968. With conflicting precedents and without explicit legislative authority, the court gave the provisions a construction that was consistent with UNCROC and the best interests of the child.<sup>151</sup> Prior to this case, conflicting approaches had been taken by the High Court when faced with a parent unwilling to follow a recommendation for testing of a child.<sup>152</sup>

#### **Best interests of the child**

- 5.59 The relevant provisions in the Family Proceedings Act 1980 do not make direct reference to the best interests of the child. Yet the courts have rejected arguments against parentage tests, on the basis that the child has a right to know his or her genetic origins and that this is in the best interests of the child because it enables the child to develop relationships with both parents.<sup>153</sup>
- 5.60 It is sometimes argued that to determine parentage by testing in a particular situation, would not be in the child's best interests because it might distress the child

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<sup>147</sup> Family Law Act 1975 (Cth), s 69W(1) and (3), s 69Y, s 69Z.

<sup>148</sup> Family Law Reform Act 1969 (UK), s 20(1).

<sup>149</sup> Uniform Parentage Act 2000 (as revised in 2002), § 622 (LexisNexis 2004).

<sup>150</sup> *S v T and Anor* [2003] NZFLR 223.

<sup>151</sup> *T v S and Anor* (17 December 2004) Court of Appeal CA 249/02 Anderson P, Hammond J and William J.

<sup>152</sup> See *Cairns v James* [1992] NZFLR 353 and *S v T and Anor* [2003] NZFLR 223 regarding the use of wardship to enforce parentage testing of a child.

<sup>153</sup> *Re C* (12 April 2001) FC POR FP 330/99; FP 273/99 Ellis J.

by disrupting his or her current parenting arrangements. This argument is typically raised where the mother does not want a man claiming to be the father to have any part in the child's life, or where the mother's partner believes he is the child's father or has taken on the role of caregiving father. The argument has been rejected by the courts on the basis that the long-term consequences to the child of uncertainty surrounding his or her parentage outweigh the short-term disruption to the child's current family life that resolving parentage might cause. Similarly, an English court has held:

To do and say nothing now is in truth storing up a potential bombshell for the future, which might be very damaging for [the child] to learn and might indeed seriously undermine the sense of trust in his [or her] mother.<sup>154</sup>

- 5.61 As the child grows up, he or she is highly likely to want to know his or her genetic parentage. The experiences of adopted children and donor-conceived children who have had this fact concealed from them show the detrimental consequences of discovering later in life their true parentage. It will usually be better for these doubts to be resolved as soon as possible and the consequences of the parentage testing managed so as to minimise the harm to the child. Nevertheless, there may be circumstances where the merits of testing need to be carefully weighed by the court or where the process for disclosure must be carefully considered.

### Options

- 5.62 Three options are available. The court could continue to have power to recommend testing and an ability to draw an inference where there is refusal to comply. A second option would be to empower the court to order testing, including of children, and retain the ability to draw an inference as the only sanction if the order is resisted. The third option would be to empower the court to order testing backed up by a range of possible orders to ensure compliance, impose penalties, and/or draw an inference.

### The view of the Commission

- 5.63 It is in the best interests of the child, his or her parents and the general public that parentage determinations are made on the basis of accurate DNA parentage testing. Without this, determining parentage may be a difficult task and result in lengthy and expensive court proceedings. The court may have to rely on legal presumptions and inferences, and the determination will not necessarily end speculation and rumour on the issue.
- 5.64 Options 1 and 2 amount to a continuation of the current situation with the same weaknesses identified above. Option 2 is a cosmetic rather than a substantial change as the court's power to "recommend" is no more than renamed as "order", and compliance is still effectively voluntary.
- 5.65 It would better reflect the importance of the matter to provide the courts with statutory authority to order DNA parentage testing of children, young persons and adults. This would also be in accordance with the approach taken by the Court of

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<sup>154</sup> *A v L (Contact)* [1998] 1 FLR 361, 366 Holman J.

Appeal in *T v S and Anor*<sup>155</sup> in December 2004 and would give better effect to New Zealand's international obligations to enable children to know their parents and genetic identity.

- 5.66 The principles the courts have already developed in deciding whether to make recommendations are still relevant. At present, the court must first find that the evidence before the court establishes a prima facie case before considering whether to recommend testing. This protects children against vexatious litigants and unjustifiable testing. The threshold test should be expressed more clearly as being the reasonable possibility that a person recognised as a parent is not the genetic parent or that a person not recognised as a parent is the genetic parent.
- 5.67 Parentage testing is an area where there may be valid and competing interests involved. We propose that, if the threshold test is met, the court should order parentage testing unless there are compelling reasons why it would not be in the interests of justice, including the best interests of the child. The child's own view should be taken into account where possible in terms of their age and maturity, but the views of any party or the child are not to be treated as determinative of the matter.
- 5.68 As with other family disputes, it is also likely to be in the best interests of the child for the matter to be resolved, where possible, by the parties themselves with a court order only obtained as last resort. A man who discovers he is not a genetic father may require counselling and support to ensure a constructive outcome for the family. Feelings of despair, betrayal, anger and revenge may arise.
- 5.69 However, support in the form of counselling or mediation may not be available in some cases under the current legislation. Both the Care of Children Act 2004 and the Family Proceedings Act 1980 limit counselling to disputes between parents and guardians, including those in a de facto relationship. A parentage testing dispute may involve a person who has not been recognised as a parent or guardian. We propose that the legislation be amended to include this situation.
- 5.70 In accordance with the current law, third parties such as men claiming paternity, social workers, government agencies, trustees and executors may wish to seek parentage testing in order to determine rights and responsibilities. Unless the parents are willing to agree to the test for these other purposes, third parties with a proper interest in determining parentage are likely to apply to the court for a declaration of paternity and the court is likely to order DNA parentage testing. The same legal tests for granting an order should apply.
- 5.71 In some circumstances, tissue from a deceased person may be required for parentage testing. While consent might be sought from the next-of-kin or executor or administrator, the court's power to order parentage testing of persons should include testing of deceased persons.

## Sanctions

- 5.72 Most submitters believed that disobedience of a court order for parentage testing should result in a penalty, so that the order "had teeth". In the Discussion Paper we asked whether the penalty should be a criminal offence. All but one submission believed that a criminal offence would be too extreme, but there was consensus

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<sup>155</sup> *T v S and Anor* (17 December 2004) Court of Appeal CA249/02 Anderson P, Hammond J and William J.

that a fine was appropriate. The Scottish Law Commission did not consider the threat of imprisonment would provide a solution: it would not provide the evidence being sought and would only add to the emotional trauma of the child.<sup>156</sup>

- 5.73 While a punitive approach is not in harmony with the general ethos of family law to facilitate relationships, the persistent refusal of some people to comply in good faith with court directions can have serious consequences for the children and other parties involved. Parliament has very recently considered these issues in passing the Care of Children Act 2004, which provides a range of incentives and penalties to ensure compliance, with enforcement orders only made as a last resort.
- 5.74 We propose that sanctions for non-compliance with parentage-testing orders should be aligned with the relevant sections in the Care of Children Act 2004. These provisions allow parties to request counselling to resolve disputes over carrying out an order.<sup>157</sup> If this does not resolve the matter and the order is still contravened, the court has various options. The most significant option is that the court can issue a warrant for enforcement of certain orders by a named person, social worker or the Police.<sup>158</sup> An order for DNA parentage testing should similarly be able to be enforced.
- 5.75 Various penalties can be applied at the court's discretion, which we consider to be less relevant than ensuring the test is completed. The court can require one party to enter into a bond as assurance for compliance or order one party to reimburse another party for the reasonable costs incurred as a result of the contravention.<sup>159</sup> Intentional obstruction of an order or execution of a warrant is an offence under the Act, with a penalty of imprisonment for a term not exceeding three months or a fine not exceeding \$2500.<sup>160</sup>
- 5.76 In making such orders or issuing enforcement warrants, the court must consider whether the order will serve the best interests of the child concerned and should only make such directions as a last resort.

### Recommendation

**R8** Legislative provisions should be enacted to ensure that a court may make an order for parentage testing or preventing parentage testing, including testing in relation to deceased persons, and that:

- in determining whether to order parentage testing of a child, the court must be satisfied there is a reasonable possibility a person recognised as a parent is not the genetic parent or that a person not recognised as a parent is the genetic parent, and shall then order testing unless there are compelling reasons why it would not be in the interests of justice, including the best interests of the child;

<sup>156</sup> Scottish Law Commission *Evidence Blood Group Tests, DNA Tests and Related Matters: Discussion Paper No 80* (HMSO, Edinburgh, 1988) para 3.20.

<sup>157</sup> Care of Children Act 2004, s 65.

<sup>158</sup> Care of Children Act 2004, ss 72–73.

<sup>159</sup> Care of Children Act 2004, ss 70–71.

<sup>160</sup> Care of Children Act 2004, s 79.

- in assessing the best interests of the child, the court must take account of the wishes of a child under 16 years, having regard to their age and maturity;
- lack of consent by any party, including children, is not determinative of the matter;
- in making an order the court can require that testing and disclosure of the results take place under certain conditions, such as that testing must or must not take place within a specified time or that the results must be disclosed in a particular way;
- counselling or mediation is available for persons and children who undertake parentage testing and others who need to resolve issues arising from the test;
- enforcement of parentage orders are aligned with the provisions in the Care of Children Act 2004 that deal with dispute resolution, making parenting orders work, and enforcement of parenting orders.



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## 6

# Donor gamete conception and legal parenthood

- 6.1 **I**N THIS CHAPTER we review the legal landscape as it exists in relation to donor gamete conception and address four issues. We consider the following: whether the automatic “deeming” rules are the best way to transfer legal parenthood when donor conception is used; whether a known donor should be able to become a legal parent; what amendments might be needed to agreements under section 41 of the Care of Children Act 2004, between donors and parents, to ensure consistency and reduce anomalies in the law; and finally, the issue of a child having only one legal parent.

### THE LEGAL LANDSCAPE

- 6.2 Donor gamete conception is used by heterosexual couples<sup>161</sup> when natural conception is not possible due to male or female infertility and by single women and lesbian couples.<sup>162</sup> The number of children being born each year from the use of donated sperm in fertility clinics is around 100. The number of children born from the use of donated eggs is estimated to be 20 to 30 per year. Some donors are recruited by clinics, and in the course of treatment some may become known to the recipients. However, in the majority of cases the donors and recipients do not meet.<sup>163</sup> Recipients choose the donor from a full, unnamed donor profile. Other donors are recruited personally and brought to the clinic by the recipients. Donor

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<sup>161</sup> The use of donor sperm by heterosexual couples has declined in recent years as better techniques have been developed that can help some couples with fertility problems to conceive.

<sup>162</sup> Between 25 per cent and 44 per cent of live births from donor insemination are to single women and women in same-sex relationships: four of nine donor insemination births at Fertility Plus, Auckland, in 2002–2003; 18 of 74 donor insemination births at Fertility Associate clinics in 2002. Information provided by Fertility Plus, to the Law Commission (24 August 2004) email; Fertility Associates to the Law Commission (18 August 2004) email. An Auckland fertility clinic counsellor, Robyn Galvin, estimated that 20 per cent of clients on their waiting list for donor sperm are lesbian couples and that 40 per cent are single women – see “Wanted: More Donor Sperm” (30 January 2005) *New Zealand Herald* Auckland 15.

<sup>163</sup> Meetings between donors and recipients prior to conception appear to be far more common in egg donation than sperm donation. The Human Assisted Reproductive Technology Act 2004 has put an end to anonymous donation. After the relevant sections of the Act come into force on 21 August 2005, all children born from donor gamete conception will be able to access identifying information about their donors. Children born after 1990 will also be able to access identifying information subject to the donor’s consent, as clinics have retained information since that time and used donors who agreed to consider being contacted by any resulting child. Issues of genetic identity for children born as a result of donor gametes and surrogacy are discussed in chapter 10.

sperm conception can take place privately or through clinics. Donor egg conceptions always require clinic facilitation.

6.3 Part 1 of the Status of Children Act 1969 establishes parenthood for the vast majority of children, essentially based on their genetic connection to their parents. Legal parenthood can be transferred from genetic parents to others under adoption legislation.<sup>164</sup> The effect of an adoption order is that the adoptive parents become the child's parents "for all purposes" and the child's legal link with his or her genetic parents is severed. In 1987, rules were introduced in the Status of Children Amendment Act to deal with donor gamete conception.<sup>165</sup> Further rules have been introduced by the Status of Children Amendment Act 2004 and the Care of Children Act 2004. The legislation (the relevant provisions of which are set out at paragraphs 6.6–6.8) allows the automatic transfer of parenthood on birth, from the gamete donor(s) to the woman carrying and giving birth to the child, if she is not the genetic mother, and to her partner if she has one.

6.4 Before the introduction of the Status of Children Amendment Act 1987, children and families created by donor gamete conception were in a precarious position: a gamete donor was still, in law, a parent to the child with full legal liabilities and rights. The legal position of an infertile intending father in relation to the child was ambiguous. The rules in the Status of Children Amendment Act 1987 were introduced as a response to this lack of clarity. In introducing the legislation, the then Minister of Justice, Sir Geoffrey Palmer, described the prevailing situation:

The result for the child is that the man the child regards as its father cannot fulfil the rights and responsibilities of a father. He commits an offence if he registers the birth of the child as his, knowing that the child was conceived using donated sperm. He has no legal standing to exercise rights over the child such as consenting to a change of name, consenting to adoption, or consenting to the child's marriage ... These anomalous situations are clearly not in the best interests of the child. Legislation is necessary to protect the children involved by giving them the same security with respect to their parents as children have who are conceived in the usual way.<sup>166</sup>

6.5 The Status of Children Amendment Act 1987 was also of critical importance to the donor and to the fertility clinic practice of retaining identifying details of donors. Donors did not wish or intend to assume parental liabilities – the handing over of gametes was an altruistic act done to enable others to have a child. The extinction of parental status meant they could be open about their identity without fear of legal claims being made against them. It was done on the understanding there would be no legal liability. Also, the recipients had no wish for the donor to

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<sup>164</sup> Adoption Act 1955. Section 16(2) of the Adoption Act provides: "Upon an adoption order being made, the following paragraphs of this subsection shall have effect for all purposes ... (a) The adopted child shall be deemed to become the child of the adoptive parent, and the adoptive parent shall be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock ... (b) The adopted child shall be deemed to cease to be the child of his existing parents (whether his natural parents or his adoptive parents under any previous adoption), and the existing parents of the adopted child shall be deemed to cease to be his parents ...". The Law Commission reviewed the adoption laws in 2000, see New Zealand Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, Wellington, 2000). Adoption is not discussed in this report.

<sup>165</sup> The Status of Children Amendment Act 1987 also introduced rules for embryo donation and has a significant impact on surrogacy arrangements. We discuss these two family types in chapters 7 and 9.

<sup>166</sup> (13 August 1986) 473 NZPD 3869.

retain rights, since his legal status could interfere with the integrity of their family unit.<sup>167</sup>

- 6.6 In relation to children born from donor gamete conception, the deeming rules established under the Status of Children Amendment Act 1987 were as follows:
- If a woman conceives with donated gametes she is for all purposes the mother of the child.<sup>168</sup>
  - If the woman who bears the child is married or has a de facto partner and the husband or partner has consented to the procedures, then her husband or partner is for all purposes the father of the child and the sperm donor is deemed not to be the father.<sup>169</sup>
  - If the woman who bears the child is unmarried or has undergone the procedure without the consent of her husband or partner, then the donor is the child's father, but he does not have any rights or liabilities as a father towards the child and the child has no rights or liabilities towards him.<sup>170</sup>
- 6.7 From 1 July 2005, the Status of Children Amendment Act 2004 moves the deeming rules to Part 2 of the Status of Children Act 1969 and amends two aspects of them:
- If the woman who bears the child has a female de facto partner and the partner has consented to the procedures, then her partner will, for all purposes, be a parent of the child.<sup>171</sup>
  - In all situations where a donor is used, the donor will have no rights or liabilities towards the child and the child will have no rights or liabilities towards him or her.<sup>172</sup>
- 6.8 Under the Status of Children Amendment Act 1987, a donor could only acquire full parental rights and responsibilities towards the child in very limited circumstances, namely if he later married or lived in a de facto relationship with the mother.<sup>173</sup> The Status of Children Amendment Act 2004 extends this rule to egg

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<sup>167</sup> At the time of enactment the focus was on sperm donation as egg donation had not started to be practised in New Zealand.

<sup>168</sup> Status of Children Amendment Act 1987, s 9(3), s 13(3), and s 15(3).

<sup>169</sup> 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), and s 15(1)(a) and (b).

<sup>170</sup> Status of Children Amendment Act 1987, s 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), and s 15(2)(a) and (b).

<sup>171</sup> See the new section 18 of the Status of Children Act 1969, as amended by the Status of Children Amendment Act 2004, s 14.

<sup>172</sup> See the new sections 21 and 22 of the Status of Children Act 1969, as amended by the Status of Children Amendment Act 2004, s 14. This gets rid of what Priestley J described as a "shell father" in *P v K* [2003] NZFLR 489 para 86. Under the Status of Children Amendment Act 1987, if a single woman used donated sperm to conceive, the donor had none of the rights and liabilities of a child with respect to the child, and the child could not enforce any rights and liabilities against the father; however, unlike other donors, he was not deemed "not to be the father of the child for all purposes".

<sup>173</sup> Status of Children Amendment Act 1987, s 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) and the new section 22 of the Status of Children Act 1969, as amended by the Status of Children Amendment Act 2004, s 14. A donor could also apply for an adoption, guardianship or custody order.

donors, so that an egg donor may become a legal parent to the child if she becomes the mother's partner.<sup>174</sup> The rules in the 2004 Act apply retrospectively.<sup>175</sup>

### **Agreements between parents and known donors**

- 6.9 The Care of Children Act 2004 has also introduced the concept of formal agreements between parents and donors.<sup>176</sup> In the past, some donors and recipients made agreements about the role the donor would play in the child's life, the amount of contact he or she would have with the child, and financial contributions. Those agreements had no standing in law.<sup>177</sup> Where such agreements broke down and dispute arose, courts struggled to apply existing concepts of parenthood and parental responsibilities to the people involved.
- 6.10 Section 41 of the Care of Children Act 2004 is a response to a New Zealand High Court decision relating to the legal status of a known donor.<sup>178</sup> It enables a donor to come to an agreement with the child's parents as to contact with the child and/or to the role he or she has in the upbringing of the child. The agreement cannot be enforced under the Act, but the court may, with the consent of all parties to it, make a consent order that embodies some or all of the terms of the agreement. That order, insofar as it relates to contact with the child, can be enforced under the Act as if it were a parenting order relating to contact.<sup>179</sup> Also, where the parties cannot agree on certain matters under the agreement, they can apply to the court for its direction.<sup>180</sup> The court may make "any order relating to the matter that it thinks proper".<sup>181</sup>
- 6.11 Although the terms of the agreement can be varied should there be a dispute that comes before the court, the agreement and order have no impact on the donor's status. They do not enable him or her to become a legal parent, nor on their own do they grant guardianship status, although the donor can apply for this separately. We discuss this further at paragraph 6.74 below.

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<sup>174</sup> See the new sections 20(2) and 23 of the Status of Children Act 1969, as amended by the Status of Children Amendment Act 2004, s 14.

<sup>175</sup> See the new section 16 of the Status of Children Act 1969, as amended by the Status of Children Amendment Act 2004, s 14.

<sup>176</sup> Care of Children Act 2004, s 41.

<sup>177</sup> Although an agreement was taken to have evidential value with regard to the pre-conception intentions of the parties in *P v K* [2003] 2 NZLR 787, [2003] NZFLR 489 (HC); [2004] NZFLR 752 (FC); [2004] 2 NZLR 421 (HC).

<sup>178</sup> *P v K* [2003] 2 NZLR 787, [2003] NZFLR 489 (HC); [2004] NZFLR 752 (FC); [2004] 2 NZLR 421 (HC).

<sup>179</sup> Care of Children Act 2004, s 41(4).

<sup>180</sup> Care of Children Act 2004, s 41(1)(b) and (5).

<sup>181</sup> Care of Children Act 2004, s 41(6).

## TRANSFERRING LEGAL PARENTHOOD WHEN DONOR GAMETE CONCEPTION IS USED

- 6.12 Donor offspring have been critical of the fact that deeming obscures from the child their true genetic parentage.<sup>182</sup> By seamlessly transferring parenthood, the rules enable parents to be secretive with their children. If the child's parents do not reveal that he or she is donor-conceived, the child has little chance of finding out (although the chances are higher if he or she is born to a single woman or lesbian couple). There are significant concerns about identity and secrecy for donor-conceived people that require ongoing attention and are discussed separately in chapter 10.
- 6.13 However, in themselves, the rules support donor offspring by ensuring their parents have the legal standing from birth to protect them adequately and grant them the benefits that flow from legal parenthood. The rules transfer parenthood upon the birth of a child with clarity, in a straightforward manner – with no need for the parents to go to court – and with certainty. They also treat the prospective parents in the same way as parents who conceive naturally and support the integrity of their intended family unit. From the child's point of view, they ensure the people parenting him or her, and undertaking his or her day-to-day care from birth, have the legal powers and responsibilities to do so.
- 6.14 The effect of the rules is also to reflect the clear intention of the adults involved in the conception and birth of the child. In the large majority of cases, infertile people using clinics use anonymous donors who do not intend to incur parental rights and responsibilities. The intending parents, at least one of whom will not have a genetic link with the child, intend to give birth to, rear and parent the child. The law endows them with the powers and responsibilities to do this from the moment of birth. The aptness, ease and automatic nature of the laws were appreciated by the vast majority of the families and unknown donors we met in our consultation meetings. The donors said they would not have donated without this protection, although they were, almost without exception, willing to meet the child if he or she requested it.
- 6.15 The single women consulted who had used unidentified donors also held the view that the rules accurately reflected and supported their family situations.<sup>183</sup> They gave certainty that the donor did not have the power to later enter their family unit and seek to exercise paternal rights, although again there was generally an openness for their children to get to know the donor during childhood. Some were in the process of initiating contact.
- 6.16 The rules received strong support from lesbian couples who were bringing up children conceived by donor gamete in clinics using unidentified donors. The recent amendments to the rules recognise the reality of the relationships in their families,

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<sup>182</sup> It has been said that the legal and regulatory scheme in New Zealand “is entirely adult driven ... and that the genesis of the process is not the interests of children but the interests of adults who wish to have children”: V Ullrich “Technobabies” in *Conference Papers – The 2001 New Zealand Law Conference* (CD-ROM, 2001) M 13.

<sup>183</sup> However, they did not like the way the child's birth certificate recorded “father unknown” and would have preferred it to record a donor conception. For discussion of annotation of birth certificates, see chapter 10, paras 10.54–10.66.

giving the mother's partner parental status in the same way as with heterosexual couples. The reform protects children born into those families by recognising two parents with responsibility for them, and by giving both parents the powers to care for and protect them.<sup>184</sup> Previously the birth-giving mother was, in effect, the child's only legal parent.<sup>185</sup>

### **Alternative means of transferring parenthood**

- 6.17 Some submitters argued that parenthood should be a status founded solely on genetics and anyone else should have only guardianship status. Another suggestion was that the only means of transferring legal parenthood should be adoption. We have considered adoption as an alternative to the automatic deeming rules for people using donor gamete conception.

#### *Adoption: timing requirements*

- 6.18 Adoption transfers legal parenthood after birth, in two stages. First, custody can be transferred in an interim order made by the court;<sup>186</sup> however, a mother cannot give her consent to release the child for adoption until he or she is 10 days old.<sup>187</sup> Secondly, six months after the interim order is granted, the prospective parents may then apply to the court for a final adoption order.<sup>188</sup> The structure surrounding adoption is appropriate to protect the birth parents – giving up a child can create a situation of life-long grief – and to ensure the welfare of the child who will be brought up by parents who do not have a genetic connection with the child and who did not plan the creation of the child.
- 6.19 It is an inevitable consequence of the factual circumstances leading to adoption that legal parental status cannot be transferred until after birth. This is not so with donor gamete conceptions where clear intentions have been formed as to who will raise the child prior to conception. Donors give their gametes with the aim of relinquishing all parental liabilities and rights at the time of donation, which may be long before conception and birth. It is unreasonable to require them to remain exposed to legal liability for an indefinite period of future time. Such a requirement would act to reduce further the already low numbers of donors. If this were intended, it should be done explicitly.
- 6.20 The model would also expose the recipient family to a donor changing his or her mind and asserting parental rights after the child was born. This could create stress and insecurity for the parents and could place the child in a precarious position as his or her parental relationships would remain uncertain until an order is granted.

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<sup>184</sup> One concern was that under the Status of Children Amendment Act 2004, partners would be deemed parents when that was not the intention of either women. However, the requirement for a woman's partner to consent to the treatment before the deeming provisions apply means that, as for heterosexual couples, legal parenthood only arises with consent.

<sup>185</sup> See n 172 above regarding "shell" fathers.

<sup>186</sup> Adoption Act 1955, s 5.

<sup>187</sup> Adoption Act 1955, s 7(7).

<sup>188</sup> Adoption Act 1955, s 13.

### *Adoption: screening requirements*

- 6.21 Under the adoption legislation, the state screens and approves the intending adoptive parents prior to receipt of the child. Typically, these parents will have no genetic relationship with the child. Screening prior to adoption has two key functions: it educates intending parents on the special challenges of parenting children who are not genetically related to them; and it provides protection to the child against unsuitable parents. The protective function is realised by a social worker's report to the court, which then has discretion whether to grant the adoption order. Protective screening became a formal requirement as child welfare issues became more prominent in society.

### *Should the adoption requirements apply for donor gamete conception?*

- 6.22 In 1987, the legislature considered that donor-conceived children did not need the added protection of state screening of the non-genetic parent for suitability. This may be justified because there is almost always a genetic connection to the child within the recipient couple. The partner has made a commitment to parent the child with that person. Natural parents are not vetted or approved. The state does not have a legal right to prevent people from having children, no matter how unsuitable they might be as parents, nor to limit how many they can have.<sup>189</sup> Nor does it have the right to determine who parents may form a partnership with and who may take on the role of a step-parent. Should the state then determine who will parent the child from birth on the basis of a partnership with the natural parent?<sup>190</sup>
- 6.23 On the basis of the genetic and gestational connection with the child within the recipient family and the manifested intention of the recipient family and the donor, we do not consider that there is the same requirement for protective screening in cases of donor gamete conception.<sup>191</sup> That is not to say that there is not a difference between donor-conceived families and those conceived conventionally. We are strongly of the view that, before conception, recipient parents should receive better education about dealing with the child's needs given the different nature of their family, and specifically about telling their child that they are donor-conceived. However, this education can take place within the existing framework under the deeming rules. We discuss education further in chapter 10.

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<sup>189</sup> It is also a value underlying the law that, with some exceptions, the state gives parents autonomy in their parenting. Parents also have inherent rights, long recognised in our law and society, to raise their children in accordance with their own personal values and the religion of their choice, and to pass on their thoughts, opinions, beliefs and cultural values.

<sup>190</sup> In effect, donors have some vetting rights over recipient parents as they can state that they do not wish their gametes to be used in conjunction with IVF, by overseas patients, or by a lesbian couple or single women. Also, where requested, clinics facilitate meetings between donors and recipients before conception, in part to enable the donor to vet the prospective recipients. We encourage this practice, which reflects the trend towards openness in adoption.

<sup>191</sup> Note also, that the proviso to section 10 of the Adoption Act 1955 dispenses with the protective measures, where the applicant or one of the applicants is an existing parent of the child, whether natural or adoptive.



## *Guardianship*

- 6.24 Nor do we consider guardianship an appropriate alternative to legal parenthood for a non-genetic parent who will parent from birth after donor gamete conception. Although guardianship gives legal authority to take responsibility and exercise rights in the day-to-day caring and future decision-making relating to the child, unlike legal parenthood, it does not endure past childhood. Nor are the responsibilities and rights as extensive as legal parenthood. The protection for the child is greater under the latter. Many parents of donor-conceived children who were consulted emphasised the importance to them that they were each on an equal legal footing from the beginning of the child's life.
- 6.25 The current mechanism, which has operated since 1987, by which legal parenthood is transferred automatically from the gamete donor to the non-genetic parent, should be retained. Parliament has recently endorsed the model by introducing the Status of Children Amendment Act 2004. This legislative scheme also remains the standard model used by comparable jurisdictions internationally, see paragraphs 6.38–6.44.
- 6.26 The deeming rules ensure clarity and certainty immediately on the birth of the donor-conceived child. They do not require timely and costly court or other state processes, which would in our view be unnecessarily disruptive to parents using donor gamete conception. The imposition of further processes, with the exception of our comments on education in chapter 10, is not justified. The deeming rules are the most appropriate means of accurately representing the reality of these children's parenting relationships.
- 6.27 It is possible that both a donor egg and donor sperm could be used to conceive; the result would be no genetic link between the child and parents. There would, however, be a gestational link between mother and child. We consider these cases should be treated in line with our recommendations made about donated embryos in chapter 9.

## SHOULD A KNOWN DONOR BE ABLE TO BECOME A LEGAL PARENT?

### **The decision in *P v K***

- 6.28 The new legal regime, including same-sex partners and section 41 agreements, was the legislature's response to the New Zealand High Court and Family Court decisions in *P v K*.<sup>192</sup> In that case, the courts were asked whether a known donor could be considered a "parent" under legislation that would give him rights of guardianship and contact with the child. An application was made by a man who had given his sperm to a lesbian couple on the basis of a written agreement that he would have a role in the child's life including access for no less than 14 days per year. The relationship between the man and the couple broke down after the child's birth.
- 6.29 One question for the court was whether he was strictly a "donor" under the terms of the Status of Children Amendment Act 1987 or whether he was a legal parent to the child. The High Court found that the letter of the law was clear – the

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<sup>192</sup> *P v K* [2003] 2 NZLR 787, [2003] NZFLR 489 (HC); [2004] NZFLR 752 (FC); [2004] 2 NZLR 421 (HC).



method of conception used meant that he could only be viewed as a donor – but considered the outcome unsatisfactory.<sup>193</sup> Heath J expressed hope that:

... it will be possible for those who live in same-sex relationships who wish to have children to be allowed to do so, regulated by modern laws which recognise the paramount interests of the child, the nature of the relationships among the adults involved and the biological necessity for assistance from someone of the opposite sex if a child is to be conceived.<sup>194</sup>

- 6.30 The High Court held that, despite being stripped of parental status under the deeming rules, the man could apply for guardianship and contact with the child.<sup>195</sup> Ultimately, the Family Court awarded guardianship to both the donor and the mother's same-sex partner (in addition to the mother), and made an order increasing the amount of contact the father could have with the child up to one week per month, on the basis that this was in the child's best interests. The court took account of the following: the fact the women had agreed to include the man in the child's life prior to conception; that this was the basis of his agreeing to participate; that it was in the child's best interests that his relationship with his genetic father was secured; and that ensuring this protected the child's right under the United Nations Convention on the Rights of the Child (UNCROC) to know his parents.<sup>196</sup>

### **Legal parenthood for a known donor**

- 6.31 A known donor can only obtain full parental status if he or she marries or enters a relationship with the mother of the child. Failing this unlikely situation, donor status remains. In order to access some or all parental rights and responsibilities, a known donor can do one of the following:
- From 1 July 2005, enter a donor and parent agreement with the recipients under section 41 of the Care of Children Act 2004, as described in paragraphs 6.9–6.11 above. However, these agreements only deal with limited aspects of “parenthood” and do not give full parental status.
  - Apply for a guardianship order,<sup>197</sup> which will give him or her the legal authority to take responsibility and exercise rights in the day-to-day caring and decision-making in relation to the child. However, as stated above, this does not give full parental status nor does it endure past childhood. We do not consider guardianship adequately resolves the issue. Guardianship is not the same as full parental status, legally or symbolically.
  - Seek to adopt the child. For the reasons set out above we do not consider adoption to be an appropriate mechanism: it would also create an unnecessary legal fiction to insist that a parent who is genetically related to a child and intends to raise it from birth should have to adopt their child. Nor would it accord with our requirements of certainty, clarity and simplicity in the law. Applications for

<sup>193</sup> *P v K* [2003] 2 NZLR 787, para 190 (HC) Heath J.

<sup>194</sup> *P v K* [2003] 2 NZLR 787, para 206 (HC) Heath J.

<sup>195</sup> Guardianship Act 1968, s 8 and s 11(1)(b).

<sup>196</sup> United Nations Convention on the Rights of the Child (20 November 1989) [1993] NZTS No 3, art 7(1).

<sup>197</sup> Guardianship Act 1968, s 8, and Care of Children Act 2004, s 27.

adoption and guardianship cannot be made until after the birth of the child, leaving the donor parent and child in an uncertain position.

- 6.32 Below, we consider whether a known donor in this scenario should be able to be recognised as a legal parent and conclude that there should be a mechanism to allow this.

### **Consultations with families created by known donor insemination**

- 6.33 In consultation meetings we met one single woman who was intending to conceive artificially with a known donor on the basis he would be a full parent along with the mother. The couple were concerned that, despite their intentions, the method of conception they chose meant that all his rights and liabilities as a parent would be extinguished. The result was that the child would have only one legal parent. The child is clearly disadvantaged in this situation. The father would not have the duties and powers to provide for or protect the child. Neither would the law recognise his maintenance responsibilities towards the child, whether during his lifetime or after his death.
- 6.34 We consulted with 27 women in same-sex relationships who had children within the relationship. Over half had used a known donor who was frequently a gay man, and many of these had conceived by self-insemination. Arrangements in these families varied enormously from the donor having little ongoing contact to donors taking a parental role equal to the women. The majority of donors appeared to play a limited but regular role in the child's life, and the scheme of the Status of Children Amendment Act 2004 and the Care of Children Act 2004, with its provisions for extinction of parental liabilities but enforceable contact agreements, suited and matched their family arrangements. However, there was consensus that where the donor was an equal parent, he should be enabled to be recognised as such and that the proposed law was inadequate.<sup>198</sup>
- 6.35 We consulted with 10 "known donors" or intending donors whose children varied in age. Generally, their arrangements appeared harmonious, and all were playing some role in the parenting of the child or intended to do so. In some cases, they saw themselves as a donor helping out a friend; more often their identity was as a father but secondary parent to the "mothers". However, in two cases, the men saw themselves as equally active participants and were unhappy that the law denied them parental status. One consultee wrote in these terms:

There is no way that I wanted to be or would have agreed to being solely a donor – I wanted to be an active participant in the parenting process and this was agreed to ... I was present at both the births and have looked after the boys in the weekends and at other times from the age of 6 months old. I am registered on both boys, birth certificates as the father. Although under the current legislation I don't have the full rights of a parent, given the non-sexual nature of the conception, I am genetically and in practice their father and I share an informal joint custody arrangement with their mothers.

All of our extended families have embraced the birth of the boys and they enjoy a loving, secure and stimulating upbringing within a large and diverse family, which in many ways resembles earlier extended familial structures – which were the norm for many societies before the development of the nuclear family.

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<sup>198</sup> At the time of consultations, the Care of Children Act 2004 was in Bill form.

While there are many issues/scenarios which impact on both heterosexuals and homosexuals when contemplating legislation of this kind, and it would be difficult to capture every eventuality, my desire for any new legislation would be that it can be as inclusive of individual circumstance as possible. My intent when I embarked on this journey of being a parent was to be as involved and as committed as I could be within the framework of the personal circumstances of those involved. I would hate for any new legislation to either nullify my current role and status or make it more difficult for a gay man like myself to become a participating parent.

I also have a concern with the current proposals where in some circumstances the details of the donors are either not on the birth certificate or officially recorded elsewhere. I believe that it is a basic right of children to know (where possible) who [their] genetic parents are ... I believe the provision of genetic material to assist create a life is not an act to be taken lightly ...<sup>199</sup>

- 6.36 Men who had conceived with a lesbian couple supported the reform that granted the mother's partner parental status, since the reality was that she was a full parent to the child. However, they considered that as a consequence the law should not deny parental status to the donor where that had been the intention.

### **Legislative and judicial approaches**

- 6.37 The problem of dealing with the rights and responsibilities of known donors is not unique to New Zealand. Most Western nations have enacted legislation in the last 20 to 30 years in response to the legal issues arising from using donated gametes as a means of conception. The essential features of the legislation are very similar: upon birth of the child, parental status is transferred automatically from the sperm donor to the husband (or, in some cases, male partner) of the birth mother. Usually the legislation automatically extinguishes all legal liabilities and rights of the donor at the same time. In most cases, the legislation treats known and unknown gamete donors identically, irrespective of the intentions of the adults or the future reality of the child's family life. As in New Zealand, courts in these countries have struggled with the issues raised by the way the laws apply to less traditional families, who in most cases were not contemplated when the laws were drafted.

#### *Overseas legislation*

- 6.38 In Australia, donor gamete conception is governed in both federal and state laws.<sup>200</sup> States have enacted legislation dealing with parentage<sup>201</sup> in cases of donor gamete conception and have established very similar rules to those in New Zealand.
- 6.39 Two Australian states have recently extended parenthood to the same-sex partner of the mother. The Australian Capital Territory's Parentage Act 2004 provides that: "[a] person is presumed to be a parent of a child if the person was in a domestic partnership with the woman who gave birth to the child at any time during the period beginning not earlier than 44 weeks, and ending not later than 20 weeks,

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<sup>199</sup> Submission 41.

<sup>200</sup> Section 60H of the Family Law Act 1975 (Cth) was introduced in 1983 to resolve issues surrounding the status of donor offspring and their parents.

<sup>201</sup> These are the Parentage Act 2004 (ACT), Status of Children Act 1996 (NSW), Status of Children Act (NT), Status of Children Act 1978 (Qld), Family Relationships Act 1975 (SA), Status of Children Act 1974 (Tas), Infertility Treatment Act 1995 (Vic) and Status of Children Act 1974 (Vic), Human Reproductive Technology Act 1991 (WA) and Artificial Conception Act 1985 (WA).

before the birth of the child”.<sup>202</sup> This presumption applies to both opposite- and same-sex couples; however, section 14 of the Act provides that “a child cannot have more than 2 parents at any one time”.

- 6.40 In Western Australia, the Artificial Conception Act 1985 was amended in 2002<sup>203</sup> so that the transfer of parentage to a mother’s partner applies equally to same-sex and opposite-sex couples.<sup>204</sup> Neither of these states provide for a known donor to retain, or be able to access, legal parental status.
- 6.41 In the United States, most states have legislation dealing with parentage following artificial insemination. In many states, the law is based on the Uniform Parentage Act 1973, which provided for the transfer of parentage in a similar way to New Zealand’s 1987 law, but on the condition, among other things, that the conception procedure is carried out by a licensed physician.<sup>205</sup> Other states have provisions that do not require the intervention of a licensed physician.<sup>206</sup> In some states, the transfer of legal parentage is dependent on the woman being married, so parentage will only be allocated to a treated woman’s husband, not her opposite-sex or same-sex partner.
- 6.42 Three states (New Hampshire,<sup>207</sup> New Jersey<sup>208</sup> and New Mexico<sup>209</sup>) have legislation that enables donors to effectively “contract” back into or retain their status as a parent in law, with the consent of the mother and under certain circumstances. In New Hampshire this can only happen if the genetic parents are unmarried.

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<sup>202</sup> Parentage Act 2004 (ACT), s 8(1).

<sup>203</sup> By the Western Australian Acts Amendment (Lesbian and Gay Reform) Act 2002 (WA), s 26.

<sup>204</sup> Artificial Conception Act 1985 (WA), s 6A.

<sup>205</sup> See Alaska: Stat 25.20.045 (2004), Alabama: Code of Ala 26-17-21 (2004), California: Cal Fam Code 7613 (2004), Colorado: CRS 19-4-106 (2004), Montana: MCA 40-6-106 (2004), Minnesota: Minn Stat 257.56 (2003), New Jersey: NJ Stat Ann 9:17-44 (2004), Nevada: NRS 126.061 (2004), New Mexico: NM Stat Ann 40-11-6 (2004), New York: NY CLS Dom Rel 73 (2004), Wisconsin: Wis Stat 891.40 (2004).

<sup>206</sup> See Maryland: Md Estates and Trusts Code Ann 1-206 (2003), Georgia: OCGA 19-7-21 (2004), Idaho: Code 39-5405 (2004), Florida: Fla Stat 742.11 (2004), Massachusetts: ALM GL ch 46 4B (2004), Michigan: MCLS 333.2824 (2004), Tennessee: Tenn Code Ann 68-3-306 (2004), Oregon: ORS 109.243 (2003), Oklahoma: 10 Okl St 552 (2004), North Carolina: NC Gen Stat 49A-1 (2004), New Hampshire: RSA 168-B:3 (2004).

<sup>207</sup> NH RSA 168-B:3 (I): “... a man is presumed to be the father of a child if ... (e) As an unmarried donor of sperm for use in artificial insemination or in vitro fertilization, he and an unmarried woman, who under RSA 168-B:2 would be the mother of the child, follow the procedures in RSA 168-B:10–12 or 168-B:13–15 and agree in writing in advance of the procedure that the donor shall be the father” (our emphasis).

<sup>208</sup> NJ Stat Ann 9:17-44(b) (2004): “Unless the donor of semen and the woman have entered into a written contract to the contrary, the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor’s wife is treated in law as if he were not the father of a child thereby conceived and shall have no rights or duties stemming from the conception of a child” (our emphasis).

<sup>209</sup> NM Stat Ann 40-11-6(B) (2004): “Any donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor’s wife may be treated as if he were the natural father of the child thereby conceived if he so consents in writing signed by him and the woman” (our emphasis). A similar provision in Washington was repealed in 2002, see Wash Rev Code Ann 26.26.050(2).

- 6.43 In the United Kingdom, sections 27 and 28 of the Human Fertilisation and Embryology Act 1990 establish rules analogous to New Zealand legislation.<sup>210</sup> The legislation does not allow for the transfer of parenthood to a same-sex partner, nor does it make allowance for a known donor to be a parent.<sup>211</sup>
- 6.44 In Canada, donor gamete conception is governed by the Assisted Human Reproduction Act 2004, but the question of parentage is dealt with under provincial law. Quebec has a provision in similar terms to the Status of Children Amendment Act 2004 that passes parental status to the female partner of a mother, as well as to a male partner.<sup>212</sup> Both Newfoundland and the Yukon have legislation passing parenthood to the mother's husband or to a man with whom she was cohabiting, providing the husband or man consented to her insemination, and deeming the sperm donor not to have the status of a legal parent.<sup>213</sup>

*Court responses to disputes involving known donors*<sup>214</sup>

- 6.45 Courts have struggled to find appropriate legal principles upon which to determine disputes about parenting in “known donor” families.
- 6.46 The Australian case of *Re Patrick*<sup>215</sup> arose from similar facts to *P v K*<sup>216</sup> and similarly illustrated the difficulty encountered by the courts when trying to apply the law strictly to non-traditional family forms. The court found that the known donor could not be considered a “parent” under the deeming rules; however, it accepted that the father would not have given the mother his sperm unless he was going to play a role in the child's life and noted his “active involvement in Patrick's conception and his ongoing efforts to build a relationship with his son”. The

<sup>210</sup> Human Fertilisation and Embryology Act 1990 (UK), sch 3, para 5. Under section 27, the woman who carries and gives birth to a child conceived by donor conception is the mother. Section 28 deems her husband, or (if she is unmarried) a man being treated with her, to be the father. Under section 28(6), a sperm donor is deemed not to have status as a father, provided his sperm has been donated with the requisite consent.

<sup>211</sup> Where a child is conceived by artificial insemination, section 30 of the Human Fertilisation and Embryology Act 1990 (UK) provides for “parental orders in favour of gamete donors” that can pass parenthood to a genetic, intending parent. However, that provision is directed at surrogacy arrangements and applies only where the donors are husband and wife and where both their gametes have been carried by another woman.

<sup>212</sup> Civil Code of Quebec SQ 1991, c C-64, art 538.2.

<sup>213</sup> Children's Law Act RSNL 1990, c C-13, s 12, Children's Law Act RSY 2002, c C-31, s 13. See also J Seymour and S Magri ART, *Surrogacy and Legal Parentage: A Comparative Legislative Review* (Victorian Law Reform Commission Occasional Paper, Melbourne, 2004) 14.

<sup>214</sup> In New Zealand and elsewhere, there has been litigation around the issue of whether the mother's partner consented to the donor insemination. See, for example, *W v CIR* [1998] NZFLR 817; *Re: CH (Contact: Parentage)* [1996] 1 FLR 569, [1996] Fam Law 274 (UK).

<sup>215</sup> *Re Patrick (An Application Concerning Contact)* [2002] Fam CA 193, para 301.

<sup>216</sup> In *Re Patrick*, a known donor had entered an agreement with a lesbian couple to donate his sperm so that one of them could conceive.

judge granted his application for increased contact on the grounds of Patrick's best interests.<sup>217</sup> He observed:

It is time for State laws to be enacted to make available to lesbian women and their known donors a well regulated scheme with all of the safeguards, medical and otherwise available to heterosexual couples. There is no doubt that the parties in this case would have benefited from such services and may not be in the position they are today had they been able to access counselling currently available to heterosexual couples.<sup>218</sup>

6.47 Cases involving similar circumstances to *P v K* have arisen in the United States, and there have been a variety of responses to attempts by known donors (and the partners of women who have used donor gamete conception) to claim parental status and access rights upon relationship break-up. In a Californian case,<sup>219</sup> the court held that since the father had given his sperm directly to the appellant mother he remained a parent to the child, as the statute required that the sperm be given instead to a licensed physician for parental status to be excluded. The opposite solution resulted in another case.<sup>220</sup> Courts have also resorted to constitutional arguments<sup>221</sup> and the concept of estoppel<sup>222</sup> in their efforts to resolve issues involving known donors. In the United States, courts considering parenting laws have also placed emphasis on the intention of the parties and their actions after birth.<sup>223</sup>

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<sup>217</sup> The judge cited other cases in Australia where the court had encountered similar problems: *In the Matter of an Application Pursuant to the Births, Deaths and Marriages Registrations Act* (Supreme Court of the ACT, 5th May 2000, unreported) and *PJ v DOCS* [1990] NSW SC 340. Also, in *Re B and J* 21 Fam LR 186, the Family Court of Australia found that the statutory scheme under section 60H of the Family Law Act 1975 (Cth) meant that a known sperm donor could not be liable for child support. In that case, the agreement had been that the donor would not have any duties or play a significant "parenting" role, although he was recorded on the birth certificate. The court based its decision on the straightforward interpretation of the legislation.

<sup>218</sup> *Re Patrick (An Application Concerning Contact)* [2002] Fam CA 193, para 322.

<sup>219</sup> *Jhordan C v Mary K* (1986) 179 Cal App 3d 386; 224 Cal Rptr 530.

<sup>220</sup> *McIntyre v Crouch* (1989) 780 P 2d 239.

<sup>221</sup> *C O v W S et al* (1994) 64 Ohio Misc 2d 9; 639 NE 2d 523. The court stated that "A statute which absolutely extinguishes a father's efforts to assert the rights and responsibilities of being a father, in a case with such facts as those [in the case before the court], runs contrary to due process safeguards".

<sup>222</sup> *Thomas S v Robin Y* (1994) 209 AD 2d 298, 618 NYS 2d 356 (App Div); overturning (1993) 59 NYS 2d 377 (Fam Ct). The court used the concept of estoppel to prevent a mother seeking to deny a known sperm donor legal recognition of his relationship to their child, despite an oral agreement that he would have no parental rights or obligations and that the child would be brought up in a two-parent household with two mothers. The decision was based on factors including that at the start of the child's life, the mother had fostered a relationship between the known donor-father and the child. The court also found that the child's best interests were served by acknowledging her filial link with her father.

<sup>223</sup> *JAL v EPH* (1996) 682 A 2d 1314, 1320. The court said: "where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent. Where such a relationship is shown, our courts recognize that the child's best interest requires that the third party be granted standing ...".



- 6.48 Evidence of intention was also considered relevant in an English case<sup>224</sup> concerning the paternity of a child born from sperm donated by the mother's partner during their relationship, but conceived after they had separated. The father was nevertheless considered to be a parent because of their "joint enterprise to conceive a child" and was thus unable to escape liability for maintenance.<sup>225</sup>
- 6.49 In 1993, the European Commission declared inadmissible an application by a known sperm donor seeking greater contact with his child on the grounds that he lacked "family life" as it is defined under the European Convention on Human Rights, since it required "close personal ties in addition to parenthood". This was despite him having had contact with the child since birth.<sup>226</sup> In Canada, the Ontario Supreme Court has held that the legislature in that state intended to limit parental status to two people.<sup>227</sup>
- 6.50 In conclusion, the international judicial approaches to the difficulties facing families created by known-donor insemination are diverse. In all cases the courts are constrained by legislative schemes that usually make no provision for the legal parenthood of a same-sex partner or a known donor father who had agreed with the women to be a full legal parent to the child.

### The view of the Commission

- 6.51 There are no apparent policy reasons why a child and family should lose the advantage of having a legal father, where the genetic father wishes and intends to act as a father from birth, simply because of the method of conception. The child will lack the legal rights he or she would otherwise obtain from his or her father such as citizenship or inheritance. Similarly, a genetic father who intends and wishes to take on all the rights and responsibilities of parenthood should not lose that legal relationship with his child purely because of the method of conception. Further, the unequal treatment of the genetic father in relation to the mother and her partner, if she has one, could have the potential to negatively affect parental relationships where the agreement was they all be legal parents.
- 6.52 The existing deeming rules should not be changed for this discrete group of people. However, the issues surrounding legal status for known donors are best dealt with by a legislative scheme. An alternative would be to let the court determine whether a donor could have parental status on a case-by-case basis, but this is cumbersome and expensive and in our view unnecessary. Genetic parents gain parental status by automatic operation of the law, and so the only limitations should be those necessary to

<sup>224</sup> *Re B (Parentage)* [1996] 2 FLR 15. See *X v Y* [2002] SLT (Sh Ct) 161, however, where an alternative approach was taken in a Scottish case involving a same-sex couple and known donor. The known donor was granted parental rights and responsibilities in the place of the mother's lesbian partner, who was found not to fall within the scope of "family".

<sup>225</sup> The court also expressed the view that unless there was clear legislative intent to the contrary, the general principle was that fatherhood concerned genetics.

<sup>226</sup> *M v Netherlands* (1993) 74 DR 120.

<sup>227</sup> *AA and BB and CC* 225 DLR (4th) 371. The known sperm donor was the legal father under Ontario law, but the reality of the child's life was that it was brought up with two mothers, both equally fulfilling the role of parent. The donor was a regular visitor to the house but did not make any financial contributions, nor play a role as a parent as the mother's same-sex partner did. However, other than adoption, the court found that there was no legal basis according to which it could make the same-sex partner a parent, as well as the two genetic parents.

retain the integrity of the donor gamete conception legislative scheme. We recommend a simple scheme should operate to enable donors to “opt into” parenthood so long as the recipient couple or single mother agrees.

- 6.53 The law relating to the status of donors should be guided by the following principles:
- If there is a donor (and thus genetic parent) who, in agreement with the other parent(s), gives gametes on the basis of being a legal parent to the resulting child, then the law should recognise him or her as a parent.
  - If a donor gives gametes on the basis of relinquishing legal parenthood to others, the law should enable that, as to do otherwise would deter donors from donating and thus hinder people who require donor gametes to create a family from doing so.
  - Where a donor gives gametes on the basis of relinquishing legal parenthood, that decision should be determinative from the point of conception. Only two exceptions should exist: first, the situation under the existing law where parental status can be restored to a donor if they assume a relationship with the birth mother; secondly, where all parties agree that the donor should become a legal parent.
- 6.54 Outside those situations, the donor’s status should not change. This reflects the intentions of all involved. Allowing a donor to change his or her mind later would create uncertainty and destabilise the child’s family. However, the law should ensure that identifying information about the donor is always retained and accessible for the child.<sup>228</sup>

*An automatic deeming model?*

- 6.55 Some consultees queried whether a deeming rule could operate automatically to give the recipient(s) and their donor all parental status upon birth in a way that would reflect the reality of the planned family.
- 6.56 For such a model to work, the law would have to find a way of automatically differentiating between an “unknown” donor gamete conception and a situation where both the recipient(s) and the donor intended to parent. It could do this by using the model adopted in some states in the United States that differentiates between clinic conception and home conception.<sup>229</sup> However, we do not consider this a viable option, since in many instances known donor families are in fact created with the assistance of clinics. Its effect could be to deter people from using clinics to conceive their child. This would not be desirable, since clinics provide other health services, for example, screening gametes for diseases such as HIV, and provide important counselling services to prospective parents.
- 6.57 In addition, because of the novel nature of the families envisaged, we consider there should be some preconditions before legal parental status is awarded to more than two persons. Although a simpler mechanism for transferring parentage than adoption can (and should, given the genetic relations involved) be introduced, there needs to be a degree of formality to avoid the potential for future dispute and conflict. People involved in these arrangements need to be clearly aware of the implications of their actions, so that the possibility for misunderstandings

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<sup>228</sup> See chapter 10.

<sup>229</sup> See para 6.41 above.



and future dispute can be minimised. For these reasons, we do not consider an automatic model is workable or appropriate.

### Proposed model

- 6.58 We propose that Part 2 of the Status of Children Act 1969<sup>230</sup> be amended to enable a known donor to be accorded legal parental status under certain circumstances. Upon receipt of the stipulated documents and evidence, registrars of the Family Court should approve an appointment of a known donor as a parent in two stages – in an interim manner before conception or birth, and giving final approval upon proof that the donor is the genetic parent. Registrars should not approve the appointment unless, having made all reasonable inquiries, they are satisfied that the documentation and evidence appears to be in order.<sup>231</sup> Since the task does not demand the exercise of judicial discretion, it should be carried out by a Family Court registrar.<sup>232</sup> In 1994, a power was extended to registrars with respect to the dissolution of marriage where there is no dispute.<sup>233</sup> More recently, section 25 of the Care of Children Act 2004 has extended registrars' powers, and concurrently lessened the court's role, with regard to the appointment of eligible partners of parents as additional guardians.<sup>234</sup> Recognition of a genetic parent as a legal parent will be a more straightforward task.
- 6.59 We recommend that known donors who will be a child's second parent be treated differently from those who will be a child's third parent. The distinction is justified on the basis of the different form of the two family types. The former involves two individuals making a decision to parent their genetic child together. Although the individuals are unlikely to be in an intimate relationship, their decision to parent a child together suggests they have made a long-term emotional commitment to each other. The justification for treating them differently from genetic parents in the rest of society, in terms of requiring legal advice and/or counselling, is difficult to identify. Where the donor will be the child's third parent, the family will involve two parents who are in an intimate relationship with each other, and a third parent who is unlikely to live with the couple. Difficulties or conflict may be more likely to occur.

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<sup>230</sup> As introduced by the Status of Children Amendment Act 2004 to take effect in 1 July 2005.

<sup>231</sup> This is in line with the requirements of section 25 of the Care of Children Act 2004, under which a registrar can exercise the function of approving an appointment of eligible partners of parents as additional guardians.

<sup>232</sup> Although judges should also be able to exercise the function.

<sup>233</sup> Family Proceedings Act 1980, s 38(2) (substituted by the Family Proceedings Amendment Act 1994).

<sup>234</sup> Care of Children Act 2004, s 25. However, the power to appoint other additional guardians remains with the court solely – s 27.

## *Legal parenthood for known donor as child's second parent*

### **Recommendation**

*This recommendation applies where a donor and woman intend to conceive or have conceived a child by assisted human reproduction on the basis that the donor will be a legal parent and raise the child jointly with the mother.*

**R9** Part 2 of the Status of Children Act 1969<sup>235</sup> should be amended to provide that the woman can appoint the donor to be a parent of the child in two stages.

Stage 1: Before conception or birth, the woman and donor should present to a registrar of the Family Court a form accompanied by:

- a sworn statement by the woman that the donor will be a genetic parent of the child and that she wants him or her to be a legal parent and a sworn statement by the donor that he or she will be a genetic parent of the child and wants to be a legal parent.

The registrar, being satisfied, having made all reasonable inquiries, that the documentation appears to be in order, shall give interim approval to the appointment.

Stage 2: After the birth of the child, upon proof of the named donor's genetic parentage of the child, the registrar shall approve the application and a parent and child relationship shall exist.

## *Legal parenthood for known donor as child's third parent*

### **Recommendation**

*This recommendation applies where a donor and couple intend to conceive or have conceived a child by assisted human reproduction on the basis that the donor will be a legal parent and raise the child jointly with the couple.*

**R10** Part 2 of the Status of Children Act 1969<sup>236</sup> should be amended to provide that the couple can appoint the donor to be a parent of the child in two stages.

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<sup>235</sup> As amended by the Status of Children Amendment Act 2004.

<sup>236</sup> As amended by the Status of Children Amendment Act 2004.

Stage 1: Before conception or birth, the couple and donor should present to a registrar of the Family Court a form accompanied by:

- a sworn statement by the woman and her partner that the donor will be a genetic parent of the child and that they want him or her to be a legal parent and a sworn statement by the donor that he or she will be a genetic parent of the child and that he or she wants to be a legal parent;
- evidence that all three parties have received independent legal advice;
- evidence that all three parties have received counselling about the issues raised by their planned family; and
- an agreement, in similar terms to an agreement under section 41 of the Care of Children Act 2004.

The registrar, being satisfied, having made all reasonable inquiries, that the documentation and evidence appears to be in order, shall give interim approval to the appointment.

Stage 2: After the birth of the child, upon proof of the named donor's genetic parentage of the child, the registrar shall approve the appointment and a parent and child relationship shall exist.

### *Effect of approving a known donor*

- 6.60 The effect of approval of the appointment would be to override the provisions of Part 2 of the Status of Children Act 1969,<sup>237</sup> which would otherwise extinguish the parenthood of the donor. The deeming rules that extinguish donor status will remain the default position for donor conceptions. Since evidence of a genetic relationship will be established, once approval is obtained it will be conclusive evidence of parenthood.<sup>238</sup> The donor will have the same parental status as any other parent in New Zealand, incurring the same liabilities. The child will have the same rights in respect of their donor as other children have from legal parenthood.
- 6.61 There will, therefore, be some onus on the registrar or judge to satisfy himself or herself that independent legal advice has in reality been obtained. Due to the cost of DNA testing we have considered whether it should be required. Naturally conceiving parents can acknowledge a father's paternity without DNA evidence. However, in the interests of certainty we prefer the model set out above.
- 6.62 As a legal parent, the donor should be able to be registered as a parent of the child, along with the mother and her partner, with the Registrar-General of Births, Deaths and Marriages. This will require amendment to section 15(3)(b) of the Births, Deaths, and Marriages Registration Act 1995.

<sup>237</sup> As introduced by the Status of Children Amendment Act 2004, to take effect in 1 July 2005.

<sup>238</sup> With the theoretical exception of the child being placed for adoption in the future.

- 6.63 In the case of an unpartnered woman, the model will provide the child with a second legal parent, which will be of significant advantage to the child. The proposed recommendation acknowledges and makes legal provision for children in a particular family type that exists in New Zealand. It supports a collaborative approach to parenting. It enhances the child's access to genetic identity and heritage.
- 6.64 Also implicit in the recommendation is the recognition placed on genetic parenthood and intention. This is consistent with the underlying policy of Part 2 of the Status of Children Act 1969, which passes parenthood to the non-genetic parent on the basis of intention. It should do the same with regard to a genetic parent where the intention is similar.

### *Timing*

- 6.65 To ensure certainty and clarity immediately upon birth, the process described above should be able to be undertaken, and interim approval obtained, before conception or birth. This also serves to protect the status and interests of the known donor, who will have contributed sperm or eggs on the understanding that his or her legal status as a parent will be affirmed. If dispute arises, the donor's parental status is assured in law, so long as he or she is the genetic parent of the child.

### *Requirement for legal advice and counselling*

- 6.66 We recognise that the requirements in the second model mean the parties will incur an additional cost. This was a concern of many consultees. Nevertheless, we consider it justified because of the need to ensure that each parent understands the legal implications and so that potential for conflict is minimised. On this basis, we also recommend that all parties entering an agreement under section 41 of the Care of Children Act 2004 should obtain independent legal advice. We note that ethical obligations on clinics before IVF surrogacy arrangements are entered into require the parties to undertake counselling and this situation should be no different in that regard.<sup>239</sup>

### **More than two legal parents**

- 6.67 Until now, legal parenthood has only ever been granted to two persons in relation to one child – the genetic mother and genetic father or their proxies in adoption and donor gamete conception. We have considered whether valid policy reasons exist to exclude the possibility of more than two parents at law. There may be a heightened potential for conflict; however, that in itself is not a reason to limit the numbers of parents. There is no restriction on how many guardians may be appointed in relation to one child,<sup>240</sup> although the potential for conflict will be a significant factor in the court's decision whether or not to appoint an additional

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<sup>239</sup> See chapter 7, para 7.15.

<sup>240</sup> Guardianship Act 1968, s 8, and Care of Children Act 2004, s 27. Under the Care of Children Act 2004, with the exception of some step-parents, the decision whether to appoint an additional guardian is left to the court, which will be guided by the best interests of the child. In consultation, we were advised of a situation where the court appointed three guardians (the mother's partner, the known donor and his partner) in addition to the mother, thus providing the child, who was by then 8 years old, with four guardians.

guardian.<sup>241</sup> The additional measures we recommend are aimed at reducing the potential for conflict and enabling it to be addressed by way of an agreed arrangement.

- 6.68 We also note that these children, and arrangements as to their creation, care and development, have usually been the subject of significant deliberation before conception and birth. While conflict can never be avoided, it is hoped that the greater deliberation and thought required before the parents enter this sort of arrangement will result in less potential conflict. Where conflict does arise, the parties will be able to seek direction from the court under the Care of Children Act 2004.
- 6.69 Should the relationships break down, a potential for difficulty is how the court will deal with issues of custody and access between three parents. However, the courts encounter the same issues when stepfamilies separate and there are two genetic parents and another “social” parent who may play a significant role in the child’s life and with whom ongoing contact may be in the child’s best interests.<sup>242</sup>
- 6.70 We have also taken note of the fact that it is not uncommon for children to have multiple “de facto” parent figures in their lives through step-parenting or customary practices in Māori, Pacific Island and other cultures where extended families exist. Open adoption, which has occurred in New Zealand over the last 20 years, effectively enables children to be aware of, and interact with, four parents at one time, although only two are the legal parents.<sup>243</sup> We are of the view that legal parenthood for three persons can be naturally encompassed within the dimensions of New Zealand society.
- 6.71 Furthermore, rapidly progressing human reproductive science may enable a child to have three genetic parents in the future. All such developments strain the logic of restricting the law to an unalterable two-parent family model.<sup>244</sup>
- 6.72 An alternative to a three-parent model would be to enable the mother’s partner to relinquish his or her parenthood in favour of the donor father, if that was the decision of the three parents. However, we do not see why this should be necessary. We do not consider that allowing the donor father his parental status should be at the expense of the child’s legal relationship with the mother’s partner, given his or her primary parenting role.

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<sup>241</sup> The Family Court has taken a cautious approach towards appointing additional guardians where there has been pre-existing conflict. See *Family Law in New Zealand* (11ed, LexisNexis NZ, Wellington, 2003) vol 1, Court-Appointed Guardians, 664, para 6.204. See also, for example, *Reid v Sharp* (3 March 1999) DC Waitakere FP 341/93.

<sup>242</sup> See also the comments made in relation to creating three parents at law where there has been mistaken procedures at chapter 8, paras 8.15–8.17.

<sup>243</sup> Although the courts have never recognised that a child has more than two legal parents, it has moved towards recognition that more than two people may have a parenting link to one child. In *H v Y* [2005] NZFLR 152, the court has opened the way for a declaration of paternity to be issued in relation to an adopted person who already has a legal father. However, no legal rights or responsibilities would flow from the declaration.

<sup>244</sup> For example, it is reported that an egg can be enucleated and another egg’s DNA transplanted and then fertilised. If this was then placed in a woman unrelated to either egg donor the child would have one biological parent and three genetic parents as a enucleated egg still carries some mitochondrial DNA. See also B Sykes *Adams Curse: A Future Without Men* (Bantam Press, London, 2003).

- 6.73 Finally, it may be argued that children with three parents are being unfairly advantaged over children with only two parents. Given that there are already enormous disparities between children based on the resources of their parents, the involvement of wider family in their parenting and care arrangements, and the quality of parenting, we do not consider this a valid concern.

## SECTION 41 AGREEMENTS

- 6.74 As indicated, section 41 of the Care of Children Act 2004 responds to *P v K* in dealing with the status of agreements between known donors and parents about the donor's involvement in the child's life. It enables the parties to the agreement to ask the court to formalise some or all aspects of the agreement in a court order.<sup>245</sup> If a dispute arises, the parties can apply to the court for direction and the court may make any order that it thinks "proper".<sup>246</sup>
- 6.75 We have two concerns with section 41 as currently framed. One relates to the disregard for the intentions of the parties where the court is given the power to vary the agreement. The other is the anomalous result when a donor parent has an enhanced parenting role in the life of the child but remains without parental liabilities.

### **Court's ability to vary agreement**

- 6.76 Section 41 does not make an order presumptively enforceable, an option set out in the Discussion Paper.<sup>247</sup> However, in line with section 4 of the Care of Children Act 2004, the court's discretion is to be exercised in accordance with the child's welfare and best interests. A donor who comes to a limited agreement as to rights and responsibilities prior to conception can later apply to the court for an order that gives the donor substantially greater involvement in the child's life.<sup>248</sup> This can be regardless of whether the child is living in a stable and happy home, knows and has access to the donor parent, and is being well parented by his or her legal parents. It could be entirely contrary to the legal parent's wishes and intentions of anyone prior to conception.
- 6.77 The discretion is unfettered and, as such, is at odds with other aspects of legal parenthood in donor gamete conception, where intentions formed prior to the creation of the child form the basis of parenthood – in fact and law.
- 6.78 The width of the court's discretion has the potential to create anxiety and mistrust between the parents and donor whenever a difficulty arises. In a sense, there is an ongoing uncertainty and looming fear of a major disruption that might occur. This creates real stress within the child's family. While parental breakdown and court-imposed solutions have this potential in any family, where donors and legal parents

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<sup>245</sup> Care of Children Act 2004, s 41(3).

<sup>246</sup> Care of Children Act 2004, s 41(6).

<sup>247</sup> New Zealand Law Commission *New Issues in Legal Parenthood* (NZLC PP54, Wellington, 2004) paras 6.18–6.25.

<sup>248</sup> This is what occurred in *P v K* where the parent and donor's agreement for 14 days maximum per year with the child was altered when the Family Court awarded him one week in four. While this was before the introduction of the Care of Children Act 2004, section 41 continues to enable the court to put aside the agreements of the parties under a very broad discretion.

are concerned the situation is different. The starting point was consciously and deliberately to parent in a particular way with chosen persons.

- 6.79 Consultees using known donors expressed fear about this aspect of the law. We also note the reason given by single women and both opposite- and same-sex recipient parents for using clinic-recruited unidentified donors was that if they had used a known donor, their family would be exposed to the risk that the donor might later change his or her mind and want a role with the child and interfere in their family. That situation was generally considered intolerable and created a large amount of anxiety at consultation meetings. Fear was expressed among some recipient families about the movement towards openness for this reason.
- 6.80 We note these are similar to the fears of adoptive parents about “interference” from a birth parent and that the open adoption scheme which operates is premised upon the fact the adoptive parents will always remain the legal parents and have the ultimate control as to contact by the birth parent. We note that in the Law Commission’s adoption report a recommendation was made that parenting plans between birth and adoptive parents should continue to be unenforceable in law.<sup>249</sup>
- 6.81 On the other hand, given the statements made by adult adoptees and donor-conceived children of a sense of loss from not having known their birth parents or donors when growing up, it seems that the law should not discourage known-donor arrangements in either same- or opposite-sex parent families, just as it should not discourage open adoptions.
- 6.82 There is an added issue in a same-sex parent family of the absence of an adult opposite-gender role model. Our consultation suggests lesbian parents and single women using donor gametes go out of their way to arrange for their children to have an adult male role model, and literature indicates that outcomes for children in lesbian families are as favourable as those in opposite-sex parent families.<sup>250</sup> Nevertheless it is surely a positive thing that the child can know their donor parent in childhood and have contact. Where the child’s parents have agreed to this, the law should be supportive of it. Arguably, as currently framed, the law has real potential to discourage parents from entering into known-donor arrangements and to instead use unidentified donors.
- 6.83 We appreciate that some men may accept a donor arrangement because it is the only option for parenthood and they really want a full parental role. Our recommendation that donors be legal parents will enable them to have a choice. Once an agreement is made and embodied into a court order under section 41 then, in any dispute we consider that the court should start from the presumption that it should be presumptively enforced on its terms, unless that is not in the best interests of the child. All things being equal, the court should not alter the arrangements, unless it is demonstrably in the best interests of the child to do so, taking account of the expressed pre-conception intentions and the anxiety and disruption the order will cause to the objecting legal parents and the child’s family.
- 6.84 We consider section 41 should be amended to provide that the agreements are to be presumptively enforceable. Another alternative with similar effect would be

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<sup>249</sup> This is because refusal to comply might ultimately lead to the discharge of the adoption order, and the resulting upheaval would be contrary to the child’s best interests – New Zealand Law Commission *Adoption and Its Alternatives* (NZLC R65, Wellington, 2000), para 113.

<sup>250</sup> See our discussion regarding this at chapter 2, paras 2.10–2.18 and n43.



to require the court to take account of the intentions of the parties when hearing disputes under section 41. Because of the inherent uncertainties that exist in section 41, we also consider that it would be sensible for all parties to have obtained independent legal advice before applying to the court to have a section 41 agreement embodied in a court order.

### Recommendations

**R11** Section 41(6) of the Care of Children Act 2004 should be amended to provide for a presumption that a pre-conception agreement made between the parties that is the subject of a court consent order is enforceable on its terms, unless the court considers it is demonstrably in the child's best interests to vary it.

**R12** Before the court makes an order under section 41(1)(a) of the Care of Children Act 2004, the parties to the agreement should have obtained independent legal advice.

### Child support liabilities

- 6.85 If the court changes the terms of the consent order and grants the donor (genetic parent) “de facto” status as a parent by making enhanced guardianship and parenting orders in his or her favour, then he or she can be said to have all the benefits and none of the responsibilities of parenthood. In consultations, known donor fathers expressed the view that benefits and responsibilities should go together. We agree and consider this to be a common expectation of the law. As currently framed, the provision creates an anomaly: even parents who have no contact rights with their children are liable for child support.
- 6.86 There is provision under the Child Support Act 1991 for a person to be declared a step-parent in relation to a child, and to thus be liable for child support.<sup>251</sup> That provision has been deemed to apply to the female partner of a mother who had taken on a parental role.<sup>252</sup> In *A v R*,<sup>253</sup> the High Court placed emphasis on the “knowing, acknowledged, and fully participatory assumption of responsibility” on the part of the mother’s partner. However, section 7(4) of the Child Support Act 1991 states that a person considered a donor under the Status of Children legislation cannot be a parent for the purposes of the 1991 Act, and thus cannot be liable for child support.
- 6.87 We consider that where known donors assume a parenting role in relation to their genetic child, whether under a section 41 agreement or otherwise, a provision similar to that relating to step-parent liability for child support should apply. However, this should operate as an exception to the general exclusion in section 7(4). Whether a known donor was liable would depend on the circumstances of the case, and should be reliant on the fact of a knowing and participatory assumption of responsibility.

<sup>251</sup> Child Support Act 1991, s 6, s 7, and s 99.

<sup>252</sup> See *A v R* [1999] NZFLR 249 and *T v T* [1998] NZFLR 776.

<sup>253</sup> *A v R* [1999] NZFLR 249, 258.



### Recommendation

**R13** A new paragraph of section 7(1) of the Child Support Act 1991 should be introduced to provide that, notwithstanding section 7(4) of that Act, a person who has been declared a liable donor by the court shall be liable for child support.

## SHOULD THE LAW CONTINUE TO ENABLE A CHILD TO HAVE ONE LEGAL PARENT?

- 6.88 In effect, the Status of Children Amendment Act 1987 enabled a child to have only one legal parent in the sense that, while not extinguishing the parenthood of a man whose gametes resulted in the conception of a child to an unpartnered woman, it extinguished the rights and liabilities of parenthood. The courts in *P v K* referred to the man's legal status as a "shell father". The Status of Children Act 2004 has removed the "shell", and the parenthood of a donor is extinguished in the same way regardless of whether there is a partner to transfer the parental status to.
- 6.89 The above legal situation arises:
- in the context of donor insemination of single women where the donor intends to relinquish his rights;
  - in the context of donor insemination of single women where the donor intends to be a legal parent but his parenthood is extinguished (we deal with this situation above and recommend the donor be able to "opt in" to legal parenthood).
- 6.90 These situations are to be distinguished from "solo parenthood" in the social context, which usually refers to a parent raising children alone where the children have been conceived naturally and have two legal parents (the genetic parents). The term "solo parenthood" is applied because the parents are living apart, and usually the second parent is not an equally participating parent or may not even be identified.<sup>254</sup>
- 6.91 Research on outcomes for children based upon whether they live in one- or two-parent families indicates that children raised by one parent generally have less favourable outcomes than children raised by two. Importantly, the differences are said to be created by factors such as economic hardship and lack of social support.<sup>255</sup>

<sup>254</sup> Some consultees representing father's groups challenged this term and said that often so-called solo-parent households involved situations where the child could be said to be within a family spread across two households rather than the child of solo parents. Hence, while some children in this class have never had the involvement of their legal father in their lives, and may not even know the identity of this person as he is not named on the child's birth certificate, others have had a fully involved father.

<sup>255</sup> See our discussion at chapter 2, paras 2.10–2.18 and n 43.

- 6.92 A major qualifier on the usefulness of one-parent research for our purposes is that it generally considers the outcomes for naturally conceived children. There are some important group differences that may suggest more favourable outcomes for children being raised by single women who conceive by donor insemination. First, they will typically be older women who have accrued assets.<sup>256</sup> They will also have planned their single parenthood, unlike solo parenthood that is caused by separation or divorce, where the child is at risk of suffering the effects of parental emotional distress.<sup>257</sup>
- 6.93 The single parent consultees were all in their late thirties and had savings, good employment and assets prior to conception. They indicated they had thought carefully about how to provide a father figure for their children. Some still hoped to form a relationship and thus bring a second parent into the family group. Generally, they indicated they parented within a wider circle of family and friends including adult male role models. Some were already taking steps for their child to meet their donor father. None were in receipt of the domestic purposes benefit.
- 6.94 Children with one legal parent can have more than one legal guardian. Some consultees had arranged this. The law allows any number of guardians, their appointment being subject only to considerations of the child's best interests. Also, one legal parent does not necessarily mean there is only one source of emotional support and nurturance. Access to those parenting qualities can come from wider networks or family or friends who create special relationships with the child.
- 6.95 That said, there are undoubted potential benefits to the child in having two rather than one legal parent, given the legal rights that flow from that status and the additional resources that exist as of right. The benefits are more marked in nuclear family models, where the single parent lives alone with the children, than where single parents live in extended families, with their own parents or other relatives. If the mother needs support, then the taxpayer has no-one to seek reimbursement from, as it does in two-legal-parent families. On the other hand, it needs to be kept in mind that not all second parents do contribute child support. Many are unnamed by the beneficiary, and others are on such low wages and high outputs that the contribution to the state is minimal.
- 6.96 The issue is whether, given the potential benefits of two legal parents, the law should be used to prevent sole legal parenthood by donor gamete conception. There would be two possible means of doing this. Amendments could be made to the Status of Children Act 1969 so that unpartnered women were not subject to the provisions. Hence a person who donated gametes to an unpartnered woman would be a legal parent. At the same time, for reasons of consistency, changes would need to be made to the Adoption Act 1955 to prevent single persons from adopting children.

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<sup>256</sup> S Golombok et al "Donor Insemination for Single Heterosexual and Lesbian Women: Issues Concerning the Welfare of the Child" (1994) 9(11) *Human Reproduction* 1972. Also, according to information provided by Fertility Associates, Auckland, the average age for single women and lesbians using donor insemination in 2002 was 39 years – Fertility Associates, Auckland, to the Law Commission (4 October 2004) email.

<sup>257</sup> See R McNair *Outcomes for Children Born of ART in a Diverse Range of Families* (Victorian Law Reform Commission Occasional Paper, Melbourne, 2004) and S Golombok et al "Donor Insemination for Single Heterosexual and Lesbian Women: Issues Concerning the Welfare of the Child" (1994) 9(11) *Human Reproduction* 1972.

- 6.97 Any such amendment, however, would place recipient women and donors in the same situation they were in prior to the enactment of the Status of Children Amendment Act 1987, where anonymous donations were standard to protect the legal status of the altruistic donor. The amendment would be unlikely to prevent women and donors from engaging in such arrangements, but would be likely to recreate incentives for each to keep his identity anonymous so as to avoid legal liability and prevent potential assertion of parental rights. It seems better for the children in these situations if the law encourages identification of their donor fathers.
- 6.98 A second option would be to prohibit clinics from providing donor services to unpartnered women but that would not prevent self-inseminations. If a woman is going to intentionally have a child by donor gametes, it seems better she does so at a clinic because of the health screening protections.
- 6.99 There are other factors that militate against a prohibition. Many children in society are being raised, in fact, as though they have only one legal parent, and so to discriminate against this small group of parents seems unfair and unreasonable. Also, the children may have the benefit of a wide supportive family network, albeit they have only one legal parent, that parent may have more assets than two parents combined, they are less likely to become a “burden” to the taxpayer, and the child may know his or her genetic father in childhood, but in any event will have those details at age 18.<sup>258</sup> Rather than the practice stopping were a law change to be effected, it is likely to be forced underground and so create health risks for the parent and child.
- 6.100 In conclusion, we do not recommend any changes to the law relating to sole legal parenthood in donor gamete conception, but we do recommend that fertility clinics be required to counsel all unpartnered women receiving donor gametes of the importance of appointing a second guardian to their child. This will give the child greater protections than if they have one legal parent and no guardian.

### **Recommendation**

**R14** Fertility clinics should be required under the Human Assisted Reproductive Technology Act 2004 to counsel all unpartnered women receiving donor gametes about the importance of appointing a second person as guardian to their child.

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<sup>258</sup> See chapter 10, paras 10.3–10.5.

## Surrogacy and legal parenthood

### BACKGROUND

- 7.1 **S**URROGACY refers to an arrangement between a woman and another person or persons, in which she agrees to become pregnant, gestate and give birth to a child and then pass the child to the other person(s) to raise from birth as the child's parents. Surrogacy has developed as a last resort option for women who are infertile.

#### **“Traditional” or “partial” surrogacy**

- 7.2 “Traditional” or “partial” surrogacy is where the surrogate mother's egg is used in conception, meaning she is the child's genetic and gestational mother. Some forms of child raising arrangements in customary Māori society have a number of parallels to traditional surrogacy arrangements discussed here.<sup>259</sup>
- 7.3 Traditional surrogacy arrangements can take place privately, without medical intervention, usually by the surrogate mother self-inseminating with the sperm of the intending father or another man who has agreed to donate sperm.<sup>260</sup>

#### **“Gestational” or “full” surrogacy**

- 7.4 “Gestational” or “full” surrogacy refers to arrangements where the surrogate mother gestates a child she has no genetic relationship with. It became possible in the late 1970s to fertilise an egg outside the womb (IVF) and therefore possible to implant a fertilised embryo into the uterus of another woman. For the first time, a woman who was unable to gestate a child could have her own genetic child.
- 7.5 If both intending parents wish to be the genetic parents of the child born to a surrogate mother, then medical intervention is the only way to proceed. However, this may not be possible due to male or female infertility and so donor eggs and sperm can be used in conjunction with surrogacy. There are many possible parent–child relationship combinations, from both to neither intending parents being genetic parents.

<sup>259</sup> Māori customary practices of whāngai or atawhai have been recognised as analogous to surrogacy insofar as the birth parent(s) hand the child to others to raise. Sometimes the reason the matua whāngai (adopting parents) are given the baby is because they do not have a child. See Ministerial Committee on Assisted Reproductive Technologies *Assisted Human Reproduction: Navigating our Future* ([Department of Justice], Wellington, 1994).

<sup>260</sup> In the past, conception in surrogacy arrangements has followed sexual intercourse between the surrogate mother and intending father, although wider public knowledge of self-insemination techniques means that sexual intercourse is less likely to be used as a method of conception in surrogacy arrangements.

- 7.6 Although it was not raised as an issue in submissions or consultation, surrogacy is an avenue whereby men in a gay relationship can have a primary parenting relationship with a child and one of the men can be the genetic father.

### **Incidence of surrogacy in New Zealand**

- 7.7 There is no reliable means of knowing the incidence of private surrogacy in New Zealand. One consultee advised she knew of five other arrangements occurring contemporaneously to hers. Not all surrogacy arrangements are formalised by adoption. From the Commission's consultations, a common scenario seems to be that the surrogate mother enters her own name and the intending father's name on the birth certificate without any other steps being taken to transfer or establish the intending parents' legal status in relation to the child.<sup>261</sup> They simply take custody of the child and care for it on a day-to-day basis.
- 7.8 In four cases known to the Commission, adoption orders have followed a surrogacy arrangement.<sup>262</sup> Media reports in the early 1990s indicate there are other cases where intending parents adopted the child.<sup>263</sup> Adoption applications may also proceed under the guise of step-parent adoptions, where the fact 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.

### **The shift towards legislative intervention**

- 7.9 Ethical and moral public debates sprang up in the 1970s around highly publicised cases, notably *Baby C*<sup>264</sup> in the United Kingdom and *Baby M*<sup>265</sup> in the United

<sup>261</sup> This would amount to prima facie proof he was the father; however, because the child was conceived artificially, Part 2 of the Status of Children Act 1969 (as amended by the Status of Children Amendment Act 2004) applies and he has donor status only.

<sup>262</sup> *Re P (Adoption: Surrogacy)* [1990] NZFLR 385; *Re G* (3 February 1993) DC INV Adopt 6/92 Neal J; *Re H* (13 August 2003) FC WANG FM-2003-034-17 Callinicos J. The fourth instance was brought to our attention by a consultee.

<sup>263</sup> See, "Surrogate Mother: Don't Ban Practice" (21 April 1991) *Dominion Sunday Times* Wellington 2; "Wombs to Let" (2 June 1991) *Dominion Sunday Times* Wellington 9; "Immaculate Conception" (December 1990) *More New Zealand* 30; "American Surrogates for Kiwi Couples?" (19 March 1990) *New Zealand Women's Weekly* New Zealand 42; "Surrogacy: Two Women – and an Extraordinary Bond" (27 March 1991) *New Zealand Women's Weekly* New Zealand 36; "It's My Gift of Love" (17 May 1993) *New Zealand Women's Weekly* New Zealand 24.

<sup>264</sup> *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846. After the baby's birth in England, the Social Services Department issued an order preventing the surrogate mother from relinquishing the baby to the commissioning couple. The mother responded by leaving the hospital without the baby, leaving it without a primary caregiver. The commissioning father applied to the court for care and control of the child, which was granted on the basis that the couple were the best persons to care for the child as the birth mother had relinquished her rights.

<sup>265</sup> *In the Matter of Baby M* (1988) 109 NJ 396, (1988) 537 A 2d 1227. 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. Baby M was handed over to the commissioning couple three days after birth, but was later returned to the surrogate mother on her request. The commissioning couple filed proceedings 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.

States. Typical arguments against surrogacy relate to its potential to exploit vulnerable surrogate mothers, the potential to cause them considerable pain by forcibly separating them from their newborn child, and the fact it can be seen as a commodification of the resultant child. Proponents argue for personal autonomy and freedom to make such arrangements and state that some women actively choose to be surrogate mothers.

- 7.10 Research into the effect of surrogacy arrangements on the surrogate mother and her family, the child and the intending parents is ongoing. One study involved 42 surrogate families in comparison with 51 egg donation families and 80 natural conception families. The children involved in the study were approximately one year of age. The study reports that mostly the surrogacy arrangements worked according to plan: the surrogate mothers had a mixture of altruistic and recompense motives in offering their services<sup>266</sup> and the children born into the arrangements did as well as children born into the non-surrogacy families.<sup>267</sup> However, the early age of the children studied means that the findings must be treated with some caution. In 1998, the Brazier Committee in the United Kingdom said "... across a wide spectrum of opinion, we judge that the existence of surrogacy is now accepted, and that the crucial issue is how far the state should intervene to protect the interests of the parties".<sup>268</sup>
- 7.11 Many jurisdictions prohibited surrogacy following the cases of *Baby M* and *Baby C*; others prohibited commercial surrogacy only. In recent years, the tide has begun to turn in favour of some form of legislative intervention. In some jurisdictions, surrogacy is subject to regulation, and parenthood is transferred as part of the regulation regime. In others, simpler mechanisms for the transfer of parenthood alone are in place.<sup>269</sup>

## THE POSITION IN NEW ZEALAND

- 7.12 Traditional surrogacy arrangements were entirely unregulated in New Zealand until the passage of the Human Assisted Reproduction Act 2004. Section 14(1) provides that "[a] surrogacy agreement is not of itself illegal, but is not enforceable by or against any person". Section 14(3) prohibits commercial surrogacy arrangements, and section 14(4) provides that only reasonable and necessary expenses can be paid. Thus, the only lawful surrogacy arrangements under the Human Assisted Reproductive Technology Act 2004 are "altruistic", where the surrogate mother receives no payment, but can be reimbursed for reasonable expenses incurred during the pregnancy or after birth.

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<sup>266</sup> They are said to have high levels of satisfaction in providing infertile couples with the "ultimate gift" of a wanted and long-awaited child.

<sup>267</sup> S Golombok et al "Families Created through Surrogacy Arrangements: Parent-Child Relationships in the First Year of Life" (2004) 40(3) *Developmental Psychology* 400; V Jadva et al "Surrogacy: The Experiences of Surrogate Mothers" (2003) 18(10) *Human Reproduction* 2196; F MacCallum et al "Surrogacy: The Experience of Commissioning Couples" (2003) 18(6) *Human Reproduction* 1334.

<sup>268</sup> M Brazier et al *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation* Report presented to Parliament by the Secretary of State for Health (HMSO, London, 1998), 30.

<sup>269</sup> See our discussion at chapter 7, paras 7.31-7.45.



## Ethical approval requirements under NECAHR

- 7.13 Full surrogacy, where medical intervention by IVF is required, has been practised since guidelines were issued by the National Ethics Committee on Assisted Human Reproduction (NECAHR) in 1997. Approvals are given on a case-by-case basis, but only ever for altruistic arrangements.
- 7.14 There are key requirements for approval under the guidelines: one or both commissioning parents should be the potential child's genetic parents; there should be a medical condition which precludes pregnancy; the birth mother should preferably be a family member or close friend; and pregnancy and childbirth expenses may be paid but there should be no payment in lieu of employment.
- 7.15 The guidelines also require: that the birth mother and her partner should have completed their family; that both parties should have had legal advice independent of each other relating to the legal issues; and that both parties should have submitted to a counselling assessment, where they have been confronted with the emotional and legal risks and challenges of such arrangements.<sup>270</sup>
- 7.16 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<sup>271</sup> 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.
- 7.17 There have been 36 applications for IVF surrogacy arrangements since the guidelines were issued in 1997. Of these, 27 have been approved and 2 have been provisionally approved.<sup>272</sup> NECAHR has been advised that, as of February 2004, 4 of the approvals have resulted in live births, one of which has included twins.<sup>273</sup>

## Legal parenthood

- 7.18 There are no specific parenthood laws to deal with the unique relationships that exist in surrogacy arrangements. Because of the artificial nature of the conception, all private self-insemination and NECAHR approved surrogacy arrangements come under the deeming rules that apply to donor gamete conception.
- 7.19 As the child's birth mother, the surrogate mother is the child's legal parent, regardless of the type of surrogacy arrangement that was entered into or whether conception was achieved privately or with fertility clinic assistance. She has full parental rights and

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<sup>270</sup> Assurances that legal advice and counselling have been given must be made in a report to NECAHR.

<sup>271</sup> The Reproductive Technology Accreditation Committee is an Australasian accreditation body, established by the Fertility Society of Australia. All New Zealand fertility clinics are Reproductive Technology Accreditation Committee accredited.

<sup>272</sup> Information provided by a Policy Analyst, Ministry of Health to the Law Commission (16 February 2005) email.

<sup>273</sup> Information provided a Senior Analyst, Ministry of Health to the Law Commission (20 February 2004) email.

responsibilities for the child's care, despite her intention to relinquish these at birth and the fact that in a gestational arrangement she will have no genetic relationship with the child. Even if the intending mother is the child's genetic parent, she will not have status as a parent at law.

- 7.20 If the child has been conceived by self-insemination of the surrogate mother using the intending father's sperm, he will be treated as a donor under the donor gamete conception rules, and his parental status will be extinguished. Instead, if the surrogate mother is partnered and her partner consented to her being inseminated, then by operation of those rules her partner will also be a legal parent to the child. If the surrogate mother is single or her partner has not consented to the insemination, then she alone will be a legal parent.
- 7.21 This means that the intending parents do not have any of the rights and responsibilities of parenthood even if both are the genetic parents of the child.<sup>274</sup>

### **Difficulties arising from the application of the law**

- 7.22 The unenforceable nature of surrogacy agreements means that if the intending parents renege on the arrangement and do not collect the baby, the surrogate mother cannot force them to take him or her.
- 7.23 If the surrogate mother reneges on the arrangement and refuses to relinquish the child to the intending parents, they cannot enforce the agreement against her. Where the surrogate mother does hand the child to the intending parents, who raise him or her as their own, legal parenthood does not automatically follow the handover. The only option currently available to intending parents to obtain legal parental status is to adopt the child. However, the particular requirements of the Adoption Act 1955 and Child, Youth and Family processes can make adoption a problematic option. This was reinforced in our consultation meetings with families created through surrogacy.<sup>275</sup> Only one couple had chosen to adopt their child in order to acquire legal parental status. The other families were caring for their children informally, without legal recognition of their status. In none of the cases did the child born of surrogacy have a full record of their birth origins.<sup>276</sup> Two of the families had decided not to pursue adoption because they had a strong belief that they should not have to adopt their own children.<sup>277</sup> The legal situation caused some anxiety for the surrogate mother we met, who expressed concern at the legal implications of her ongoing status as the child's legal parent.

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<sup>274</sup> However, in the rare case that the child is conceived through sexual intercourse, the intending father will be able to obtain legal parental status.

<sup>275</sup> These were a woman who had been a surrogate mother twice and two families who had had children through surrogacy arrangements – one traditional and one gestational.

<sup>276</sup> In two cases, the children have birth certificates that state that the surrogate mother is the mother and the intended father is the father. The changes introduced by the Status of Children Amendment Act 2004 combined with section 89(1)(a) of the Births, Deaths, and Marriages Registration Act 1995 will make it unlawful to register the father in those situations. In one case, the intending parents refused to register the child's birth because this would have involved registering the gestational mother and the intended father who are siblings as parents, suggesting an incestuous relationship.

<sup>277</sup> These children were conceived using the gametes of both parents in one case and the sperm of the intended father through a traditional surrogacy arrangement in the other. In both these cases, parental status remained solely vested in the surrogate mothers.



- 7.24 In chapter 6, we noted that adoption transfers legal parenthood after birth in two stages: custody can be transferred in an interim order made by the court,<sup>278</sup> although a mother cannot give her consent to release the child for adoption until he or she is 10 days old;<sup>279</sup> and six months after the interim order is granted, the prospective parents may then apply to the court for a final adoption order.<sup>280</sup>
- 7.25 Thus, intending parents can be in breach of the Adoption Act 1955 if they assume care of the child within 10 days of his or her birth, before the birth mother's consent to the adoption may be given.<sup>281</sup> In one case, the intending parents were not aware that it was unlawful to take the child into their home after birth if they were contemplating adopting the child, and their adoption application was opposed by Child, Youth and Family because of this and other breaches.<sup>282</sup>
- 7.26 Prospective adoptive parents are also subject to vetting for their fitness to parent. Intending parents in a surrogacy arrangement may also be in breach of the Adoption Act 1955 if they make any public requests or advertise for a surrogate mother.<sup>283</sup> It is also common that expenses are paid in surrogacy arrangements. This sits uncomfortably with section 25 of the Adoption Act 1955, which prohibits payments in consideration for adoption.<sup>284</sup>
- 7.27 For these reasons, the current adoption model is inappropriate for surrogacy arrangements where one or both of the intending parents are genetic parents of the child: it requires screening of all applicant parents regardless of genetic affinity; it comes into effect only after the child is born; it makes it difficult for the intending parents to care for the newborn child in the two weeks post-birth; and it prohibits the passing of money between birth and adoptive parents.
- 7.28 Conversely, it is in the interests of all the parties to a surrogacy agreement that the child should be cared for by the intending parents as soon as possible. In surrogacy arrangements, the intending parents and gestating mother intend, prior to conception, that the intending parents will raise the child from birth. The planned nature of surrogacy pre-conception distinguishes it from adoption and enables the law to set in place a degree of pre-conception and pre-birth certainty.

### *Guardianship and “parenting” orders*

- 7.29 Guardianship and “parenting” orders<sup>285</sup> are also available where intending parents do not pursue adoption, but these orders do not confer parental status on the

<sup>278</sup> Adoption Act 1955, s 5 and s 15(2)(a).

<sup>279</sup> Adoption Act 1955, s 7(7).

<sup>280</sup> Adoption Act 1955, s 13.

<sup>281</sup> Adoption Act 1955, s 6 and s 7. The Law Commission has recommended (for adoption) that the 10-day period be increased to a 28-day one – New Zealand Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, Wellington, 2000) 59.

<sup>282</sup> *Re G* (3 February 1993) DC INV Adopt 6/92 Neal DCJ. The adoption order was made in any event.

<sup>283</sup> Adoption Act 1955, s 26(1).

<sup>284</sup> Although it was successfully argued in *Re P (Adoption: Surrogacy)* [1990] NZFLR 385 that there was no element of profit in payments made to the surrogate mother and that the agreement contained no provision relating to adoption, so the intending parents were not in breach of section 25.

<sup>285</sup> Section 48 of the Care of Children Act 2004 replaces custody and access orders with “parenting orders”.

applicants. The parental status of the surrogate mother and her husband or partner are also unaffected by these orders, meaning that they remain recognised as legal parents with full parental rights and responsibilities as the child's natural guardians. Only those parents recognised as parents in law may be registered on the child's birth certificate.

- 7.30 The consequence is that, in many cases, the intending parents simply care for the child informally without acquiring the appropriate rights and responsibilities to act as the child's legal parents. If they do not pursue adoption or seek guardianship orders from the court, they cannot consent to medical treatment on the child's behalf or enrol the child in school. They cannot apply for a passport for the child, or ensure that the child is entitled to the various benefits that flow from the legal parent-child relationship, such as immigration entitlements or succession. The child is vulnerable and lacks those protections afforded to him or her by legal parenthood.

## OVERSEAS LEGISLATIVE APPROACHES TO TRANSFERRING PARENTHOOD

### **Regulation and transfer by prior approval of the surrogacy agreement**

- 7.31 Different legislative approaches have been adopted in the few jurisdictions where surrogacy is regulated. One approach has been to require that parties obtain prior approval of the surrogacy agreement from the court, or other approval body, if the status of the intending parents as legal parents is to be recognised after the child's birth.
- 7.32 Israel adopted this approach when it enacted the Surrogacy Agreements (Approval of Agreement and Status of Newborn Child) Law in 1996.<sup>286</sup> The legislation requires parties to apply to a multi-disciplinary body for approval where the child is to be conceived using the gametes of both intending parents (or, in some cases, the sperm of the intending father and a donor egg) pursuant to a commercial or non-commercial surrogacy agreement. The Approvals Committee considers applications in accordance with established guidelines that aim to ensure the interests of the parties, society and the intended child are protected.<sup>287</sup>
- 7.33 The law requires the intending parents to apply to the court within seven days of the child's birth for an order vesting them with parental status. Prior to this, the

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<sup>286</sup> As of March 2002, 104 surrogacy agreements had been approved (of 150 requests) and 44 children had been born – M Gross et al "Israel: Bioethics in a Jewish-Democratic State" (2003) Cambridge Quarterly of Healthcare Ethics, 247, 252. A translation of the legislation is on file at the Law Commission.

<sup>287</sup> The Israeli guidelines require, among other things: that the intending parents be married; that the parties to the agreement be adult Israeli citizens; that the surrogate mother be single or divorced and not a relative of one of the intending parents; that the surrogate mother be of the same religion as the intending parents; that there is a medical reason why the intended mother cannot become pregnant or carry a pregnancy to term; and that the parties submit to medical and psychological assessments for their suitability in entering the arrangement – J Schenker "Legal Aspects of ART Practice in Israel: ART Regulations Around the World" (2003) 20(7) Journal of Assisted Reproduction and Genetics 250, 256–257.

intending parents may have care of the child, but the legislation requires that a child welfare officer be appointed as the child's sole legal guardian until the transfer of parenthood is complete.

- 7.34 While some states in the United States have prohibited the enforcement of surrogacy arrangements as contrary to public policy,<sup>288</sup> facilitative legislative models apply in the states of Virginia and New Hampshire.<sup>289</sup> In both states, parties are required to obtain court approval of the surrogacy agreement prior to conception and to comply with various statutory criteria. These are aimed at assessing the suitability of the parties and ensuring they have entered into the agreement voluntarily and with a full understanding of its nature and effects.
- 7.35 In Virginia, legal parental status is then transferred to the intending parents, provided they notify the court of the child's birth within seven days. Once written notice is filed, and it is proved with medical evidence that at least one intending parent is genetically related to the child, the court must enter an order directing that the State Registrar of Vital Records issue a new birth certificate naming the intending parents as legal parents.<sup>290</sup>
- 7.36 The Virginian model also contains a default regime to cover cases where parties do not seek court approval of the agreement. In these cases, the surrogate mother may relinquish her parental rights to the intending parents by signing a surrogate consent form 25 days after birth. A new birth certificate is issued naming the intending parents as parents, if the surrogate consent form, a copy of the surrogacy agreement and a doctor's certificate confirming that at least one intending parent is genetically related to the child is lodged with the State Registrar within 60 days of the child's birth.<sup>291</sup>
- 7.37 In New Hampshire,<sup>292</sup> court approval of the surrogacy arrangement has the effect of terminating the parental rights of the surrogate mother on birth, although the surrogacy agreement must contain a clause that allows the surrogate to execute notice in writing of her intention to keep the child until 72 hours after birth.<sup>293</sup>

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<sup>288</sup> US states include Arizona, Michigan, the District of Columbia, Indiana, New York, North Dakota and Utah. See: *Ariz Rev Stat* § 25.218 (West 2001); *Mich Comp Laws Ann* § 722.855 (West 2002); *DC Code Ann* § 16.402(a) (2001); *Ind Code Ann* §§ 31-20-1-1, -2 (West 1999); *NY Dom Rel Law* § 122 (McKinney 1999); *ND Cent. Code* § 14-18-05 (1997); *Utah Code Ann* § 76-7-204 (1999). See also A Plant "With a Little Help from My Friends: The Intersection of the Gestational Carrier Surrogacy Agreement, Legislative Inaction, and Medical Advancement" 54 *Ala L Rev* 639, 650.

<sup>289</sup> See *Va Code Ann* § 20-160D (2004) and *NH Rev Stat Ann* § 168-B:23 (2003).

<sup>290</sup> *Va Code Ann* § 20-160D (2004).

<sup>291</sup> *Va Code Ann* § 20-162 (2004).

<sup>292</sup> *NH Rev Stat Ann* § 168-B:23 (2003).

<sup>293</sup> Both the Virginian and New Hampshire statutes were modelled on article 8 of the Uniform Parentage Act (UPA), which was drafted by the Uniform Law Commissioners National Conference of Commissioners on Uniform State Laws in 2000 (and amended in 2002) to standardise state laws in relation to gestational surrogacy arrangements. The other US model statute that addresses these issues is the Uniform Status of Children of Assisted Conception Act (USCACA), which was also drafted by the Uniform Law Commissioners National Conference of Commissioners on Uniform State Laws in 1988. This provides two alternatives for states in approaching these issues: one that provides a process for transferring legal parental status in gestational and traditional surrogacy arrangements, and another that simply renders all surrogacy agreements void. Similar to the UPA, alternative A of the USCACA provides that a surrogacy agreement is valid if it is approved by the court prior to conception. If the surrogacy agreement is not approved, it is void and the surrogate mother is the legal parent of the resulting child.

## Enforceable surrogacy agreements

- 7.38 Other jurisdictions have adopted less prescriptive models for transferring legal parental status in gestational surrogacy arrangements, where at least one intending parent is genetically related to the child.
- 7.39 In Illinois, the intending parents can acquire legal parental status by simply signing a voluntary acknowledgment, along with the surrogate mother and her husband, that they are the child's parents. Provided a physician certifies that neither the gestational surrogate nor her husband, if any, is the child's genetic parent, the intending parents may be entered as legal parents on the child's birth certificate.<sup>294</sup>
- 7.40 In Florida, the intending parents may petition the court for an expedited affirmation of parental status after the child's birth, where one or both the intending parents are genetically related to the child. If the court determines that a binding surrogacy agreement has been entered into under state law, it is required to order that a new birth certificate be issued naming the intending parents as legal parents.<sup>295</sup>

## Parental orders post-birth

- 7.41 In the United Kingdom and the Australian Capital Territory, intending parents may apply for a court order vesting them with parental status after the child's birth. These orders are available in respect of gestational surrogacy arrangements only in the Australian Capital Territory and for both gestational and traditional surrogacy arrangements in the United Kingdom.
- 7.42 In the United Kingdom, the intending parents must be married and must apply between six weeks and six months after the child's birth for a parental order.<sup>296</sup> The surrogate mother cannot consent prior to six weeks post-birth. The court must be satisfied that:
- the child is genetically related to one or both of the intending parents;
  - the child is living with the intending parents at the time the order is made;
  - one or both intending parents are domiciled in the United Kingdom;
  - both the intending parents have attained the age of 18 years;
  - no money has been exchanged during the arrangement (other than for reasonable expenses) except as authorised by the court; and
  - the surrogate mother and her husband (if she has one) have entered into the arrangement voluntarily and have given their unconditional consent to the making of the order, having a full understanding of what is involved.
- 7.43 In the Australian Capital Territory, the intending parents may apply for a parentage order from the Supreme Court when the child is between six weeks and six months old, provided:<sup>297</sup>

<sup>294</sup> 750 ILCS 45/6 (a)(1)–(2).

<sup>295</sup> Fla Stat ch 742.16 (2002).

<sup>296</sup> Human Fertilisation and Embryology Act 1990 (UK), s 30.

<sup>297</sup> Parentage Act 2004 (ACT), ss 23–31.

- at least one of the intending parents is the child’s genetic parent;
  - the child was conceived as a result of a gestational surrogacy arrangement involving assisted reproductive technology that was carried out in the Australian Capital Territory; and
  - the intending parents live in the Australian Capital Territory.
- 7.44 The court is required to make a parentage order if it is satisfied that the order is in the child’s best interests and both the surrogate mother and her partner (if any) have agreed to the making of the order with a full understanding of what is involved.
- 7.45 As in the United Kingdom, the court must also take a number of other matters into consideration in deciding whether to make the order.<sup>298</sup> If made, the order has effect as if it were an order made about the child under the Adoption Act 1993 (ACT).

## JUDICIAL APPROACHES WHEN ARRANGEMENTS HAVE BROKEN DOWN

- 7.46 There have been a range of judicial approaches adopted for the resolution of legal parenthood when surrogacy arrangements have broken down, and where the practice is either unregulated or there are no laws allocating legal parenthood in these arrangements. Most jurisprudence has resulted from the United States.
- 7.47 As with the discussion on known donors, it is evident that the courts have struggled to formulate consistent principles upon which to resolve the disputes. One approach has been to determine issues by reference to the parties’ intentions, as evidenced by the existence of a written surrogacy agreement. The most influential decision, made by the Californian Supreme Court in 1993, is *Johnson v Calvert*<sup>299</sup> where the court declared that the intending mother, who was the genetic mother, was the child’s legal parent. It indicated that either a genetic or gestational relationship was sufficient for a declaration of maternity under Californian law but, as both components were split in that case, intention was the determinative factor.
- 7.48 A dissenting opinion argued that it was inappropriate to analyse a family law dispute from the standpoint of intention, which is a property, contract and tort law concept, and that, because there was no legislative framework, the best interests of the child should be the yardstick.<sup>300</sup>
- 7.49 An intention-based approach was also taken in *Buzzanca v Buzzanca*.<sup>301</sup> A donor embryo was used and no genetic connection existed between child and surrogate mother or child and intending parents. The court held that the intended mother was the child’s legal parent and drew an analogy between her act of arranging

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<sup>298</sup> Under section 26(3) of the Parentage Act 2004 (ACT), the court is required to consider, among other things, whether the child’s home is with the intending parents at the time of making the application, whether both intending parents are at least 18 years old, whether payment or reward has been given for the surrogacy (other than reasonable expenses), and whether the parties to the agreement have received appropriate counselling and assessment from an independent counselling service.

<sup>299</sup> *Johnson v Calvert* (1993) 851 P 2d 776 (Cal).

<sup>300</sup> *Johnson v Calvert* (1993) 851 P 2d 776 (Cal) Kennard J dissenting, 788.

<sup>301</sup> *Buzzanca v Buzzanca* (1998) 72 Cal Rptr 2d 280 (Ct App).

the surrogacy and the intending father in donor insemination laws who consents to his wife's insemination using donor sperm and is thereby recognised as a legal parent.<sup>302</sup>

- 7.50 Courts have also ranked genetics and gestation in resolving disputes, depending upon the particular surrogacy circumstances, though the results have been inconsistent. In traditional surrogacy cases, the courts have sometimes placed weight on whether the surrogate mother is the child's genetic mother.<sup>303</sup> In *Belsito v Clark*, the court declared gestation to be "subordinate and secondary to genetics".<sup>304</sup>
- 7.51 In a number of cases, the courts have determined issues of legal parental status in surrogacy by reference to the best interests of the child. In the *Baby M*<sup>305</sup> case, the court awarded custody to the intending parents, who were in a much more advantageous financial situation than the surrogate mother who was also the child's genetic mother, on a best interests basis, and the surrogate was awarded visitation rights as the child's natural mother.
- 7.52 In one Family Court of Australia decision, a best interests approach resulted in the opposite decision being reached.<sup>306</sup> In *Re Mark* there was no broken surrogacy arrangement but two men wanting legal recognition as parents.<sup>307</sup> The court made

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<sup>302</sup> However, as Richard Storrow notes, the analogy breaks down when applied to traditional surrogacy arrangements. Under the artificial insemination legislation, the husband or the partner of the surrogate mother would be deemed the child's legal parent if he consented to the surrogate being inseminated with the intended father's sperm – R Storrow "Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parenthood" (2002) 53 Hastings LJ 597, 613.

<sup>303</sup> If so, the court has held that parties' intentions in entering the surrogacy agreement can only be given effect by adoption after the child's birth. Hence in *Re Moschetta* (1994) 30 Cal Rptr 2d 893 (Ct App), the California Court of Appeals declined to enforce a traditional surrogacy agreement that required the surrogate mother to relinquish the child, on the basis that it would be incompatible with existing parentage and adoption principles under Californian law. Although, it should be noted, in another traditional surrogacy case, the trial court ordered the surrogate mother to surrender custody of the child to the intended father after she was born, in the first instance. The surrogate mother was allowed frequent visitation. See *RR v MH* (1998) 689 NE 2d 790 (Mass). See also R Storrow "Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage" (2002) 53 Hastings LJ 597.

<sup>304</sup> *Belsito v Clark* (1994) 644 NE 2d 760, 767. In finding for the intended genetic parents, the court described gestation as a "filtering system that left no genetic imprint on the foetus", (761–62) and took the view that the gestational presumption of legal maternity was merely a relic from a time when it was impossible to separate the components of gestation and genetics in motherhood (763–64). This decision has been criticised for its minimalising of gestation and can be seen as the high water mark, to date, in placing value on genetics above all else.

<sup>305</sup> *In the Matter of Baby M* (1988) 109 NJ 396; (1988) 537 A 2d 1227.

<sup>306</sup> In *Re Evelyn* [1998] Fam CA 55, the surrogate and genetic mother was favoured over the intending parents, where the intending father was the genetic father. The court identified Mrs S's biological and genetic relationship as one factor in the decision but placed emphasis on others such as the relationships and attitudes of all four parents. It considered Mrs S more likely to facilitate relationships with the Qs than the Qs would with Mrs S. Also that Mrs S would be able to support the child the most in coming to terms with her entry into the world.

<sup>307</sup> In *Re Mark* [2003] Fam CA 822, the Family Court of Australia considered an application by Mr X and Mr Y regarding a child born under a surrogacy arrangement with a woman in the United States, where the child was conceived using a donated egg and Mr X's sperm. While the Court recognised that Mr X was the child's genetic parent and the person named as his father on his birth certificate, they found that he could not be recognised as the child's parent by operation of section 60H of the Family Law Act 1975 (Cth). This Act is similar to the New Zealand Status of Children Amendment Act 2004 and removes parental status from a sperm donor.



parental orders in favour of both Mr X and Mr Y on the basis that Mark's best interests would be advanced by a legal recognition of their role in his life. The court noted that both Mr Y and Mr X were raising Mark together and that each were involved all aspects of his care. It also noted that each had an excellent relationship with Mark and that he was strongly attached to both.

## THE VIEW OF SUBMITTERS

7.53 In her submission, the foundation chairperson of NECAHR, Dr Rosemary De Luca, made some general comments on the vision of NECAHR when it drafted the guidelines for surrogacy arrangements:

NECAHR's ideal was a continuing extended family wherein origins were known and rights and responsibilities were worked out by the parties early on, and continued to be negotiated. The law needs to establish a vehicle for the active recognition of a kind of parenthood where boundaries are fluid and roles continue to be negotiated.<sup>308</sup>

7.54 She suggested that surrogacy was best conducted where "all parents relate to the baby and to one another in an open way and on the understanding that the gestational mother could indeed change her mind" and that "the likelihood of this is minimised through a sensitively conducted and shared journey by the parties prior to and during the pregnancy".

7.55 Of the submitters who specifically addressed the surrogacy questions, there was a clear consensus that new laws are needed to address the unique issues of parenting in surrogacy arrangements, to protect all parties and the children born from them.<sup>309</sup> None supported a law automatically deeming the intending parents the legal parents, as in donor gamete conception. Where neither intending parent was a genetic parent, there was a near universal consensus that they should be screened as in adoption. However, a large majority rejected adoption itself as a way to proceed.

7.56 Some felt the surrogate mother should not have an automatic right to keep her child but should have to demonstrate her reason for dishonouring the agreement. When she was the gestational mother only, opinion was equally divided as to whether she should have a right to keep the child or not. Many rejected, as paternalistic and legalistic, conditions restricting the age or marital status of the surrogate mother.

## THE VIEW OF THE COMMISSION

7.57 It is the Commission's view that there is an urgent need to create a legislative framework for the allocation of parenthood in surrogacy arrangements, which includes guidance for the court where disputes arise. The current legal framework results in children being cared for by one or both parents who have no legal standing in relation to the child.

7.58 A legal framework to allocate parenthood in surrogacy needs to take account of the interests of the child born of the surrogacy arrangement, the surrogate mother,

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<sup>308</sup> Submission 21.

<sup>309</sup> One submitter disagreed with the introduction of any laws, however, because of objections to surrogacy per se.



the intending parents, the child's siblings and the wider family of the child. It also needs to ensure that legal certainty can be enabled at the earliest possible opportunity. However, the framework should enable the surrogate mother a period of time after birth in which she can reconsider her agreement to hand over her baby.

- 7.59 The recommended model would need to be consistent with the approach taken by law to allocating parenthood in cases of donor gamete conception and natural conception. It would also need to take account of values that are well established in society, such as openness and transparency. Finally, it needs to be carefully drafted, so that it does not cut across Māori customary laws relating to whāngai or other analogous cultural practices.<sup>310</sup>

### **Best interests on a case-by-case basis**

- 7.60 We reject the court being involved on a case-by-case basis after the birth of the child. Where possible, parental issues need to be determined as early as possible. Involving the court in every family situation in such a fact-intensive exercise as determining legal parenthood can cause uncertainty and stress, delays and financial costs. The legislature should provide a legal framework for adults to parent, and to the extent possible this should be clear prior to conception.

### **Automatic transfer**

- 7.61 We also reject an approach that automatically transfers legal parenthood. This option has some appeal, since the intending parents have formed the intention to create the child and entered into an agreement with the surrogate mother to gestate the child on their behalf. They are the persons who will assume day-to-day care and responsibility for the child's upbringing. One or both are usually the genetic parents.
- 7.62 However, unlike donor gamete conception, the other critical factor in surrogacy arrangements is the role of the birth mother. Not all surrogacy arrangements go to plan. In traditional surrogacy arrangements, the mother is in effect handing over her own child to others to raise. In gestational arrangements, she is still handing over a baby she has gestated and given birth to. To date, there has also been insufficient research conducted into the impact of gestation on mother and child to warrant marginalising the surrogate mother's role in the process.<sup>311</sup> The role that gestation, as distinct from genetics, plays in maternal bonding is largely unknown and has only been able to be fully studied since genetic and gestational motherhood has been able to be divided. Serious trauma to a closely bonded mother, separated from the child, whether the relationship is genetic or gestational, must remain a real possibility. She should not have legal parenthood removed from her prior to birth, with no recourse to the law should circumstances alter. There must

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<sup>310</sup> See the conclusions of the Ministerial Committee on Assisted Reproductive Technologies in 1994 that: "No rules should be developed which prohibit ordinary sexual relations or whāngai, 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." Ministerial Committee on Assisted Reproductive Technologies, *Assisted Human Reproduction: Navigating our Future* ([Department of Justice], Wellington, July 1994).

<sup>311</sup> The acute pain many birth mothers reported suffering when being forced to give up their children during the era of closed adoption is well documented.

be particular concerns when arrangements are made privately without counselling and legal advice prior to the conception and the child is her genetic child.

- 7.63 In no overseas model is parenthood transferred automatically, although it has been touted from time to time that such arrangements in gestational-only surrogacy arrangements should be seen as any other commercial contract. However, the delay period for the surrogate mother to withdraw her consent is typically much shorter than given to a birth mother giving her child up for adoption.
- 7.64 By making surrogacy contracts unenforceable and prohibiting commercial surrogacy, the legislature can be said to have signalled its view that requiring surrogate mothers to hand over the child against their will is contrary to public policy.<sup>312</sup> Even though commercial inducements are prohibited, there may be other pressures, including within a family, which make it difficult for a women to resist a request to carry a child for others. As a result, a cautious approach should be taken to the transfer of parental status to the intending parents.

## Considerations for reform

### *Intentional parenthood*

- 7.65 Intention underlies the bestowal of legal parenthood in donor gamete conception, and it has an important role to play in legislative schemes transferring parenthood and determining disputes.<sup>313</sup> It is evident from overseas case law that intention has increasingly been used to determine parental status. The court's approach to determining legal parenthood in *Johnson v Calvert*<sup>314</sup> has been described as follows:
- First, the intending parents have a special status and claim because they are the prime movers of the child's birth; the child would not have been born without their efforts. Second, the court was also influenced by the intending parents' intentions because they were "voluntarily chosen, deliberate, express and bargained-for ... ." Third, the court followed what might be called the "mental concept doctrine" – that is, the parent is that person who was the originator of the concept of the child. Fourth, the court seemed to be influenced by the desire to meet the needs of other situations which may arise using new technology. Finally, the court viewed the intending parents as those who will act in the best interests of the child ...<sup>315</sup>
- 7.66 It has been said that using intention as a criterion of parenthood in these families reflects their deliberative nature – the children are in the vast majority of cases the

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<sup>312</sup> Human Assisted Reproductive Technology Act 2004, s 14.

<sup>313</sup> A number of American academics have suggested there should be greater acknowledgment of the role that intention plays, on the basis it is preferable for people to be "more rather than less purposeful about their procreational and parenting intentions". See, for example, M Schultz "Reproductive Technology and Intent Based Parenthood: An Opportunity for Gender Neutrality" (1990) Wis LR 297, 323

<sup>314</sup> *Johnson v Calvert* (1993) 851 P 2d 776 (Cal).

<sup>315</sup> A Miller "Baseline, Bright-Line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage" (2003) 34 McGeorge LR 637, 660–661 in relation to the court's decision in *Johnson v Calvert* (1993) 851 P 2d 776 (Cal).

result of lengthy thought and consideration. In this way, intention as a criterion promotes responsible parenthood.<sup>316</sup>

### *Genetics*

- 7.67 Genetics is another important factor. Genetics underlies parenthood laws where conception is by natural means. The law requires protective measures for children whose parents lack a genetic connection with them, further demonstrating the value it currently holds in parenthood laws. Similarly, a distinction should be made depending upon whether the intending parents are full genetic parents, are partially genetically connected, or have no genetic connection to the child. In the latter situation, intending parents should be subject to the same process and requirements as apply to adoption.

### *Gestation*

- 7.68 Scientific understanding of the physical, emotional and psychological effect of gestation on the mother–child relationship is in its infancy. It is said that the nine-month gestational period involves a “dynamic and intense” process, during which the gestational mother’s body constantly supplies nutrients, eliminates toxins and provides warmth and protection to the developing foetus.<sup>317</sup> During the pregnancy and labour, the gestational mother risks sickness and inconvenience. She faces the certain prospect of painful labour and risks the small but measurable possibility of death.<sup>318</sup> One commentator has said of the contribution of the gestational mother to the child’s creation, “[a]t the end of the process of birth, the woman who gives birth to the child will have contributed much more of herself than the egg donor in order to bring about the child’s birth.”<sup>319</sup>

### *Parental relationships*

- 7.69 We note that the Status of Children Amendment Act 2004 and its predecessor also place value on parental relationships when transferring parenthood. In fact, there would be no legal transfer to the non-genetic partner of the birth mother if that person was not in a relationship with her.

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<sup>316</sup> H Shapo “Matters of Life and Death: Inheritance Consequences of Reproductive Technologies” [1997] Hofstra LR 1091, 1209.

<sup>317</sup> A Reichman “Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity” (1995) 80 Iowa L Rev 265, 274: “The gestational mother’s many months of gestation, labour and delivery necessarily constitute a more significant biological and relational contribution to the child’s existence than genetics”. See also L Bender “Genes, Parents and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race and Law” (2003) 12 Colum J Gender & Law 1, 50.

<sup>318</sup> J Hill “What Does it Mean to be a ‘Parent’? The Claims of Biology and the Basis for Parental Rights” (1991) 66 NYU L Rev 353, 408.

<sup>319</sup> S Rae *The Ethics of Commercial Motherhood: Brave New Families?* (Praeger, Westport, 1994) 87–88.

- 7.70 However, unlike the approach in the United Kingdom, we do not distinguish between marital and non-marital relationships. To do so would be inconsistent with the Status of Children legislation, which does not differentiate between spouses and de facto partners in the transfer of parenthood.
- 7.71 No one factor can or should be taken to be solely determinative of legal parenthood.<sup>320</sup> Our legislation already uses the interplay of intention, genetics, gestation and relationships to determine legal parenthood.

### *Screening of intending parents*

- 7.72 Where one or both intending parents are genetically related to the child, surrogacy arrangements are more similar to donor gamete conceptions or natural parenthood than adoption. State vetting of parental suitability should not be required in these circumstances. In consultations, parents objected strongly to having to be approved to be legal parents of their own or their partner's genetic child. However, protection for the surrogate mother needs to be built into the transfer mechanism.

## **Proposed model**

### *Interim pre-birth orders*

- 7.73 We favour a model which allows interim legal parental status to be determined prior to conception or birth. The Family Court should be able to issue an interim order transferring legal parenthood to the intending parents, if it is satisfied that:
- the surrogate mother is over 18 years and has already had one child herself;
  - the child would be the genetic child of at least one of the intending parents;
  - the only money that will pass between the parties is for "reasonable and necessary expenses" incurred in the pregnancy;
  - the intending parents and surrogate mother have had separate and joint counselling;
  - the surrogate mother and her partner have entered into the arrangement voluntarily and have given their unconditional consent to the making of the order, having had independent legal advice and having a full understanding of what is involved.

### *Post-birth – if an interim order has been obtained*

- 7.74 After birth, there should then be a period of 21 days during which the surrogate mother can seek to petition the court to overturn the interim order. After 21 days and in the absence of a petition being filed by the surrogate mother, a registrar of the Family Court shall approve the application, upon proof of the genetic parentage of one of the intending parents and that they have the child in their care. A parent and child relationship shall then exist. The registrar's approval will also extinguish the legal parenthood of the surrogate mother (and her partner if she has one).

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<sup>320</sup> We note that although intention has been used as a primary criterion in courts in the United States, it has not been embraced as a sole decisive factor in the legislation of various of its states. Genetics is also important, and in most legislatures the law requires one intending and one genetic parent, though section 801 of the Uniform Parentage Act 2000 (as revised in 2002) (LexisNexis 2004) does not make this a requirement.

- 7.75 Within 21 days, if any aspect of the interim agreement is in dispute, for example because the surrogate mother does not wish to relinquish the baby or the intending parents refuse to receive him or her, the matter should go to court to be determined according to the best interests of the child. Drawing on the approaches taken by courts in surrogacy disputes, the court should take account of:
- the genetic relationships between child and adults;
  - the gestational relationship between child and adult;
  - the intentions of all the parties;
  - the sibling relationships of the child;
  - the comparative potential ability of each of the parties to be fit and proper parents of the child;
  - the ability of each of the parties to facilitate the child's relationships with other parties, should that be considered by the court to be desirable;
  - whether issues could be resolved by guardianship and parenting orders, rather than declarations of legal parenthood in relation to each of the parties.

*Post-birth – if an interim order has not been obtained*

- 7.76 Where a child has been born by a surrogacy arrangement, but the surrogate and intending parents failed to approach the court before birth, a question arises whether there should be a simpler mechanism than adoption to transfer parentage. A simpler mechanism exists in the United Kingdom (which only provides for post-birth transfer of parentage) and the Australian Capital Territory, and default models exist in Virginia and New Hampshire enabling this to take place. We consider the law should also provide for this situation in New Zealand.
- 7.77 We have noted that there are difficulties with applying adoption legislation to surrogacy arrangements and that genetic connection and intention to parent underpin assisted reproduction parenthood laws. We consider there should be a limited period post-birth in which parenthood in surrogacy arrangements can be transferred, other than by adoption. A best interests of the child approach will need to be taken to keep consistency with the approach of the Family Court where a child is in existence. We note that the court is unlikely to consider that the best interests of the child will be served by ordering that he or she stays with a surrogate mother who wishes to relinquish her parental status to the child's genetic parent(s) who intend(s) and wish(es) to parent the child.
- 7.78 Until six months after the birth of a child born into a surrogacy arrangement, the Family Court should be able to make an order giving parental status to the intending parents and extinguishing the parental status of the surrogate and her partner (if she has one), if it is satisfied that:
- the surrogate mother is over 18 years and has already had one child herself;
  - the child is the genetic child of at least one of the intending parents;
  - the only money that passed between the parties was for "reasonable and necessary expenses" incurred in the pregnancy;
  - the intending parents and surrogate mother have had separate and joint counselling;
  - the surrogate mother and her partner have entered into the arrangement voluntarily and have given their unconditional consent to the making of the order, having had independent legal advice and having a full understanding of what is involved; and
  - making the order is in the best interests of the child.

## Recommendation

**R15** A new Part 3 of the Status of Children Act 1969 should be introduced. The Family Court should be empowered to make an interim order transferring legal parenthood to the intending parents if it is satisfied that:

- the surrogate mother is over 18 years and has already had one child herself;
- the child would be the genetic child of at least one of the intending parents;
- the only money that will pass between the parties is for “reasonable and necessary expenses” incurred in the pregnancy;
- the intending parents and surrogate mother have had separate and joint counselling; and
- the surrogate mother and her partner have entered into the arrangement voluntarily and have given their unconditional consent to the making of the order, having had independent legal advice and having a full understanding of what is involved.

If an interim order has been made, after 21 days and upon proof of the genetic parentage of one of the intending parents, that they have the child in their care, and in the absence of a petition being filed by the surrogate mother, a registrar of the Family Court shall approve the application and a parent and child relationship shall exist.

If no interim order has been sought, the Family Court should be empowered to issue a parental order at any time from 21 days post-birth to 6 months post-birth if it is satisfied that:

- the surrogate mother is over 18 years and has already had one child herself;
- the child is the genetic child of at least one of the intending parents;
- the only money that passed between the parties was for “reasonable and necessary expenses” incurred in the pregnancy;
- the intending parents and surrogate mother have had separate and joint counselling;
- the surrogate mother and her partner have entered into the arrangement voluntarily and have given their unconditional consent to the making of the order, having had independent legal advice and having a full understanding of what is involved; and
- making the order is in the best interests of the child.

- 7.79 The effect of the final order will be to extinguish the legal parental status of the surrogate mother and her partner (if that person is deemed to be a legal parent under existing legislation). Until and unless parental orders are made to the contrary, the child remains the legal child of the birth-giving surrogate mother.
- 7.80 If the surrogate mother declines to hand over the child or challenges the interim order in the 21 days post-birth, issues of parental status and care arrangements should be determined by the court in accordance with the best interests of the child, taking account of the criteria set out above.
- 7.81 In recommending this model we have taken features from several other jurisdictions. However, we have not differentiated as some jurisdictions do, between full and partial surrogacy arrangements. Both arrangements are entered into in society, and neither is unlawful so long as the arrangement is not commercial. In these circumstances it seems preferable to provide for both in the same way.
- 7.82 We prefer pre-birth orders because of the greater security and certainty they provide to the parties. In legislation in the United States, where there is provision for pre-birth orders, the law typically centres around the creation of a binding gestational surrogacy agreement between the parties.<sup>321</sup> Given the policy in the Human Assisted Reproductive Technology Act 2004 that surrogacy agreements are unenforceable, this approach is not suitable in New Zealand. However, the Human Assisted Reproductive Technology Act 2004 does not conflict with recognition of parentage in such agreements, so long as it is separately legislated for. In line with the approach in the United Kingdom, we consider that this process should be able to be followed by parents up to six months after the birth of the child.
- 7.83 The United States and Israeli legislation is also highly prescriptive and operates as a regulator of surrogacy at the same time as transferring parenthood. Parliament has very recently considered surrogacy in New Zealand and made no provisions to regulate it, apart from making surrogacy contracts unenforceable and prohibiting commercial surrogacy. The NECAHR has set some preconditions for IVF surrogacy. In these circumstances, it is not appropriate to use the donor gamete conception legislation to regulate surrogacy. Status of Children legislation should be aimed at giving recognition to parent-child relationships in a manner that builds in protection for the surrogate mother and child.<sup>322</sup>
- 7.84 In chapter 10 we discuss the information to be retained by the Registrar-General of Births, Deaths and Marriages. The effect of our recommendations is that the Registrar-General would be required to register the parents who are subject to the parentage order on the child's birth certificate as legal parents. We recommend

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<sup>321</sup> There are many statutory requirements to be inserted into the contracts, and it is only if all these are met that the courts will validate the contract and so transfer parentage. For example: the agreement must be entered into within 14 days of the transfer of the gametes into the surrogate; and provision must be made for impairment of the child and treatment of the child in utero, etc. In all states, the intending parents are required to be married; some states also have medical and age criteria.

<sup>322</sup> Note that in Canada there is no legislative provision for parentage recognition in surrogacy arrangements, but a number of provincial decisions have ordered intending parents (commissioning parents) to be entered on the birth certificate as the legal parents in gestational surrogacy arrangements.



changes to the Human Assisted Reproductive Technology Act 2004 to require retention within the birth register of details of the surrogate mother's identity as well as the identity of the egg or sperm donor if one was used.

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## 8

# Mistaken implantation and legal parenthood

### INTRODUCTION

- 8.1 **A**S USE of new birth technologies becomes more prevalent, there is the risk that women undergoing fertility treatment may be mistakenly implanted with another woman's egg or couple's embryo or the wrong semen. The mistake may not be noticed until after birth, or the gestating woman may be informed of the mistake prior to birth but nevertheless decide to continue with the pregnancy. There have been several reported examples of egg or embryo mix-ups in the United Kingdom, the United States and Italy.<sup>323</sup> This matter was not raised in the Discussion Paper, but in the intervening period some jurisprudence has developed. It is not possible to rule out such a scenario arising in New Zealand.
- 8.2 A former inspector for the United Kingdom's Human Fertilisation and Embryology Authority (HFEA) is reported as estimating that one in 1000 test-tube babies may have been implanted in the wrong woman in the United Kingdom, meaning at least 25 to 30 IVF children are being brought up by persons other than their genetic parents. Another HFEA inspector estimates that at least 100 women have been affected by IVF errors.<sup>324</sup>
- 8.3 Typically, where a clinic implants the wrong embryo, the gestational mother and her partner will have no genetic connection to the child at all. Where a clinic fertilises the wrong egg with a woman's husband's or partner's sperm before implanting it, the child will have a genetic link with its prospective father but not with his partner, the gestational mother. The genetic mother will be another woman and will typically be unknown to them.
- 8.4 Allocating legal parenthood in mistaken egg or sperm or embryo implantation is particularly difficult. A number of adults, otherwise unrelated to each other, may want to claim parenthood on the basis of their or their partner's genetic or

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<sup>323</sup> S Hall "Two women given wrong embryos in IVF mix-up" (29 October 2002) *The Guardian* <[http://www.guardian.co.uk/uk\\_news/story/0,3604,821239,00.html](http://www.guardian.co.uk/uk_news/story/0,3604,821239,00.html)> (last accessed 23 February 2005); "\$1m pay-out for IVF embryo mix-up" (5 August 2004) *BBC News* <<http://news.bbc.co.uk/1/hi/health/3537950.stm>> (last accessed 23 February 2005); "IVF mix-up heads for court" (8 July 2002) *BBC News* <<http://news.bbc.co.uk/1/hi/health/2115522.stm>> (last accessed 23 February 2005); "Experts Troubled by Fertility Mixup Case" (15 July 2004) *ABC 7 News* <<http://www.wjla.com/news/stories/0704/159324.html>> (last accessed 23 February 2005); "'Mix-up' in fertility hospital" (8 September 2004) *The Hindu* <<http://www.thehindu.com/2004/09/08/stories/2004090801901400.htm>> (last accessed 23 February 2005).

<sup>324</sup> L Rogers "Women given wrong embryos at IVF clinics" (12 November 2000) *The Sunday Times* London 12; C Ryan "How likely are IVF blunders?" (22 August 2003) *BBC News* <<http://news.bbc.co.uk/1/hi/health/3173169.stm>> (last accessed 23 February 2005).

gestational connection to the child. If the mistake is discovered later, bonding and attachment issues arise.

### ***Perry-Rogers v Fasano***

- 8.5 In the United States case *Perry-Rogers v Fasano*,<sup>325</sup> Fasano had been accidentally implanted with an embryo created from the egg and sperm of another couple. She was informed of the mistake during pregnancy but elected to continue it. She gave birth to “twin” boys, one of whom was genetically related to her and one to the other couple. She and her husband looked after both boys for several months.<sup>326</sup>
- 8.6 The Supreme Court of New York considered whether Fasano, who had agreed to acknowledge the genetic parents provided that they gave her visitation rights, could claim visitation when the genetic parents refused. The court refused to create a legal principle that a gestational but not genetic mother could never claim visitation with the child. In recognition of current reproductive technology, the term “genetic stranger” alone was no longer enough to end a discussion of who was, or might be, a “parent”.<sup>327</sup>
- 8.7 The court acknowledged that a bond may develop between a gestational mother and baby before, during and after the birth and did exist here. Nevertheless, that was not sufficient to allow visitation in this case, because she had known the mistake and had deliberately allowed a bond to develop.

### **Genetic and gestational motherhood**

- 8.8 Much of the discussion surrounding mistaken implantation has centred around concerns about the nature of the relationship of the “mothers” to the child. Several American courts have held that the genetic link is the most powerful factor in the parent–child relationship, as it “can provide a basis of connection between two individuals for the duration of their lives”.<sup>328</sup> The genetic link may also be of great significance for the genetic mother, who may suffer psychological harm if not granted parenthood of her genetic child.
- 8.9 On the other hand, there are strongly expressed arguments for gestation to be determinative.<sup>329</sup> It is argued that the investment of the gestational mother results

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<sup>325</sup> *Perry-Rogers v Fasano* (2000) 276 A D 2d 67.

<sup>326</sup> Further fertility treatment for the Perry-Rogers was not successful. The Perry-Rogers then began proceedings against Fasano, claiming that they were the lawful parents of their genetic child. To prevent proceedings, Fasano agreed to acknowledge that the Perry-Rogers were the parents of the child in return for visitation rights. The Perry-Rogers initially agreed, but once they gained custody of the child refused visitation rights.

<sup>327</sup> *Perry-Rogers v Fasano* (2000) 276 A D 2d 67, 72.

<sup>328</sup> *Anna J v Mark C* (1991) 286 Cal Rptr 369, 381 (Cal Ct App).

<sup>329</sup> These commentators argue that to give priority to the genetic mother reflects a male conception of reproduction. Men can contribute to reproduction only through the provision of their genetic material carried by sperm cells. To deem the genetic role as being the only element of reproduction with legal significance to determining legal maternity is to deny status to the exclusively female experience of pregnancy and childbirth. See, for example, A Goodwin “Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements” (1992) 26 Family LQ 275, 283–285.

in her developing a prenatal bond with the child, which continues after birth.<sup>330</sup> Her commitment is not only physical, but also psychological and emotional.

## LEGAL PARENTHOOD UNDER NEW ZEALAND LAW

- 8.10 While some doubt arises, it seems that in this situation parenthood would be determined under the donor gamete conception rules rather than the general rules, as assisted reproductive procedures had been used. In any event, the birth mother would be the legal mother, regardless of whether the general or donor gamete conception rules applied. Her partner or husband would be the other legal parent under the donor gamete conception rules.
- 8.11 It is our view that legal parenthood should not be allocated according to rules that are intended for situations where there has been no mistake. Three options present themselves:
- A rule could state either the gestational mother or the genetic mother is the legal mother and parenthood for the respective partners is determined according to genetics or their relationship to the legal mother. Those not granted legal parenthood could apply to be made guardians and granted contact with the child.
  - The gestational mother and the genetic mother could each be deemed the legal mother of the child and, again, parenthood for the respective partners determined according to genetics or their relationship to the legal mother.
  - The question of who is the legal mother could be determined by the court on a case-by-case basis on the best interests of the child. This could result in the child having any combination of legal parents and guardians.
- 8.12 There can be no justification for a firm rule that prefers the genetic role to the gestational role or vice versa. Ultimately, a best interests of the child inquiry in each case is to be preferred. While there may be strong emotional and cultural tendencies to prefer the genetic mother, knowledge of the developing research into gestational bonding between mother and child would also have to be taken into account.<sup>331</sup> Further, if the gestational mother's partner is the genetic father, there would be a balance of genetic interests between the couples.
- 8.13 Cases where the mistake is discovered before birth will have a different balance of relevant factors than cases where the child is months or years old and has

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<sup>330</sup> See L Bender "Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race and Law" (2003) 12 Colum J Gender & L 1, 50–51: "Researchers have attempted to document particular incidents during pregnancy or behaviours of a pregnant woman that foster a bond between mother and fetus. Theorists have identified accelerated maternal attachment after sensory stimulation such as quickening, the mother's experience of fetal movements, ... counting of fetal movements, and ... viewing the fetus by means of ultrasound imaging. Some researchers have pointed out associative behaviours with the unborn child that assist mothers to begin the attachment process, such as verbal communication, stomach-rubbing, and visualizing what the baby will look like." See also I Hurwitz "Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood" (2000) 33 Conn L Rev 127, 159–160.

<sup>331</sup> There is no evidence to suggest that deeming the genetic mother to be the legal mother would invariably be in the best interests of the child. In his exhaustive review of sociological research concerning the experiences of genetic mothers, gestational mothers and children they help to create, Hill demonstrates that the research is conflicting and contradictory, see generally J Hill "What Does It Mean To Be 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) NYUL Rev 353.

formed a strong bond with his or her gestational parents. Relevant factors for the consideration of the court will be:

- the age of the child and the bond developed between it and the gestational parents;
- the genetic relationships between child and adults;
- the gestational relationship between child and adult;
- the intentions of the parties;
- the behaviour of the parties;
- the sibling relationships of the child;
- the comparative potential ability of each of the parties to be fit and proper parents to the child;
- the ability of each of the parties to facilitate the child's relationships with other parties, should that be considered by the court to be desirable; and
- whether issues could be resolved by guardianship and parenting orders, rather than declarations of legal parenthood in relation to each of the parties.

- 8.14 Where there has been theft and fraud in the implantation, that also needs be taken into account, but if the child has many years of bonding with the perpetrators, that also needs to be considered.<sup>332</sup>

### **More than two parents?**

- 8.15 A question arises as to whether the court should be able to make an order that the child have more than two parents. There are differences between the three-parent model recommended in chapter 6 and the situation here, as here there will have been no group intention to create and parent a child together, and the adults will typically be strangers to each other. In most situations, the best interests of the child will be met by awarding parenthood to two adults, with possibly guardianship for one or both of the others. However, the court should not be constrained from making parental orders in favour of more than two persons if it considers this to be the best solution. The consequences of excluding a genetic or gestational parent may be very significant for the child, given the rights that flow from legal parenthood and also given the fact that in some scenarios the gestational mother may be the partner of the genetic father.
- 8.16 The determination of who should have parenting and contact rights is likely to follow the determination of legal parenthood. However, a case-by-case approach needs to be taken, and in this, the court will be working in a field it knows well.<sup>333</sup>

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<sup>332</sup> One commentator has suggested that in cases of theft of gametes by the gestational mother, the balance should initially be tipped in favour of the genetic mother, who would be presumed to be the legal mother. The gestational mother would prevail only if she was able to demonstrate that it would be in the child's best interests to remain with her despite her involvement in the wrongdoing: A Noble-Allgire "Switched at the Fertility Clinic: Determining Maternal Rights When a Child is Born from Stolen or Misdelivered Genetic Material" (1999) 64 *Mo L Rev* 517, 588.

<sup>333</sup> "The situation is not significantly different, however, from the traditional division of custody between a legal mother and a legal father on divorce. It simply means that a court potentially may have parental claims from three parties – two biological mothers and the biological father – rather than the typical claim involving one mother and one father. In the vast majority of cases, however, the father will be the spouse of one of the mothers. As a result, the court faces a straightforward question of determining how much time the child will spend between two households, just as in the typical divorce case, or a surrogacy situation" – A Noble-Allgire "Switched at the Fertility Clinic: Determining Maternal Rights When a Child is Born from Stolen or Misdelivered Genetic Material" (1999) 64 *Mo L Rev* 517, 585–586.

- 8.17 Depending upon who the court decides are to be the legal parents, it may need to extinguish the legal parenthood of the existing legal parents. The legislation should make it clear that the court has the power to extinguish existing legal parenthood as well as issue parental orders in favour of those adults it considers should be the child's legal parents.

#### **Recommendation**

**R16** Part 2 of the Status of Children Act 1969 should be amended to provide for situations of mistaken implantation of an embryo, mistaken fertilisation of an egg, or mistaken insemination. The court should be empowered to make parental orders in favour of, or to extinguish the legal parenthood of, any one or more of the group of adults with a proper interest in the parenthood of the resulting child, on the basis of the child's best interests taking account of specified criteria.

## Embryo donation and legal parenthood

### INTRODUCTION

- 9.1 **E**MBRYO DONATION involves the donation by a couple of one or more surplus embryos to an infertile couple or individual who will gestate and raise the resulting child.<sup>334</sup> Surplus embryos arise out of IVF treatment cycles. In most cycles, five to eight embryos are formed but only two or three are implanted.<sup>335</sup> The remaining embryos can be cryopreserved and subsequently used by the genetic owners to achieve further pregnancies.
- 9.2 There are currently only two options for the genetic owners of surplus embryos when they have achieved their desired family size: they may choose to have their embryos either disposed of or stored. Under the Human Assisted Reproductive Technology Act 2004,<sup>336</sup> they may be stored for a maximum of 10 years.<sup>337</sup>
- 9.3 Embryo donation has not received ethical approval and cannot be practised in New Zealand at present. However, in May 2004, the NECAHR issued draft guidelines

<sup>334</sup> National Ethics Committee on Assisted Human Reproduction *Guidelines for the Practice of Embryo Donation for Reproductive Purposes: Consultation Document* (Ministry of Health, Wellington, 2004) 2. There are very different views as to the status of a human embryo, some consider it a human life while others see it as only having the potential for human life. Overseas literature indicates the breadth of the debate which includes the use of surplus embryos for research. In the area of parenthood laws, debate has largely focused on the difference between embryo donation and adoption, and to what extent, if at all, these should be aligned. See N Johnson “Excess Embryos: Is Embryo Adoption a New Solution or a Temporary Fix?” 68 Brooklyn L Rev 853; C Kindregan and M McBrien “Embryo Donation: Unresolved Issues in the Transfer of Surplus Cryopreserved Embryos” 49 Vill L Rev 169; P Cunningham “Embryo Adoption or Embryo Donation? The Distinction and Its Implications” (The Centre for Bioethics and Human Dignity, Bannockburn (Illinois), 2003) at <<http://www.cbhd.org>> (last accessed 21 February 2005).

<sup>335</sup> The Fertility Society of Australia Reproductive Technology Committee requests that service providers limit the number of embryos transferred in any one treatment cycle to two unless exceptional clinical circumstances exist – *Code of Practice for Centres Using Assisted Reproductive Technology (Revised April 2002)* (Fertility Society of Australia Reproductive Technology Committee, Melbourne, 2002) guideline 5.1, available at <<http://www.fsa.au.com/pdfs/RTAC-guidelines-2002.pdf>>.

<sup>336</sup> Human Assisted Reproductive Technology Act 2004, s10 – embryos may only be stored for more than 10 years if prior approval has been obtained from the ethics committee.

<sup>337</sup> In some other countries, genetic owners may also choose to donate their embryos to medical research. In New Zealand, such research would require ethics committee approval. To date, there have been no applications to NECAHR for approval for this type of research, although ethical approval has been given for research on non-viable embryos – information provided by a Policy Analyst, Ministry of Health to the Law Commission (18 January 2005) email.



for embryo donation for public comment.<sup>338</sup> A revised version of these guidelines has subsequently been submitted to the Minister of Health for approval and embryo donation may be permitted in the near future.<sup>339</sup>

## LEGAL PARENTHOOD OF CHILDREN BORN THROUGH EMBRYO DONATION

- 9.4 The Status of Children Amendment Act 1987 was introduced to clarify the legal parenthood of a child conceived with donor gametes. It also dealt with the status of a child born by embryo donation, although embryo donation was neither possible nor approved at the time. Under the Act, a woman who becomes pregnant as a result of a donor embryo implantation procedure is the mother of the child.<sup>340</sup> If she is married, or living in an opposite-sex de facto relationship, and her husband or partner has consented to the procedure, he is also deemed to be the father of the child.<sup>341</sup> All parental rights and responsibilities of the donors are removed.<sup>342</sup> These rules are similar to ones in comparable jurisdictions.
- 9.5 As stated in chapter 6, the Status of Children Amendment Act 2004, which amends the Status of Children Act 1969 and comes into force on 1 July 2005, retains this rule but extends legal parenthood to the same-sex partner of a woman who becomes pregnant this way.
- 9.6 The effect of the legislation is that parenthood is transferred automatically on birth to the recipients of the embryo in a situation where neither of the child's legal parents are his or her genetic parents. It treats embryo donation identically to gamete donation, although in gamete donation one adult in the parent combination will have a genetic connection to the child. On the other hand, adoptive parents (who also have no genetic connection to the child) are subject to

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<sup>338</sup> National Ethics Committee on Assisted Human Reproduction *Guidelines for the Practice of Embryo Donation for Reproductive Purposes: Consultation Document* (Ministry of Health, Wellington, 2004). Under these draft guidelines, providers of fertility services must inform both new and existing clients of the options regarding their surplus embryos, including storage, disposal, or donation of embryos, and no pressure can be exerted on couples to donate. A donor couple may, if they wish, choose to whom they donate their embryos, and they can withdraw or vary the terms of donation at any time prior to the transfer of the embryos to the recipient(s). Further, the donor couple may donate embryos to create no more than two families and they cannot donate for at least two years after the completion of their family. Recipients are only eligible to receive an embryo donation if they are unable to reproduce and have not responded to other infertility treatments. Before any embryo donation can occur, providers must have both donors and recipients complete a "lifestyle declaration" form, which covers their medical, psychosocial and criminal histories. The information in the declaration must be confirmed by a statutory declaration. Both donors, recipients, and their children (where appropriate) must undergo formal counselling, and where the donating couple has chosen the recipient(s) of their embryo(s) they must attend at least one joint counselling session. Hence, donors and recipients are able to vet each other further to the lifestyle declaration through the joint counselling meeting. Both parties must give informed consent prior to the donation taking place, and a written record of this consent must be kept by the fertility service provider.

<sup>339</sup> The Minister of Health must finally approve the guidelines. At the time this report went to print the content of the revised guidelines and the extent to which they differ from the draft was unknown.

<sup>340</sup> Status of Children Amendment Act 1987, s 9(3).

<sup>341</sup> Status of Children Amendment Act 1987, s 9(1).

<sup>342</sup> Status of Children Amendment Act 1987, s 9(1)–(2).

screening and court processes before an adoption order can be made. Hence the law currently contains an inconsistency.

- 9.7 Rules that transfer parenthood automatically in cases of embryo donation have been criticised overseas for not giving the same protections to donor embryo children as adopted children.<sup>343</sup> On the other hand, recipients of embryo donations are not the same as adoptive parents in that, although there is no genetic connection between the parents and the child, the mother has a gestational connection. She has carried and given birth to the child and hence bonded with the child for the entire gestation. We view embryo donation as a scenario that sits between adoption and gamete donation. The lack of genetic connection warrants additional steps being taken to those that exist for gamete donation.
- 9.8 In their May 2004 form, the draft NECAHR guidelines required some vetting of the donors and recipients and underscore a value of parental autonomy. We endorse moves towards active donor and recipient selection, and openness and communication between the couple donating an embryo and the couple receiving it.
- 9.9 As stated above, we do not know the final form of the guidelines and in these circumstances make general recommendations only. In line with the need for clarity and certainty at the first appropriate opportunity, all matters relating to parental suitability should be decided prior to conception, and it should be clear in law who a child's parents will be before the recipient woman becomes pregnant. The existing legislation allows for this, and we see no need for it to be altered so long as additional child protective measures are completed prior to implantation of the donor embryo.
- 9.10 The measures should encompass some form of education on the special issues arising in parenting a genetically unrelated child. One option is that an education programme be devised by fertility clinics in collaboration with Child, Youth and Family. The measures should also include some form of screening of the parents. In cases of embryo donation, clinics should be prohibited from treating intending parents who have not complied with the designated requirements.

### Recommendation

**R17** Prior to a fertility clinic treating recipient parents using donated embryos, the parents should be required under ethical guidelines or legislation to undertake both education on the challenges of parenting a child without a genetic connection and screening.

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<sup>343</sup> N Johnson "Excess Embryos: Is Embryo Adoption a New Solution or a Temporary Fix?" 68 Brooklyn L Rev 853; C Kindregan and M McBrien "Embryo Donation: Unresolved Issues in the Transfer of Surplus Cryopreserved Embryos" 49 Vill L Rev 169; O Batsedis "Child Protection in the 21st Century: Embryo Adoption: A Science Fiction or an Alternative to Traditional Adoption?" 41 Fam Ct Rev 565; P Cunningham "Embryo Adoption or Embryo Donation? The Distinction and Its Implications" (The Centre for Bioethics and Human Dignity, Bannockburn (Illinois), 2003) at <<http://www.cbhd.org>> (last accessed 21 February 2005).

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# 10

## Identity

### INTRODUCTION

10.1 **I**N THE DISCUSSION PAPER we identified genetic identity as an important issue in the law on legal parenthood.<sup>344</sup> Three groups of New Zealand children may encounter real difficulties in obtaining information about their genetic lineage:<sup>345</sup>

- those conceived using donated sperm, eggs or embryos;
- those born as a result of surrogacy arrangements; and
- those who have no record of their father on their birth certificate or have the wrong father recorded.

10.2 We received more submissions on identity than on any other issue. It was also the most emotive issue in consultation meetings, and the options for access to information about one's genetic identity were the most rigorously debated. In this chapter we discuss the new legal framework introduced by the Human Assisted Reproductive Technology Act 2004, which was enacted after publication of the Discussion Paper<sup>346</sup> and which addresses identity issues for people conceived by donated gametes or embryos. We identify outstanding issues for this group of people following the Human Assisted Reproductive Technology Act 2004 and consider the position of people born as a result of a surrogacy arrangement. We also discuss the issues for those with no father identified on their birth certificate and what information should appear on birth certificates generally.

### Human Assisted Reproductive Technology Act 2004

#### *Accessing identifying information*

10.3 Part 3 of the Human Assisted Reproductive Technology Act 2004, which comes into force on 21 August 2005, puts an end to anonymous donor conception and reflects changes that have either already been introduced or are planned in Sweden,<sup>347</sup> the

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<sup>344</sup> New Zealand Law Commission *New Issues in Legal Parenthood* (NZLC PP54, Wellington, 2004).

<sup>345</sup> People adopted under the closed stranger adoption regime of the Adoption Act 1955 also fall into this category. We do not consider adoption in this report. Adoption was the subject of a Law Commission report in 2000: New Zealand Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, Wellington, 2000).

<sup>346</sup> The Bill's provisions, as they then were, were appended and discussed in detail in our Discussion Paper: New Zealand Law Commission *New Issues in Legal Parenthood* (NZLC PP54, Wellington, 2004), paras 5.33–5.42.

<sup>347</sup> Lag om insemination (Act on Insemination) SFS 1984: 1140 (Sweden), art 4.

Netherlands,<sup>348</sup> the United Kingdom,<sup>349</sup> and the Australian states of Victoria<sup>350</sup> and New South Wales.<sup>351</sup> It places a duty on “providers”<sup>352</sup> – essentially clinics – to retain certain information about donors.<sup>353</sup>

- 10.4 Section 53 of the Act provides that when a live birth occurs from a donor’s gametes or embryo, the clinic must pass information about the donor-conceived child<sup>354</sup> and the name and address of the donor and his or her date, place and country of birth to the Registrar-General of Births, Deaths and Marriages. The clinic must pass all other information obtained about the donor to the Registrar-General after 50 years, or sooner if the clinic closes.<sup>355</sup>
- 10.5 The information retained by the Registrar-General and/or the clinic is to be available to the child at 18 years, or 16 or 17 with the court’s consent, or earlier on application by his or her guardian.<sup>356</sup> When a request for the information is made, the clinic or the Registrar-General may refuse to disclose it, if it is satisfied on reasonable grounds that the disclosure is likely to endanger “any person”.<sup>357</sup>

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<sup>348</sup> See “New Law Affects Sperm Donation in the Netherlands” (4 June 2004) *BioNews* <<http://www.BioNews.org.uk>> (last accessed 17 February 2005).

<sup>349</sup> See Human Fertilisation and Embryology Authority <<http://www.hfea.gov.uk/PressOffice/Backgroundpapers/DonorAnonymity>> (last accessed 15 March 2005; “Donor Anonymity To Be Removed in UK” (21 January 2004) *BioNews* <<http://www.BioNews.org.uk>> (last accessed 18 February 2005); S Boseley “Donor Children Will Have Right To Know” (22 January 2004) *The Guardian – Final Edition* London 4.

<sup>350</sup> Infertility Treatment Act 1995 (Vic), ss 79–80.

<sup>351</sup> See “New South Wales to ‘Shake-Up’ Fertility Laws” (26 January 2004) *BioNews* <<http://www.BioNews.org.uk>> (last accessed 18 February 2005). Also, reports in both South Australia and Western Australia have recommended that donor offspring should have access to identifying information about their origins – see South Australian Council on Reproductive Technology *Conception by Donation: Access to Identifying Information in the Use of Donated Sperm, Eggs and Embryos in Reproductive Technology in South Australia* (Rundle Mall, 2000) available at <<http://www.dh.sa.gov.au/reproductive-technology/documents/archive/Reports/donor-issues-discussion-paper.pdf>> (last accessed 22 February 2005); and see M Roberts “A Right to Know for Children by Donation—Any Assistance from Down Under?” (2000) 12 *Child and Family Quarterly* 371.

<sup>352</sup> “Provider” is defined in section 5 of the Human Assisted Reproductive Technology Act 2004 as: “(a) a person who, in the course of a business (whether or not carried on with a view to make a profit), performs, or arranges the performance of, services in which donated embryos or donated cells are used; and (b) includes a successor provider”.

<sup>353</sup> According to section 47 of the Human Assisted Reproductive Technology Act 2004, the information to be obtained is the donor’s name, gender, address, date, place and country of birth, height, eye and hair colour, ethnicity and relevant cultural affiliation, whānau, hapū and iwi, medical history and that of his or her parents, grandparents, children and siblings, and the donor’s reasons for donating.

<sup>354</sup> For example, the date and place of the offspring’s birth, his or her sex and name, and the names and addresses of the guardians of the offspring.

<sup>355</sup> Human Assisted Reproductive Technology Act 2004, s 47 and s 48.

<sup>356</sup> Human Assisted Reproductive Technology Act 2004, s 50 and s 65.

<sup>357</sup> Human Assisted Reproductive Technology Act 2004, s 50(4).

### *Siblings of donor offspring*

- 10.6 The Human Assisted Reproductive Technology Act 2004 provides that a clinic or the Registrar-General “may” tell a donor-conceived child (or his or her guardian) whether he or she has any siblings or half-siblings conceived from the same donor.<sup>358</sup> The child, or his or her guardian, can then ask for access to information about the sibling or half-sibling, but that information can only be released with the consent of the sibling or half-sibling (or his or her guardian).<sup>359</sup>

### *Access to information by donors*

- 10.7 The Act only allows “one-way” access to the information held by the clinic or Registrar-General. It does not give donors the ability to contact families who have children who were conceived with their gametes or embryos. However, after the age of 18, donor offspring can notify the clinic or Registrar-General that they are willing to have information about them released to their donor.<sup>360</sup> Again, the clinic or Registrar-General can refuse access to the information if they believe to do so might endanger any person.<sup>361</sup>

### *Voluntary register*

- 10.8 Importantly, the Act is not retroactive.<sup>362</sup> It only applies to gametes or embryos donated, or to children conceived by gametes or embryos donated, after the relevant sections of the Act come into force. This contrasts with the Adult Adoption Information Act 1985, which enabled people adopted before the Act came into force to access their adoption records; although under that Act, both adoptees and genetic parents of children born prior to its enactment can place an endorsement or “veto” on the record if they do not consent to it being opened up.<sup>363</sup>
- 10.9 Instead, the Human Assisted Reproductive Technology Act 2004 makes provision for the establishment of a voluntary register for donor offspring conceived prior to the Act taking effect. Under section 63, offspring and donors can add their details to the voluntary register, and the Registrar-General can pass information between offspring and donors if he or she has reason to believe they may be genetically related.<sup>364</sup>

### *Enabling offspring to know they are donor-conceived*

- 10.10 It is clear from the commentary to the Human Assisted Reproductive Technology Bill provided by the Select Committee that there were significant discussions about the issue of parents not disclosing to their children the fact they were donor-conceived. Contrary to media reporting at the time, the solution the Committee

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<sup>358</sup> Human Assisted Reproductive Technology Act 2004, s 58(1).

<sup>359</sup> Human Assisted Reproductive Technology Act 2004, s 58(2).

<sup>360</sup> Human Assisted Reproductive Technology Act 2004, s 59.

<sup>361</sup> Human Assisted Reproductive Technology Act 2004, s 60(3) and s 61(3).

<sup>362</sup> Human Assisted Reproductive Technology Act 2004, s 43.

<sup>363</sup> Adult Adoption Information Act 1985, s 3 and s 7.

<sup>364</sup> For further discussion see paras 10.84–10.96 below.

came up with falls short of an obligation on parents to tell their children about the circumstances of their birth.<sup>365</sup> Instead, a clause was inserted stating that a provider must inform donors and recipients of “the importance of telling offspring about the nature of their conception”.<sup>366</sup> Seven principles are listed in the Act to guide service providers, one of which is “donor offspring should be made aware of their genetic origins and be able to access information about those origins”.<sup>367</sup>

### Outstanding issues

- 10.11 Following the passage of the Human Assisted Reproductive Technology Act 2004, there remain three outstanding information issues for people conceived with donated gametes, embryos or through surrogacy arrangements:
- The offspring must still rely on other people to tell them they are donor-conceived or born as a result of a surrogacy arrangement before they can access their information.
  - The Act only covers people conceived in a clinic and not those conceived at home or in private surrogacy arrangements.
  - The voluntary register alone may not be an effective means of enabling people conceived prior to the Human Assisted Reproductive Technology Act 2004 coming into force to access information about their identity.

### GENETIC IDENTITY – A LEGAL RIGHT TO KNOW?

- 10.12 The Human Assisted Reproductive Technology Act 2004, while reforming the law for donor offspring conceived in a clinic after 21 August 2005, fails to grant those conceived at home by donor sperm or in a surrogacy arrangement, or those conceived prior to that date, the right to access their genetic or gestational information.
- 10.13 The right of an adopted child to know his or her genetic origins was recently considered by the Court of Appeal in *H v Y*. After an extensive review of international treaties and case law, Hammond J stated:

I conclude that international instruments, practice and jurisprudence have not yet reached the point where it can conclusively be said that adopted children possess a universal and internationally recognised right to know their biological parentage, although the tide of opinion is flowing in that direction.<sup>368</sup>

The situation must be the same for donor offspring and those born as a result of surrogacy arrangements.

- 10.14 New Zealand, by ratifying the United Nations Convention on the Rights of the Child (UNCROC) in 1993, has illustrated its commitment to children’s rights.<sup>369</sup>

<sup>365</sup> See, for example, “New Laws Would Require Children to Know of Assisted Conception Genetic-Babies” (7 August 2004) *The Dominion Post* Wellington A3.

<sup>366</sup> Human Assisted Reproductive Technology Act 2004, s 46(3)(g).

<sup>367</sup> Human Assisted Reproductive Technology Act 2004, s 4(e).

<sup>368</sup> *H v Y* [2005] NZFLR 152, para 88.

<sup>369</sup> The notion that children have rights is said to be “underpinned by a growing view of children as social actors and as participants in family life, rather than as ‘objects of concern’ and passive victims of forces and adult actions” Dame Butler-Sloss quoted in G Douglas *An Introduction to Family Law* (Oxford University Press, 2001) 72. This decision was affirmed in the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112. See also para 1.18 of this report.



Although UNCROC did not deal with new birth technologies specifically, and it can only be speculated how that might have affected the expression of the articulated rights, two articles are nevertheless directly relevant to the preservation of information about a child's genetic origins. These are the rights:<sup>370</sup>

- to preserve their identity, including family relations, from unlawful interference (article 8(1)) and to be provided with state assistance to speedily re-establish their identity if illegally deprived of it (article 8(2));
- to have the freedom to seek and receive information of all kinds (article 13(1)).

10.15 In other jurisdictions, human rights mechanisms have been used in attempts to give effect to claims for access to information for identity purposes. In *Gaskin v UK*<sup>371</sup> the European Court of Human Rights supported the view that “respect for private life”, as protected in article 8 of the European Convention on Human Rights, requires that everyone should be able to establish details of their identity as individual human beings, and that in principle they should not be obstructed by the authorities from obtaining such very basic information without specific justification.<sup>372</sup>

10.16 On the other hand, it has been held that rights to preserve identity, or to seek and receive information of all kinds, have to be weighed against other interests, such as those favouring family autonomy and the privacy of the genetic parent.<sup>373</sup> These rights are supported by article 14 of the Universal Declaration on Human Rights and article 17 of the International Covenant on Civil and Political Rights, which provides:

- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.
- (2) Everyone has the right to the protection of the law against such interference or attacks.

10.17 The Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine may also provide some direction in relation to establishing a person's right to know their genetic heritage.<sup>374</sup>

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<sup>370</sup> Two others have some relevance though the reference to “parents” includes a reference to persons who are legal parents (whether or not they are genetic parents). These are: to know their parents from birth and to be cared for by them (article 7(1)) and to maintain personal relations and direct contact with their parents if separated from them (article 9(3)).

<sup>371</sup> *Gaskin v UK* (1989) EHRR 36.

<sup>372</sup> See also the decision in the United Kingdom *R (on the application of Rose and another) v Secretary of State for Health and another* [2002] EWHC 1593 (Admin), (2002) 3 FCR 731.

<sup>373</sup> See, for example, *Odièvre v France* [2003] ECHR 86 where the European Court of Human Rights recognised a right to genetic identity but, on the particular facts of the case, applied article 12 of the European Convention to protect the privacy of a birth mother from requests by an adopted child for information about her for identity purposes.

<sup>374</sup> These treaties take into account the increasing impact of science and technology. The first notes the necessity of strengthening “the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments ...” (Charter of Fundamental Rights of the European Union (7 December 2000) [2000] OJ C 364, 1, preamble) and the second, the “importance of ensuring the dignity of the human being” (Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (4 April 1997) [1997] ETS 164, preamble).



## Māori view of identity

- 10.18 Any determination of whether there is a right to know about one's genetic origins must be influenced by the recognition, required by law, of the cultural rights of ethnic adherents whose values compel open disclosure of genetic lines.<sup>375</sup> That is plainly the case for many who identify as Māori.
- 10.19 While identity for individual Māori may depend more on upbringing than strict bloodlines, it is still the case that bloodlines are important in many tribal or customary situations. The centrality of identity to Māori culture finds expression in many ways, particularly cosmic identity through ancestral association with land and water resources, as expressed in traditional speech protocols, and personal identity in relation to others by the extensive manipulation of complex genealogies. In these situations, speakers will often prefer the genetic line when introducing themselves or referring to others, omitting those who have exercised a fostering or adoptive role. Primacy may also be given to strict bloodlines, rather than foster or adoptive lines, in determining status within the tribe or his or her connection with other tribes.<sup>376</sup>
- 10.20 Recently, the genetic line has been given further emphasis, first as a result of a decision of the Maori Appellate Court and secondly, as a result of legislation. Under Māori land laws prior to 1993, children adopted only by Māori custom (whāngai) continued to succeed to the estate of their birth parents and not to that of their adoptive parents (unless wills provided otherwise). This was seen as unduly prescriptive and the law was changed in 1993 to give the Maori Land Court a wide discretion to make provision for whāngai in any case.<sup>377</sup> Nonetheless, the Maori Appellate Court has recently determined that a blood relationship to the owners in the land must still be established for a whāngai to succeed.<sup>378</sup>
- 10.21 Provision has been made for an equally prescriptive approach in the Maori Fisheries Act 2004. This is an Act that enables individual Māori to share in the benefits resulting from a national settlement of Māori fishing claims on proof of descent from a primary ancestor of one or more specified iwi (tribal organisations). The iwi organisations are required to determine a policy, "in accordance with tikanga [customs] of the ... iwi organisation", on the rights of whāngai "or other persons who do not descend from a primary ancestor of the iwi".<sup>379</sup> In short, to gain access to substantial benefits, descent by blood may need to be established depending on what the relevant iwi organisation has decided.
- 10.22 For Māori, as a result of statutory and judicial intervention, the default position is that the genetic line must be proven in order to gain identity as Māori and to gain rights in respect of significant resources.

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<sup>375</sup> Recognition is due in terms of article 27 of the International Covenant on Civil and Political Rights ("the right ... to enjoy their own culture") replicated as section 20 of the New Zealand Bill of Rights Act 1990. In addition, when making recommendations we are particularly obliged to take into account the Māori dimension and to consider the multicultural character of New Zealand society – Law Commission Act 1985, s 5(2).

<sup>376</sup> The Commission has previously considered this sense of Māori identity in New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001). The Māori favouring of openness in adoptions and other child placements was considered by the Commission in New Zealand Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, Wellington, 2000).

<sup>377</sup> Te Ture Whenua Maori Act 1993, s 115.

<sup>378</sup> See *Estate of Tangi Biddle or Hohua* (2001) Māori Land Court Minute Book 10 APRO 43.

<sup>379</sup> Maori Fisheries Act 2004, s 17 and sch 7, kaupapa 6.

## The importance of genetic identity

- 10.23 Most people take their genetic background for granted. The people they know as their parents are indeed their genetic mothers and fathers. They have access to their family histories, medical information, and genetically related grandparents, cousins, siblings and wider family members, and they can pass that information on to their children
- 10.24 For donor-conceived people,<sup>380</sup> however, one or both of their parents are not their genetic parents. One genetic parent's legal parenthood has been extinguished at their birth by automatic operation of the law.<sup>381</sup> Until the Human Assisted Reproductive Technology Act 2004, this left no legal record of their genetic parentage.
- 10.25 The publicly expressed concerns of many adult donor offspring echo those of people who were adopted under the closed stranger adoption regime of the Adoption Act 1955.<sup>382</sup> Some have expressed a sense of loss, disappointment, anger and resentment, sometimes directed at the individuals involved in their conception, but also at the system itself, which facilitated the maintenance of the fiction.
- 10.26 One study found the following themes among donor children who had grown to adulthood:<sup>383</sup> that they felt their life was a lie; that they found it difficult to trust others; that withholding information had effects on the family dynamics; and that they experienced a need to know and to make genetic connections, a “primal and unrelenting”<sup>384</sup> need to search for their genetic relatives – both donor and half-siblings.<sup>385</sup> As a consequence of their feelings and experiences, many donor offspring have spent much of their adult life dominated by the search for their donor.<sup>386</sup>

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<sup>380</sup> Though we use the generic word “donor conception” here, we use it to refer to unknown donor conception. All the research cited relates almost exclusively to unknown donor conception. In New Zealand, the distinction is important as there are a significant number of known donor conceptions, particularly in egg donations and same-sex parent families. Some of the issues will be the same for this group, though many can be expected to have more access to knowledge of their genetic identity.

<sup>381</sup> See our discussion at chapter 6, paras 6.2–6.8.

<sup>382</sup> The Adult Adoption Information Act 1985 partially opened up adoption by providing a process by which birth parents can seek contact with their children, and adopted children can obtain their original birth certificates and make contact with their birth parents. However, under sections 3 and 7 both the adoptee and the birth parent can opt to place a veto on the information being passed on.

<sup>383</sup> A Turner and A Coyle “What Does It Mean To Be a Donor Offspring?” (2000) 15 Human Reproduction 2041, 2044–2048.

<sup>384</sup> Donor quoted in A Turner and A Coyle “What Does It Mean To Be a Donor Offspring?” (2000) 15 Human Reproduction 2041, 2046.

<sup>385</sup> This is a particular concern for older donor offspring who were conceived before limits were placed on how many recipients could be inseminated with one donor's sperm.

<sup>386</sup> A donor-conceived woman who is pursuing a claim to gain access to information about her donor in the United Kingdom described the significance of obtaining that knowledge as follows: “I feel that these genetic connections are very important to me, socially, emotionally, medically, and even spiritually. I believe it to be no exaggeration that non-identifying information will assist me in forming a fuller sense of self identity and answer questions that I have been asking for a long time. I am angry that it has been assumed that this would not be the case, and can see no responsible logic for this (given the usual pre-eminence accorded to the rights and welfare of the child), unless it is believed that if we are created artificially we will not have the natural need to know to whom we are related. I feel intense grief and loss, for the fact that I do not know my genetic father and his family ...” – *R (on the application of Rose and another) v Secretary of State for Health and another* (2002) 3 FCR 731, para 7.

- 10.27 The donor gamete conception rules, enabling parenthood to be transferred automatically from genetic to non-genetic parent without a trace of its occurrence, also enabled parents dealing with the shame of infertility and fear of rejection to mislead their children into believing they were genetically connected.
- 10.28 Research indicates that secrecy and shame can have a significant effect on family relationships. It can negatively impact on the parents' marital relationship and on child adjustment.<sup>387</sup> Even if they do not know the family secret, children can often sense that something is wrong and pick up hidden clues.<sup>388</sup> Further, maintaining the secret can become more and more difficult<sup>389</sup> and the child may find out about their donor conception inadvertently and in an inappropriate manner, causing distress and trauma.<sup>390</sup>
- 10.29 It is impossible to know how widespread the quest for genetic identity is among donor-conceived children. There is no reason to believe it would be any less among donor offspring than among adopted children.
- 10.30 Telling children does not necessarily solve all the problems. Parents who have told their child from the outset may later have to field questions that they cannot answer about the personality, looks and habits of the donor. It has been said that telling children is "not an isolated incident, but an ongoing conversation".<sup>391</sup>
- 10.31 It appears that only a minority of parents who have conceived with donated gametes tell their children about the circumstances of their conception. In the only reported study in New Zealand, only 30 per cent of the respondents had told their children, though a larger number of parents said they intended to in the future.<sup>392</sup> Nevertheless, this study, of 78 couples and 25 individuals, revealed one of the highest proportions of actual or intending disclosers in countries where research has been carried out.<sup>393</sup>

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<sup>387</sup> E Lycett et al "Offspring Created as a Result of Donor Insemination: A Study of Family Relationships, Child Adjustment, and Disclosure" (2004) 82 *Fertility and Sterility* 172, 173.

<sup>388</sup> See A Turner and A Coyle "What Does It Mean To Be a Donor Offspring?" (2000) 15 *Human Reproduction* 2041, 2042.

<sup>389</sup> J Matot and M Gustin "Filiation and Secrecy in Artificial Insemination with Donor" (1990) 5 *Human Reproduction* 632; A McWhinnie "Gamete Donation and Anonymity" (2001) 16 *Human Reproduction* 807, 811.

<sup>390</sup> A Turner and A Coyle "What Does It Mean To Be a Donor Offspring?" (2000) 15 *Human Reproduction* 2041, 2045. Some of those involved in this study had found out about their origins following a family crisis or after asking because of a feeling of being "different" to their family.

<sup>391</sup> A Rumball and V Adair "Telling the Story: Parents' Scripts for Donor Offspring" (1999) 14 *Human Reproduction* 1392, 1393.

<sup>392</sup> A Rumball and V Adair "Telling the Story: Parents' Scripts for Donor Offspring" (1999) 14 *Human Reproduction* 1392. Seventy-seven per cent of the parents who had not told their children indicated that they intended to do so.

<sup>393</sup> In comparison, a study in the United Kingdom basing its research at a clinic that had a policy of encouraging future parents to tell their children about their genetic origins, found 39 per cent of the participants were classed as "disclosers", with only 13 per cent having actually told their children at the time of the study – E Lycett et al "Offspring Created as a Result of Donor

- 10.32 Parents may choose not to tell their donor-conceived children for a number of reasons.<sup>394</sup> In some cases it may be because of unresolved feelings about infertility,<sup>395</sup> in others it may be because the parents believe it is irrelevant to tell children about donor conception.<sup>396</sup> It has also been suggested that the decision not to disclose protects the family, not only from the stigma of male infertility but also from the risk that stigma will be attached to the whole family as not representing a normal or secure unit.<sup>397</sup>
- 10.33 In other instances it may be merely a question of *how* to tell the child. Without help from experts, or without aids to help them tell their child, parents may feel incapable of answering all the child's questions or may fear the questions that will ensue. The non-genetic parent may also fear rejection from the child if he or she knows the truth. In fact, parents who have told their children generally report positive experiences.<sup>398</sup>
- 10.34 The authors of a Swedish study note that the attitudes of the professionals involved influence parents' willingness to tell their children.<sup>399</sup> Matot and Gustin<sup>400</sup> strongly argue that it has to become part of the practitioners' role to educate on other issues that the parents will have to deal with, so that they are properly counselled about infertility and the child's development and can tell their children in a confident way and be able to deal with questions.

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Insemination: A Study of Family Relationships, Child Adjustment, and Disclosure" (2004) 82 *Fertility and Sterility* 172, 173. The young age of the children may have had an impact on the numbers who had disclosed the information already. Even in Sweden, where donors have been identifiable since 1985, only 52 per cent of parents in one study had told their children or intended to do so: C Gottlieb et al "Disclosure of Donor Insemination to the Child: The Impact of Swedish Legislation on Couples' Attitudes" (2000) 15 *Human Reproduction* 2052. This is despite legislation being in place that ensures that children in Sweden have access to information about their donor. The picture is very similar for embryo donation: one study into parents of children born with donated embryos has been completed, finding that only 34 per cent of parents planned to tell their children, although 86 per cent of the families had told other people about the method of conception: F MacCallum "Embryo Donation Families: Psychological Implications" in *European Society of Human Reproduction and Embryology: Annual Meeting* (Berlin, 2004).

<sup>394</sup> See, for example, E Blyth et al "The Implications of Adoption for Donor Offspring Following Donor-Assisted Conception" (2001) 6 *Child and Family Social Work* 295, 297.

<sup>395</sup> R and E Snowden "Families Created Through Donor Conception" in K Daniels and E Haines (eds) *Donor Insemination: International Social Science Perspectives* (Cambridge University Press, New York, 1998).

<sup>396</sup> A Rumball and V Adair "Telling the Story: Parents' Scripts for Donor Offspring" (1999) 14 *Human Reproduction* 1392, 1396.

<sup>397</sup> Nachtigall et al "Stigma, Disclosure, and Family Functioning Among Parents of Children Conceived Through Donor Insemination" (1997) 68 *Fertility and Sterility* 83.

<sup>398</sup> E Blyth et al "The Implications of Adoption for Donor Offspring Following Donor-Assisted Conception" (2001) 6 *Child and Family Social Work* 295, 300.

<sup>399</sup> C Gottlieb et al "Disclosure of Donor Insemination to the Child: The Impact of Swedish Legislation on Couples' Attitudes" (2000) 15 *Human Reproduction* 2052.

<sup>400</sup> J Matot and M Gustin "Filiation and Secrecy in Artificial Insemination with Donor" (1990) 5 *Human Reproduction* 632.

## Consultations and submissions

- 10.35 The large majority of consultees and submitters expressed a clear view that children have a right to knowledge about their genetic origins if they want it. This was considered important for medical reasons and for developing identity. Some recipients also had concerns about their children starting relationships with half-siblings. There was also almost universal support for the safe retention of records about the donor.
- 10.36 However, the questions of whether donors should remain anonymous and whether parents should tell their children were responded to in more complex ways. Most recipients supported disclosure to children, using age-appropriate information. One parent who had struggled with the idea of disclosure due to difficulty in accepting his infertility thought that, despite his feelings, the rights of the children had to come first. However, while expressing an intention to tell their children, many recipients felt there needed to be an equal balancing of the child's rights and family life, and that parents should be able to decide if, when and how to tell.
- 10.37 Of the sperm donors we met, only three argued that the decision should be left to the parents. The large majority of donors were open to being contacted by their offspring (indeed, some donors thought they were already under an obligation to be contactable), but nearly all were concerned about an unexpected "knock on the door". There was a consensus that the passing on of identifying information had to be a managed process. A majority felt that this should be managed through the clinics.
- 10.38 The large majority of written submissions also supported what the Salvation Army described as the "right of every child to know the truth about their conception and birth".<sup>401</sup> Organisations with a focus on the interests and needs of children such as Youthlaw Inc, the Royal New Zealand Plunket Society and Action for Children and Youth Aotearoa also supported this. The right is also supported by FertilityNZ, an advocacy and representative organisation on fertility issues, and by the New Zealand fertility clinics from whom we received submissions.
- 10.39 A few people spoke strongly against disclosure. One consultee considered that arguments that children should be told was merely "scaremongering" and others considered it "political correctness". One submitter objected to the "loaded semantics of the phrase the 'right to know' ". One donor could not understand the need for a child to know their genetic background, and he did not think recipient families should tell their children as disclosure could harm the family unit.

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<sup>401</sup> This reflects views held elsewhere. For example, in a submission to a South Australian working group on access to identifying information, all adult offspring members of the Australian National Donor Conception Support Group considered that offspring should have access to identifying information on their donors and that it should be a right mandated by law: South Australian Council on Reproductive Technology *Conception by Donation: Access to Identifying Information in the Use of Donated Sperm, Eggs and Embryos in Reproductive Technology in South Australia* (Rundle Mall, Adelaide, 2000) available at <<http://www.dh.sa.gov.au/reproductive-technology/documents/archive/Reports/donor-issues-discussion-paper.pdf>> (last accessed 22 February 2005).

## ENABLING CHILDREN TO KNOW THEY ARE DONOR-CONCEIVED

### Legal duty on parents to tell?

- 10.40 In light of the views of donor offspring and the potential outcomes for families and children when secrecy is maintained, we have considered ways of encouraging more parents to tell their children. In the Discussion Paper we asked whether there should be a legal duty on parents to tell their children. Many submitters expressed very strong views about the law needing to facilitate openness and some, including the Auckland District Law Society and Youthlaw Inc, favoured the option. However, on balance we do not recommend there be such a duty.
- 10.41 Such a rule would represent an unprecedented intervention by the law into the way parents raise their children. While the law will act to protect children under direct threat from their parents or guardians, it would be a new and undesirably intrusive step for it to require one group of parents to impart specific information to their children.
- 10.42 Parents need support and help in telling their children about their conception, and in being prepared to deal confidently with the questions their children may ask. We agree with the view of the South Australian Council on Reproductive Technology that any duty to provide information should not lie with the parents alone but with clinics and the state.<sup>402</sup> The state has endorsed donor conception as a treatment, and provided a legislative framework that supports its use. Similarly, practitioners and clinics have devised the technology and provided and profited from the services.
- 10.43 Section 46 of the Human Assisted Reproductive Technology Act 2004 requires clinics to tell donors and recipients of the importance of telling offspring about the nature of their conception. We understand that, in fact, most clinic counselling in New Zealand has included such information for many years. Yet the research indicates that many parents have serious difficulties in telling their children. Other mechanisms must, therefore, be made available to encourage this to happen.

### Birth certificates

- 10.44 In the Discussion Paper we asked whether it would be appropriate to use a child's birth certificate as a mechanism for ensuring they were informed of the method of their conception. A birth certificate has been described as a "document of historical fact"<sup>403</sup> and a "historical record" that stands "for all time".<sup>404</sup> Births, Deaths and Marriages consider the birth certificate to be a "snap shot of the circumstances as they were at the time of the child's birth".<sup>405</sup>

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<sup>402</sup> South Australian Council on Reproductive Technology *Conception by Donation: Access to Identifying Information in the Use of Donated Sperm, Eggs and Embryos in Reproductive Technology in South Australia* (Rundle Mall, Adelaide, 2000) available at <<http://www.dh.sa.gov.au/reproductive-technology/documents/archive/Reports/donor-issues-discussion-paper.pdf>> (last accessed 22 February 2005) 6.

<sup>403</sup> G Naldi "No Hope for Transsexuals?" (1987) 137 NLJ 127.

<sup>404</sup> D Miller and R Hill "J's story" (1999) 149 NLJ 764.

<sup>405</sup> New Zealand Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, Wellington, 2000) 170.



- 10.45 Although in the normal course of events it is the child's genetic parents who are recorded on the birth register, birth certificates do not always reflect a child's genetic lineage and birth history, for example: adopted children, for whom a second birth certificate, showing the adoptive parents, is issued; donor offspring, whose legal parentage has been determined by the "deeming" rules; people who give wrong information, either knowingly or by mistake; and instances where no father has been registered with Births, Deaths and Marriages. It is important that people understand that the birth certificate reflects the legal rather than genetic parentage of the child, though usually the two coincide.
- 10.46 Birth certificates themselves only record *some* of the information retained on the Births, Deaths and Marriages register. It will reveal basic information about the child, the mother and, if the information has been passed to Births, Deaths and Marriages, the father. But when registering a birth, parents are asked to provide information about their marital status, any other children of the relationship, the addresses of the parents, whether the parents are of Māori descent, and the ethnicity of the child and the parents. This information is recorded on the birth register, but does not appear on the birth certificate.
- 10.47 Birth certificates are relied upon by schools and universities on enrolment, by authorities when issuing a passport or driving licence, and to verify information for tax purposes. They may also be required by banks, before marriage, and by agencies abroad. All these institutions need to be able to rely on the accuracy of the information being presented to them. However, the fact that such a wide range of institutions seek access to birth certificates, and the fact that they need to be presented with such frequency, raises issues of privacy.

#### *Two birth certificates*

- 10.48 We asked whether a child should have two birth certificates, with the private one recording all donor, gestational and legal parent details and the public one recording only legal parent details. The Law Commission has made a similar recommendation in relation to adopted people.<sup>406</sup>
- 10.49 The advantage of this would be that a document would exist that would inform a child of his or her background, but also the child could decide which certificate he or she preferred to use in the future.
- 10.50 This suggestion did not receive a great deal of support in submissions. Births, Deaths and Marriages was concerned about the security implications of New Zealanders having two forms of a birth certificate. Submitters thought it would be an overly bureaucratic system to operate. Clinics, donors and recipients were concerned that a second certificate that recorded the donor could disrupt the recipient family, accord donors status, rights and responsibilities that were not intended, interfere with the parents' decision if and when to tell their child at the appropriate time, and compromise the privacy of donors. A different position was taken by parties to surrogacy arrangements and many of those conceiving using a known donor. Many of these parents wanted their child's birth certificate to record the gestational mother or known egg or sperm donor, though not as the legal parent. At the least, most wanted the record to indicate that the child was conceived in

<sup>406</sup> New Zealand Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, Wellington, 2000) 173.



donor or surrogacy circumstances. This was seen as a matter of fact and even pride within the family.

### *Short-form certificate*

- 10.51 A number of submitters and consultees suggested that children should be able to opt to use a certificate with only child-centred information on it. This form would not record information about the child's parents at all, but could record just the place and date of birth.
- 10.52 Prior to September 1995, when the Births, Deaths, and Marriages Registration Act 1995 came into force, a short-form certificate could be requested from Births, Deaths and Marriages that displayed only the name, date and place of birth. However, Births, Deaths and Marriages advised us that these certificates have rarely been requested because they are not recognised by the institutions who demand sight of birth certificates, as parentage information assists agencies in the verification of an applicant's personal details. Due to the lack of demand, provision for them was not included in the Births, Deaths, and Marriages Registration Act 1995.

### **The view of the Commission**

- 10.53 In light of the uses and purposes of a birth certificate and of Births, Deaths and Marriages' concerns, we do not recommend the dual birth certificate model.<sup>407</sup> The requirement under the Human Assisted Reproductive Technology Act 2004 that information about the donor and the child's donor status be registered by Births, Deaths and Marriages achieves the same aim as having two birth certificates – that is, it ensures there is a separate record of the circumstances of birth accessible to the child. However, even with genetic information being retained on a separate register, the problem remains that a donor-conceived person is still reliant on being told about his or her conception.<sup>408</sup>

### **Annotations**

- 10.54 In the Discussion Paper we asked whether the birth certificates of donor offspring should be annotated in some way to indicate that a parent was not a genetic parent. In this way there would be an official means for donor offspring to discover they are donor-conceived. Annotations would enable the child to seek out further information and choose whether to contact those involved. They would have the ability to access their full genetic identity. It would also be an inducement for parents to tell their children.
- 10.55 Many submissions that dealt specifically with the issue were in favour of birth certificates being annotated. However, the Family Law Section of the New Zealand Law Society and the Auckland District Law Society were concerned about the potential invasion of privacy and the potential for offence or embarrassment. Youthlaw Inc raised concerns about the degree of competition that surrounds school enrolment and the potential for discrimination against children.

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<sup>407</sup> This is in contrast to a Law Commission recommendation in the 2000 Adoption Report, however, the effect of these later recommendations will be the same as that intended in the 2000 recommendation. Since that time, terrorism has increased security issues and emphasised the importance of verifying identity. Dual birth certificates could exacerbate terrorism risks.

<sup>408</sup> Births, Deaths and Marriages indicated concern that proliferation of birth certificates can increase the risk of identity theft.

- 10.56 In consultation meetings, the issue of annotations was very contentious. Some people voiced concerns about privacy very strongly. One mother who had already told her children described the suggestion as punishing her child for the failure of other parents to tell their children.
- 10.57 On the other hand, some parents argued that there was no reason to feel ashamed about the use of donor conception, and that the more such birth certificates were in circulation, the less the risk of differential treatment of children. They said they would prefer their child's birth certificate to say that the child is donor-conceived rather than that the father is "unknown", the only option currently available to single women. Other supporters of annotation included Action for Child and Youth Aotearoa.
- 10.58 We received a range of suggestions as to what an annotation could say, including: the certificate having a box for donor details in addition to those for parents; the letter "D" being put somewhere on the certificate; an asterisk next to the non-genetic parent's name with a note referring to the relevant section of legislation; a code or serial number that led to the donor register; and a note on all birth certificates to the effect that the certificate "does not necessarily reflect *genetic* parentage".
- 10.59 Parents were concerned that their children may be subjected to different treatment because of annotation. Parents were also concerned that school staff would learn about their infertility and they would be the subject of gossip. This is understandable. While disclosure of donor status to the child is our objective, here the protection of private and personal information from involuntary disclosure to strangers must also be our concern. The information on a birth certificate goes to the core of an individual's identity and it is a public document that can reveal to the reader private details.<sup>409</sup>
- 10.60 We are not aware of any overseas jurisdictions that impose annotation of any kind, although in the United Kingdom, Baroness Warnock has suggested annotation in response to the increasing recognition of the child's needs and right to know their genetic identity and the search for mechanisms to give effect to this.<sup>410</sup>
- 10.61 The consensus among consultees was that some indication would be acceptable, as long as it was generalised and on every birth certificate. Given this is an issue that also includes adopted children, we have considered whether such an option was possible. One way is to draw attention on all birth certificates to the existence of additional information in the Births, Deaths and Marriages register.
- 10.62 This proposal has the benefit of signalling the fact of other information while at the same time respecting the privacy of the individuals and their families. For the vast majority of people, the additional information will be known and uncontroversial – such as their parents' addresses at their birth. However, the aim is that it would become known that Births, Deaths and Marriages holds additional information about all New Zealanders. Anyone with a sense of difference in their family will know that it is their right to ask Births, Deaths and Marriages for access to it.

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<sup>409</sup> In the context of debate about how the gender of transsexual people should be recorded on birth certificates, the Births and Deaths Registration Act 1953 (UK), regulating the registration of births, has been described as a "seemingly innocuous Act" that can have an unforeseen but significant impact on the lives of some individuals. See D Miller and R Hill "J's story" (1999) 149 NLJ 764.

<sup>410</sup> Annotation of birth certificates in the United Kingdom was suggested by Baroness Mary Warnock, chair of the Warnock Committee on Human Fertilisation and Embryology: H McGavin "Sperm Donor Children Have Right to Know Fathers, Says Warnock" (13 May 2002) *The Independent* London.

### **Recommendation**

**R18** Birth certificates should include a statement to indicate that the Births, Deaths and Marriages register contains other information that may be accessed by the person whose certificate it is.

- 10.63 In the case of children born into a surrogacy arrangement or conceived using a known donor, as described in chapter 6, and in some instances to single women, it may be that the information recorded on their birth certificate bears little resemblance to the reality of family life.
- 10.64 Where there is no father recorded with Births, Deaths and Marriages, the words “unknown” appear repeatedly. This practice was a source of discontent for single women we met. They considered that although illegitimacy no longer exists as a status in New Zealand, prejudice remained. They felt that the repeated statement that the father was “unknown” would be a source of embarrassment for the child, and they should be able to opt for a voluntary annotation that their child was donor-conceived. Adoptive parents can employ a similar annotation, but Births, Deaths and Marriages says it is rarely used.
- 10.65 Allowing such an annotation is in line with encouraging a practice where children know about their origins. The lack of such an option at present means that the law or practice prevents children having a birth certificate that honestly reveals to them the circumstances of their birth.
- 10.66 If a birth certificate is to be a record of historical fact, the way the information is recorded needs to be flexible enough to be able to reflect all children’s reality. However, this flexibility has to be confined to an extent by the purpose and uses of a birth certificate.

### **Recommendation**

**R19** Births, Deaths and Marriages should consider allowing parents to choose to have an annotation stating that the child was born by “donor”.

## **Education and counselling**

### *Education*

- 10.67 Child, Youth and Family runs a mandatory educational programme for prospective adoptive parents. The programme involves a number of evening sessions and a personal workbook. The aim is that prospective adopters understand that they will be creating a family different from “traditional” families in its lack of genetic connection between parents and children. It also seeks to prepare them for dealing with talking to their adoptive children about their backgrounds. Although we acknowledge the significant differences between donor gamete conception and adoption, the lack of genetic connection and the task of telling the child about their origins are similar. We consider families using donor gamete conception

should attend a similar mandatory education programme that provides information and instruction.

- 10.68 We note that almost all participants at consultations felt that more educational material about donor gamete conception would benefit them. For some, our meetings were the first time they had been in a room with other recipients and they appreciated the opportunity. A number of submissions considered that clinics bore a moral responsibility to provide counselling and education.
- 10.69 However, a few consultees objected strongly to infertile couples being required to submit to processes not required of other parents. They felt that it would be discriminatory to insist that they should have to undergo further checks or steps to become a parent. We appreciate their concerns and do not consider that the process should be onerous – but at the same time note the needs of the children born into their families. Clinics should not provide treatment unless couples have participated in the education programmes.

### **Recommendation**

**R20** Pre-conception educational programmes for adults using donated gametes and embryos should be developed as a joint task of the government and fertility service providers. It should be a requirement of treatment under the Human Assisted Reproductive Technology Act 2004 that recipients attend the programmes.

### *Counselling*

- 10.70 We have distinguished between education and counselling, on the basis that education provides information and instruction in a group setting to the prospective parents whereas counselling allows them to discuss the personal implications of using AHR technology.
- 10.71 Counselling for people considering conceiving with donated gametes or embryos is not compulsory under the Human Assisted Reproductive Technology Act 2004. The Australian and New Zealand Infertility Counsellors Association guidelines, appended to the Reproductive Technology Accreditation Committee code of practice, require donors and recipients to have counselling, and emphasise that it should not be seen merely as the “provision of a ‘one-off’ routine information review”. All clinics in New Zealand should observe these guidelines, although they do not have legislative force.
- 10.72 In contrast, Victorian legislation requires counselling for those having infertility treatment.<sup>411</sup> Canada obliges clinics to provide counselling services and ensure people use them.<sup>412</sup> The British Infertility Counselling Association has recently

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<sup>411</sup> Infertility Treatment Act 1995 (Vic), s 11.

<sup>412</sup> Assisted Human Reproduction Act SC 2004 c 2, s 14(2)(b).

recommended mandatory “implications” counselling for those considering donor gamete conception, similar to that required for adoption.<sup>413</sup>

- 10.73 While all consultees expressed satisfaction with the services they received from their fertility clinics, some consultees indicated that they opted not to undergo counselling, and many others said they had one hour of counselling which they described as more of an “information giving” session. A number said that during the session they really did not engage with the issue of telling their child.
- 10.74 The Australian and New Zealand Infertility Counsellors Association guidelines distinguish between implications counselling, which aims to ensure all involved understand the implications of the course of action, supportive counselling for times of stress, and therapeutic counselling, which addresses the consequences of infertility and helps people adjust their expectations and their situation. Implications counselling may be insufficient for some recipients who are still coming to terms with their infertility and may need therapeutic counselling before being confident about telling their children. At present we understand that clinics only provide implications counselling.
- 10.75 It is evident to us that both implications and therapeutic counselling, as well as education, is key to preparing parents for dealing with the issues that can accompany having a donor-conceived child, including how and when to disclose their genetic and/or gestational origins.
- 10.76 In their submission, FertilityNZ proposed a consistent, best-practice counselling protocol for all fertility treatment providers using the Reproductive Technology Accreditation Committee process. The quality of counselling and counselling protocols should be consistent across all providers. Given the small reported numbers of parents telling their children they are donor-conceived, a review of the counselling practices is timely. It should consider the needs of children and parents and the implications of the Human Assisted Reproductive Technology Act 2004. Following such a review, consideration should be given as to whether counselling should be mandated by law.

### **Recommendation**

**R21** Fertility clinics and counsellors should develop a best-practice counselling protocol to be included in accreditation standards. Work to develop the protocol should include consideration of whether counselling should be a requirement before prospective parents undergo treatment.

### **The way forward**

- 10.77 Giving effect to the needs and rights of donor-conceived children and children born into surrogacy arrangements to access full information as to their genetic and gestational origins requires not one but a raft of complementary measures. The Human Assisted Reproductive Technology Act 2004 is a start, but it will not, on its own, produce the results required.

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<sup>413</sup> British Infertility Counselling Association “Memorandum to the UK Select Committee on Science and Technology”, appendix 32 <<http://www.publications.parliament.uk>> (last accessed 14 February 2005).

- 10.78 Studies are ongoing in New Zealand into the outcomes for donor families and into how many parents do tell their children. We suggest that research carried out over the next ten years should be reviewed after that period, to see whether the Human Assisted Reproductive Technology Act 2004, together with more education and counselling, is having an impact on the number of children being informed about their genetic or gestational origins. If the proportion of parents disclosing has not increased significantly, measures such as annotation of birth certificates should be revisited.

## AGE

- 10.79 A basic premise of the Human Assisted Reproductive Technology Act 2004 is that people born as a result of donor gamete conception should be made aware of their genetic origins and have access to this information.<sup>414</sup> Donor offspring over the age of 18, or their guardian where they are under the age of 18, are entitled to access identifying information about their donors.<sup>415</sup> Donor offspring under the age of 18 can access non-identifying information,<sup>416</sup> and those aged between 16 and 18 can apply to the Family Court for access to identifying information.<sup>417</sup>
- 10.80 There is no policy justification given for the age restrictions. It is unclear what advantage there is to a person to have their right to information about their origins withheld from them until the age of 18.
- 10.81 A number of written submissions argued that there should be no lower age restriction on children accessing information about their origins. These included submissions from Action for Children and Youth Aotearoa, FertilityNZ and Youthlaw Inc. Youthlaw Inc also noted that the Privacy Act 1993 does not specify an age at which children may access their personal information, although an agency may withhold information to people under 16 years where the disclosure would be contrary to the person's interests.<sup>418</sup> Arguably, this age restriction is inconsistent with an approach that places the rights and welfare of the child at the centre of decision-making.
- 10.82 The statutory ages at which children are deemed capable in law to consent to various activities or procedures vary greatly. For example, 16 years is the age when children are treated as adults in relation to parentage testing, section 2 of the Adult Adoption Information Act 1985 restricts access to information to people over the age of 20, and custody orders made under section 108 of the Children, Young Persons, and Their Families Act 1989 cease automatically when the child reaches the age of 17. Essentially, section 21(1)(i) of the Human Rights Act 1993 provides that discrimination on the basis of age for people over 16 years old is prohibited.
- 10.83 We note that the Ministry of Youth Affairs and the Ministry of Justice have undertaken to look into the minimum ages in New Zealand legislation, to ensure our laws are consistent with the Human Rights Act 1993 and to take account of UNCROC requirements. They are due to report on their work in 2006.

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<sup>414</sup> Human Assisted Reproductive Technology Act 2004, s 4(e).

<sup>415</sup> Human Assisted Reproductive Technology Act 2004, s 50(1) and (2) and s 57(1) and (2).

<sup>416</sup> Human Assisted Reproductive Technology Act 2004, s 50(3) and s 57(3).

<sup>417</sup> Human Assisted Reproductive Technology Act 2004, s 65.

<sup>418</sup> Privacy Act 1993, s 29(1)(d).



### Recommendation

**R22** The policy work on minimum ages, currently being undertaken by government, should include the question of whether there ought to be a restriction on the age at which children can access their own genetic information, and if so, what that age should be.

## PEOPLE CONCEIVED BY DONOR GAMETES PRIOR TO 21 AUGUST 2005

- 10.84 Part 3 of the Human Assisted Reproductive Technology Act 2004, which removes donor anonymity, comes into force on 21 August 2005 and all adult donor offspring conceived after this date will have a right to access information. For those conceived before 21 August 2005, the Act provides a voluntary register whereby donor-conceived persons and donors can give their details to the Registrar-General, who can pass this information on if there is reason to believe the persons may be genetically related.
- 10.85 Most New Zealand clinics began recording information about donors in the 1990s.<sup>419</sup> People conceived after that, although still prior to 21 August 2005, may have some success in tracking information, though there is no obligation on clinics to release the information or on donors to agree to being identified. However, clinics seem to have only recruited donors willing to be identified from about 1990. People conceived before 1990 will generally be entirely reliant on the voluntary register and may have more difficulty, as information about donors was not often kept.
- 10.86 There are voluntary registers in some states in the United States, the United Kingdom, and Australia. UK DonorLink is a pilot register funded by the United Kingdom's Department of Health. It can be used by anyone over 18, and offers a counselling service and genetic testing to match offspring with donors and siblings.<sup>420</sup> At present, the register's use is restricted to those born before 1991, when the United Kingdom's Human Fertilisation and Embryology Act 1990 came into force. Depending on the outcome of the pilot, the plan is to extend it to all donor offspring.
- 10.87 Since 2001, the Infertility Treatment Authority in Victoria has maintained two voluntary registers for donor procedures undertaken before identifying and non-identifying information was required to be retained by clinics.<sup>421</sup> Section 92G

<sup>419</sup> This information has been recorded from 1983 in Wellington and from 1985 at the Fertility Centre in Christchurch.

<sup>420</sup> At present, the cost of a DNA test through DonorLink is £75: UK Donorlink <<http://www.ukdonorlink.org.uk>> (last accessed 21 February 2005).

<sup>421</sup> The registers hold information on offspring and donors donating or conceiving pre- and post-1988 respectively. The Infertility (Medical Procedures) Act 1984 (Vic) required clinics to keep identifying and non-identifying information about donors, recipients and donor offspring. The Infertility Treatment Act 1995 (Vic) established the Infertility Treatment Authority, which is responsible for maintaining a central register of donor information. See Infertility Treatment Authority <<http://www.ita.org.au>> (last accessed 27 October 2004).



of the Infertility Treatment Act 1995 (Vic) requires individuals to have undergone counselling before identifying information held on the register is released to them.<sup>422</sup> A similar register has been established by the Director-General of the Department of Health in Western Australia.<sup>423</sup> It is a requirement of that register that counselling must be undertaken before an introduction takes place.

### **How successful are voluntary registers?**

- 10.88 Since voluntary registers are in their early days, it is difficult to say how successful they will be. On one hand, a register founded in Colorado in 2000 had matched 500 sets of half-siblings by 2004.<sup>424</sup> Voluntary registers in Victoria and Western Australia appear to have had less success.<sup>425</sup>
- 10.89 Publicity will be key to the success of the voluntary register in New Zealand. A major publicity campaign accompanied the Adult Adoption Information Act 1985, with posters, pamphlets, a free national helpline, and television and radio advertisements, among other initiatives. Between 1986 and the end of February 2004, 31 353 adopted people had applied for and received their birth information, and 8697 applications had been made by birth parents.<sup>426</sup> This is a relatively high proportion given that between the start of adoption records in the late 1800s and the introduction of the Adult Adoption Information Act, there were over 100 000 adoptions in New Zealand.<sup>427</sup>
- 10.90 We estimate there are approximately 3000 donor-conceived children, young persons and adults in New Zealand. Introduction of the voluntary register and publicity is not, by itself, likely to lead to a straightforward resolution for them. They need to be told they are donor-conceived in the first place. Nevertheless, any success achieved by the register will not happen without an educational publicity campaign. Such a campaign may also prompt parents to tell their children.

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<sup>422</sup> Although section 92H allows the Infertility Treatment Authority to waive the need for counselling in certain circumstances.

<sup>423</sup> See Department of Health Voluntary Register Information about Donation in Assisted Reproduction <<http://www.voluntaryregister.health.wa.gov.au>> (last accessed 21 February 2005).

<sup>424</sup> Information provided by Infertility Network, Toronto, Canada, 24 July 2004, email newsletter.

<sup>425</sup> The 2003 *Annual Report* of the Victoria Infertility Treatment Authority shows that a total of only 29 donors and 18 offspring or recipient families had registered their information as at 31 December 2002. The *Annual Report* notes the requirement of section 82(3) of the Infertility Treatment Act 1995 (Vic) to promote the register and the Infertility Treatment Authority has elicited the help of a public relations company to publicise it – Victoria Infertility Treatment Authority *Annual Report* (The Authority, Melbourne, 2003) 14. The Reproductive Technology Council of Western Australia received 41 completed application forms to register on the voluntary register between November 2002 and 19 July 2004 – information provided by the Reproductive Technology Council of Western Australia to the Law Commission (12 November 2004) email.

<sup>426</sup> Information supplied by Keith Griffiths, see submission 19. See K Griffiths *New Zealand Adoption: History and Practice* (K Griffiths, 1997).

<sup>427</sup> See K Griffiths *New Zealand Adoption: History and Practice* (K Griffiths, 1997) 24.

### Recommendation

**R23** The voluntary register provided for in the Human Assisted Reproductive Technology Act 2004 should be accompanied by a publicity campaign designed to reach as many donor offspring and donors as possible.

## Counselling for offspring and donors using the voluntary register

### *Donor-conceived offspring*

- 10.91 The voluntary register schemes in the United Kingdom and Australia are accompanied by counselling services, and in some cases there is a requirement that counselling should take place. Section 5(2) of the Adult Adoption Information Act 1985 makes counselling compulsory for adoptees before they are given their original birth certificate.
- 10.92 Free but voluntary counselling for offspring using the register would be valuable, considering the reported confusion or trauma many express, particularly those who have searched for many years for their progenitor. Adoption support groups or Child, Youth and Family social workers with experience in the adoption field may be better qualified to provide counselling for offspring than clinics. The role of both the state and clinic in facilitating their conception, however, places a duty on each of them to provide support and counselling.<sup>428</sup> We consider free counselling should be offered to those using the register. The funding requirement would be low, since the pool of people accessing it is very small.

### *Donors*

- 10.93 Almost all the donors we met were happy to be contacted in the future by offspring conceived with their sperm or eggs. However, without exception they wanted the process to be managed and support to be provided. Nearly all said they were nervous about a “knock on the door”.
- 10.94 Donors may have donated when they were young adults and in secrecy. They may have since partnered and had children of their own. Contact with donor offspring could impact on their families and upset their own children, who may never have known they have half-brothers and half-sisters. Donors should also be offered free counselling before they are introduced to offspring.

### Recommendation

**R24** Counselling should be available for donor-conceived offspring and donors using the voluntary register, and the Registrar-General of Births, Deaths and Marriages should inform offspring and donors of the availability of counselling for those using the voluntary register. Government should consider paying for or subsidising such counselling.

<sup>428</sup> We understand from consultation with Fertility Associates Ltd that they provide counselling for children and their parents, if requested, prior to meeting.

## DNA testing to establish a genetic link

- 10.95 Unlike adoption, which has operated under a central register since the late 1800s, it will be difficult to establish a definite link between donors and offspring in some circumstances. Records that have been kept in the past by clinics and individual practitioners may not be complete enough to establish a genetic link between two people. In instances where identifying information is no longer in existence that can definitively link a donor to their offspring, the task of matching genetically linked individuals is likely to be even more difficult.
- 10.96 It may be that only a DNA test will establish a genetic relationship between some donors, offspring and siblings. For people using the voluntary register, DNA testing to confirm a genetic link, where such is a real possibility, could be subsidised by the state.

### Recommendation

- R25** The government should consider the provision of subsidised DNA testing for people using the voluntary register.

## Should the Human Assisted Reproductive Technology Act 2004 apply retrospectively?

- 10.97 The amendment to the Human Assisted Reproductive Technology Bill that introduced the voluntary register was made after the Select Committee process, at the instigation of a Member of the House. Some consultees have queried why the problems for pre-Human Assisted Reproductive Technology Act 2004 donor-conceived persons could not be resolved by making the mandatory information provisions of the Act apply retrospectively.
- 10.98 The Adult Adoption Information Act 1985 was a retrospective piece of legislation. This is a rarity and contrary to constitutional tradition.<sup>429</sup> Under the Act, provision was made to enable birth parents and adoptees to “veto” the release of information. When the Act was first passed, 2730 vetoes were placed by birth parents and 861 by adoptees.<sup>430</sup> Ten years after the Act came into force, the number had dropped, by virtue of expiry and cancellation, to 532 birth parent and 95 adoptee vetoes.
- 10.99 A retrospective Human Assisted Reproductive Technology Act 2004 would mean that all clinic records that identify donors could be made available to donor offspring searching for their genetic parents, even if they were conceived with gametes or embryos donated before the Act comes into force. A veto system could operate in the same way as under the adoption model.

<sup>429</sup> In legal systems like New Zealand’s, there is a general presumption against retrospective legislation. This is reinforced by section 7 of the Interpretation Act 1999, which provides: “An enactment does not have retrospective effect”. However, Parliament is at will to introduce legislation that is expressly to operate retrospectively.

<sup>430</sup> At the time there were a little over 100 000 recorded adoptions: K Griffiths *New Zealand Adoption: History and Practice* (K Griffiths, 1997) 431–431A.

- 10.100 Is donor gamete conception so different from adoption as to justify a different regime? It is now generally accepted that secrecy in adoption can be harmful, and the associated distress and “genealogical bewilderment” is a matter of public record.
- 10.101 Donors, like birth parents, may be very concerned about the intrusion into their private lives if the process was opened up, especially if they donated on the understanding of anonymity. However, in comparison to adoption, which generally only involves one child, donors may have a number of offspring who would be able to contact them if the process was opened up. This could in fact justify the release of the information because of concern about incest or because the donor offspring may have many half-siblings who they may want to contact.
- 10.102 The differences that do exist between adoption and donor conception are primarily differences between the adults involved, rather than the adoptees and donor offspring, who are in a similar position.<sup>431</sup> The adoptive contract has been described as being made between two parties – the adoptive parents and the birth parent or parents. The third side of that triangle – the resulting child – has no choice in the contract, and, particularly when he or she reaches parenthood, has rights and interests independently of those involved in the adoption.<sup>432</sup> This is equally true for donor offspring.
- 10.103 Adoption and donor gamete conception may be distinguished on the basis that adoption is a public process designed to ensure the welfare of the children involved. Clinics, on the other hand, are independent organisations which have operated on the basis of helping infertile people have children and under an agreement with donors and parents that anonymity will be assured. It is, we understand, on this basis that the retrospective opening of donor conception records has not occurred elsewhere in other jurisdictions.<sup>433</sup>
- 10.104 There would have been real merit in the retrospective application of the Human Assisted Reproductive Technology Act 2004 with veto protection being available to donors and donor offspring. Such a system would have required some adjustments, given that the information is not in a state-controlled central register.
- 10.105 However, given the recent enactment of the Human Assisted Reproductive Technology Act 2004, the voluntary register should be given time to work. If it does not achieve success and there are strong concerns by donor-conceived persons, the possibility of retrospective application could be revisited.

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<sup>431</sup> E Chestney “The Right To Know One’s Genetic Origin: Can, Should or Must a State that Extends this Right to Adoptees Extend an Analogous Right to Children Conceived with Donor Gametes?” 80 Tex LR 365, 368.

<sup>432</sup> See Hon J Hunt (21 September 1985) 457 NZPD 436.

<sup>433</sup> See, for example, *R (on the application of Rose and another) v Secretary of State for Health and another* [2002] EWHC 1593 (Admin), (2002) 3 FCR 731, para 17. The South Australian Council on Reproductive Technology also considered the issue of whether records should be opened up retrospectively in 2000, but decided against it primarily for reasons of protecting donors. There, a guarantee of secrecy had been enshrined in law from 1998 onwards: Reproductive Technology Act 1988 (SA), s 18(1).

## DONOR OFFSPRING NOT CONCEIVED THROUGH CLINICS

- 10.106 The Human Assisted Reproductive Technology Act 2004 places the responsibility on “providers” to obtain information about donors and pass it on to the Registrar-General of Births, Deaths and Marriages.<sup>434</sup> The result is that the Act does not capture donor conceptions taking place outside clinics. This will include children born to heterosexual couples, single women, or lesbian couples where the child is conceived by private donor insemination at home. It will also include conceptions through traditional surrogacy arrangements.
- 10.107 We cannot know how many children are involved. We know that there are approximately 100 donor births each year through clinics. We also know that NECAHR approved 24 IVF surrogacy applications between 1997 and 2003.<sup>435</sup> From consultations, we estimate that just as many donor births, if not more, happen privately as through a clinic, and just as many traditional surrogacy arrangements as IVF ones. Currently there is no obligation for information about the donor to be recorded or retained in the case of such private arrangements.
- 10.108 These parents will usually know the donor, although a few will have used an intermediary. However, even though the large majority will know the donor, there is no guarantee the child will be given this information.
- 10.109 The vast majority of donor parents we consulted supported the retention of a more accurate record of their child’s conception and birth. They felt that their child’s birth record should reflect the reality of the roles played by those involved in the conception. In fact, they felt frustrated by the lack of a system that was capable of recording this information.
- 10.110 We have considered whether parents conceiving by donated gametes privately should be required to provide genetic and gestational information to the Registrar-General, to be recorded under the Human Assisted Reproductive Technology Act 2004. Although this requirement would be difficult to enforce, the offspring have a strong interest in, and right to, information about their identity.
- 10.111 The Births, Deaths, and Marriages Registration Act 1995 requires that a child’s guardians register its birth “as soon as practicable”.<sup>436</sup> Births are notified on a Notification of Birth for Registration form, which requests basic identifying information about the child and parents. The form states that every birth in New Zealand must be registered by law.
- 10.112 A duty could also be placed on parents to notify the Registrar-General if their child was born as a result of donor gamete donation or surrogacy and to notify the same identifying information about the donor as that required under sections 47 and 53 of the Human Assisted Reproductive Technology Act 2004. The Notification of Birth for Registration form could be amended to record this information. The form could also state that under New Zealand law parents must register details

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<sup>434</sup> Human Assisted Reproductive Technology Act 2004, s 47, s 48 and s 53.

<sup>435</sup> National Ethics Committee on Assisted Human Reproduction *Annual Report to the Minister of Health for the Year Ended 31 December 2003* (Ministry of Health, Wellington, 2004) 4.

<sup>436</sup> Births, Deaths, and Marriages Registration Act 1995, s 9(1).

about a donor or surrogate, if one was used. Failure to notify the Registrar-General could then be an offence under section 89(1)(a) of the Births, Deaths, and Marriages Registration Act 1995.

- 10.113 Information about a private or known donor or gestational parent would then be listed in the Human Assisted Reproductive Technology Act 2004 register. The information could then be available on the same terms as the information provided by fertility clinics. The birth certificate would record the legal parents.
- 10.114 Children born from self-insemination at home or from surrogacy arrangements are the same as those conceived in fertility clinics. When adults have gone to lengths to involve other adults in the conception and birth of their child, they bear a responsibility to ensure that all the relevant birth and genetic information is recorded for those children.

### Recommendations

**R26** The parents of a child born as a result of gamete donation or surrogacy should be required to notify the Registrar-General of Births, Deaths and Marriages of the same identifying information about the donor as that required under sections 47 and 53 of the Human Assisted Reproductive Technology Act 2004 and it should be available to donor offspring as prescribed in that Act.

**R27** The Notification of Birth for Registration form should be amended to state that under New Zealand law parents must register details about a donor or surrogate, if one was used.

## NAMING FATHERS ON THE BIRTH RECORD

- 10.115 Of the 58931 children whose births were registered with Births, Deaths and Marriages in 2001, nearly 4000 (6.76 per cent) had no details of their father shown in their birth certificate as at 22 October 2003.<sup>437</sup> Information given by the Minister of Social Development and Employment in January 2005 indicates that some 17000 mothers receiving the domestic purposes benefit were not able to, or chose not to, name the father of their child.<sup>438</sup>

### Getting registered

- 10.116 The guardian or guardians are required to register a birth as soon as is reasonably practicable after the child is born.<sup>439</sup> Birth certificates have one section for the child's father and another for the child's mother. The mother's name is always shown. If

<sup>437</sup> Registrar-General of Births, Deaths and Marriages to the Law Commission (18 February 2005) email.

<sup>438</sup> Interview with Hon Steve Maharey, Minister of Social Development and Employment (Sean Plunket, Morning Report, National Radio, 26 January 2005) transcript provided by Newstel News Agency Ltd (Christchurch).

<sup>439</sup> Births, Deaths, and Marriages Registration Act 1995, s 9.



the man is married to the child's mother, paternity is presumed.<sup>440</sup> Where the father is married or in a de facto relationship with the mother, either parent can register the birth.<sup>441</sup> In all other cases, the consent of both parties is usually required for the father's name to appear:<sup>442</sup> a father will need to sign the form or provide the mother with a signed statement acknowledging paternity in order to be registered. Only in certain limited circumstances can his consent be dispensed with.

- 10.117 An obstacle to gaining a father's consent is that he may incur financial liabilities under the Child Support Act 1991<sup>443</sup> and the Family Proceedings Act 1980.<sup>444</sup>
- 10.118 Research by the Ministry of Social Development has identified a number of reasons why mothers who are beneficiaries do not identify the fathers of their children.<sup>445</sup> Most commonly, the father denied paternity and the mother did not pursue the matter for reasons such as cost, fear or simply not knowing what to do. Other reasons included the father being unknown, a wish not to have him involved if he did not want to involve himself, or that private financial arrangements existed on condition that he was not named. Some mothers did not want the father to have any rights over the child because of his perceived unsuitability for fatherhood.
- 10.119 This research suggests that more fathers would be named if the mechanisms for establishing paternity were easier and cheaper. Currently, where DNA tests are recommended by the court under the Family Proceedings Act 1980, each party must meet his or her own expenses unless the court directs otherwise.
- 10.120 Section 18 of the Care of Children Act 2004 provides that a man who is identified as the father on the birth certificate is automatically a guardian of the child. The effect is that a mother would have to go to court to get the guardianship status of a father rescinded. This may also act as a disincentive for some women to register their child's father.

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<sup>440</sup> Status of Children Act 1969, s 5(1). See chapter 4, paras 4.1–4.4 for our discussion of presumption of paternity.

<sup>441</sup> See the Births, Deaths, and Marriages Registration Act 1995, s15 and amendments under the Care of Children Act 2004, sch 4.

<sup>442</sup> Births, Deaths, and Marriages Registration Act 1995, s 15(2)(b)(i), s 15(2)(b)(ii), s 15(2)(c), s 15(3)(a)(i), s 15(3)(a)(ii) and s 15(3)(b)(i).

<sup>443</sup> Section 7(1)(a) of the Child Support Act 1991 provides that a person is a liable parent under the Act if, among other things, the person's name is entered in the Register of Births as a parent of the child.

<sup>444</sup> Section 145D(1)(d) of the Family Proceedings Act 1980 provides that "[n]o person who is not married to the mother of a child, and has never been married to the mother, or whose marriage to the mother has been dissolved before the conception of the child, shall be liable as a father to maintain the child unless" among other things "[h]is name has at any time been entered pursuant to the Births and Deaths Registration Act 1951 in the Register of Births as the father of the child".

<sup>445</sup> H Barwick *Section 70A Penalty: Key Informant Perspective and Analysis of DWI Administrative Data* (Preliminary Investigation commissioned by the Ministry of Social Policy and the Department of Work and Income, 2001) and H Barwick *Section 70A Penalty Interviews with Domestic Purposes Benefit Recipients Subject to the Penalty* (Research Report commissioned by the Ministry of Social Development, 2002).



## Initiatives to get fathers on the birth record

- 10.121 A sole parent beneficiary who does not name the liable parent of his or her child, or who does not apply for child support from the other parent, may have his or her benefit reduced by \$22 per week.<sup>446</sup> This reduction cannot be imposed: where there is insufficient evidence to establish who the other parent is; the beneficiary is taking active steps to identify the other parent; or the child was conceived as a result of incest or sexual violation. From 1 July 2005, there will be a further reduction of \$6 per week after three months of the initial reduction.<sup>447</sup>
- 10.122 The Social Security (Social Assistance) Amendment Bill, if passed, would introduce two new exemptions to the penalty. No reduction will apply where sole parent beneficiaries or their children are at risk of violence, or when there are compelling circumstances for the sole parent's failure to comply and no child support is likely to be collected from the other parent.<sup>448</sup>
- 10.123 As noted in the Discussion Paper, in Sweden a government agency has responsibility for ensuring that, wherever possible, the name of a child's genetic father is recorded as a matter of public record.<sup>449</sup> Jurisdictions in the United States have used a number of different initiatives to get more fathers on birth certificates. These include: state-funded paternity testing;<sup>450</sup> employing a prosecutor to specialise in paternity establishment procedures;<sup>451</sup> making acknowledgments of paternity signed by the father and mother legally binding determinations of paternity;<sup>452</sup> and hospital-based initiatives, including the provision of staff to advise unmarried parents about the benefits of paternity and to obtain acknowledgments of paternity.<sup>453</sup>
- 10.124 Parness has argued that strategies to increase the numbers of fathers named on birth certificates should not focus solely on the period prior to, and immediately after, birth.<sup>454</sup> The mother and father often need time to consider, discuss and settle on the consequences of birth. Ideally, strategies to encourage the identification of fathers on birth certificates should continue to operate as long as one or two years after birth. Parness suggests that there should be periodic inquiries by social workers, hospital personnel or doctors into the paternity of the child whose birth certificate, without explanation, does not contain the father's name. These inquiries should involve providing information about family law that is more extensive than

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<sup>446</sup> Social Security Act 1964, s 70A.

<sup>447</sup> Social Security (Social Assistance) Amendment Bill 2004, no 193-1, cl 7.

<sup>448</sup> Social Security (Social Assistance) Amendment Bill 2004, no 193-1, cl 7.

<sup>449</sup> R Pickford "Unmarried Fathers and the Law" in A Bainham et al (eds) *What is a Parent? – A Socio-Legal Analysis* (Hart Publishing, Oxford, 1999) 143, 157 n 31.

<sup>450</sup> F Sonenstein et al "What Works Best in Improving Paternity Rates" (1993) 51 *Public Welfare* 28, 31.

<sup>451</sup> Because the state is the plaintiff in these proceedings, delays resulting from the non-cooperation of the custodial parent are avoided: C Adams et al "Organizational Impediments to Paternity Establishment and Child Support" [1994] *Social Services Review* 109, 122.

<sup>452</sup> See, for example, in Texas: the Uniform Parentage Act of 2000 Tex Fam Code Ann § 160.301; § 160.302 (a)(3)(A); § 160.302 (a)(3)(B); § 160.302 (a)(4) (Vernon 2004).

<sup>453</sup> C Adams et al "Organizational Impediments to Paternity Establishment and Child Support" [1994] *Social Services Review* 109.

<sup>454</sup> J Parness "Designating Male Parents at Birth" (1993) 26 *U Mich J L* 573.

that provided to the mother at the time of birth. Emphasis should be placed on how having the father's name on the birth certificate benefits the child, and the mother should be made aware of the ways in which the state can help her identify the child's father.

- 10.125 While several of these strategies may lead to greater numbers of fathers on the birth register, a number of commentators fear that the ease of some procedures may increase the numbers of misattributed paternity. There has also been support amongst commentators for requiring paternity testing before a man can establish his paternity by acknowledgment.<sup>455</sup>
- 10.126 In addition, it has been suggested that some unmarried putative fathers, especially if young, may not fully comprehend the obligations they are entering into when signing an acknowledgment at a hospital. Although hospital and birthing centre staff can be trained to obtain acknowledgments, it has been suggested that legal advice is necessary to ensure that putative fathers fully appreciate the consequences and that they have considered the option of DNA tests if uncertain of their paternity.<sup>456</sup>

### Submissions

- 10.127 The majority of submissions and views expressed in the consultations supported efforts being made to increase the number of fathers named on birth certificates. It was considered that: achieving greater numbers would give effect to the child's right to know his or her genetic origins; it was not in the child's best interests to grow up unaware of the identity of his or her father; fathers should be encouraged to take responsibility for their children; and mothers should enable this to occur by providing the name of their children's father. However, most submissions acknowledged that there may be cases where it would not be in the best interests of the child for the father's name to be on the birth certificate.
- 10.128 Many submissions considered that there should be an agency directed at increasing the number of fathers on birth certificates. However, the Salvation Army considered that it was not the proper role of the state to "chase" reluctant fathers, unless the mother of the child asked for assistance. Similarly, the Interchurch Bioethics Council was concerned that having a state agency charged with identifying fathers would be an unjustifiable intrusion and result in the loss of civil liberties. Both submissions stated that education was the better solution.

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<sup>455</sup> "By far, the most straightforward solution to the problem [of misattributed paternity] is to require genetic testing at birth" – A Greenwood "Predatory Paternity Establishment: A Critical Analysis of the Acknowledgment of Paternity Process in Texas" (2004) 35 St Mary's LJ 421, 452. The suggestion received support in the decision of *In Re Paternity of Cheryl* (2001) 746 N E 2d 488 (Mass) 495, where it was suggested in a footnote: "Where the State requires an unmarried woman to name her child's putative father, the department should require that the parties submit to genetic testing prior to the execution of any acknowledgment of paternity or child support agreement. To do otherwise places at risk the well-being of children born out of wedlock whose fathers subsequently learn, as modern scientific methods now make possible, that they have no genetic link to their children".

<sup>456</sup> A Greenwood "Predatory Paternity Establishment: A Critical Analysis of the Acknowledgment of Paternity Process in Texas" (2004) 35 St Mary's LJ 421, 452.

- 10.129 YouthLaw Inc submitted that the information should be recorded on the register of Births, Deaths and Marriages rather than the birth certificate. This could increase the child's access to accurate information about his or her paternity, without leading to the complicating outcomes of the child support and maintenance legislation, and without conferring guardianship on the parent.
- 10.130 There was slightly less support in the submissions for the adoption of the numerous United States' models suggested. Child Advocacy Services submitted that resort should not be had to default judgments for non-appearance at paternity proceedings. YouthLaw Inc was concerned that some strategies, such as voluntary interviews for women not in receipt of a benefit but mandatory for those on benefits, might be inconsistent with the Human Rights Act 1993.
- 10.131 The submissions suggested a number of other strategies, including: amending the Child Support Act 1991; reducing child support liability if the father comes forward voluntarily; education for fathers to encourage them to take on their parenting role; and creating an offence if the mother does not name the father within a reasonable time, but with an exception where the child was conceived as a result of incest or sexual violation.

### **The view of the Commission**

- 10.132 The Law Commission considers that the purpose of increasing the number of fathers on birth certificates should be clarified. Currently the state appears only to concern itself with the identity of the father for the purposes of enforcing liability for child support. This involvement only occurs if the mother claims child support or the domestic purposes benefit. We consider that a primary purpose should be to provide a repository of genetic information, thereby fulfilling New Zealand's obligations under article 8 of UNCROC, which relates to a child's right to preserve his or her identity. The government, therefore, needs to develop strategies to achieve this primary purpose.
- 10.133 One practical step would be to make DNA paternity testing more accessible. This strategy has been used successfully in some states in the United States, where men who deny paternity are offered free testing if they agree to acknowledge paternity if the test results are positive.<sup>457</sup> Because of the higher risk of misattribution where paternity is voluntarily acknowledged and there has been no relationship between mother and man, DNA testing in these situations is a preferable alternative in any event. The efficacy of this strategy would depend on the willingness of putative fathers. In *Hall v Brady*,<sup>458</sup> the High Court observed that a great deal of time, trouble and expense to all concerned can be avoided if paternity testing is voluntarily adopted.
- 10.134 It seems clear that in many cases the father is not named on the birth certificate because of the attitudes of the mother and the father. This emphasises the need for education in order to encourage an attitudinal shift by informing people of

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<sup>457</sup> Provided a specified level of probability is reached: F Sonenstein et al "What Works Best in Improving Paternity Rates" (1993) 51 Public Welfare 28, 31.

<sup>458</sup> *Hall v Brady* (28 February 1992) HC HAM AP 103/91 Fisher J.

the benefits to the child in having his or her father named on the birth certificate. Work in this area might usefully be undertaken by the Families Commission, within its functions as set out in the Families Commission Act 2003.<sup>459</sup>

10.135 Our view is that the government has a responsibility to increase the number of fathers on birth certificates in order to enable people to have access to their genetic information. Above, we have noted some non-coercive measures, such as removing obstacles to fathers establishing their paternity and thus registering as fathers, and education about fatherhood. However, the legal consequences of registration are an undoubted obstacle to the objective of ensuring all children have their father recorded on the birth certificate, and strategies to overcome this need to be explored further.

### **Recommendations**

**R28** Government should consider subsidised DNA paternity testing where real doubt exists as to paternity.

**R29** Government should undertake work to identify the policy objectives in recording legal parents and genetic information on the Births, Deaths and Marriages register, and develop strategies to achieve these objectives.

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<sup>459</sup> See the Families Commission Act 2003, ss 7–8.

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# Index

The initial numeric character of references identifies the chapter; subsequent number(s) refer to the numbered paragraph(s) within that chapter. For example, 4.16 refers to paragraph 16 in chapter 4.

References prefixed with an "n" refer to the footnotes, numbered continuously through the chapters. For example, n15 refers to the 15th footnote in the text.

## A

- access
  - to donor-identity information 10.3–10.11
  - orders for *see* parenting orders
- accreditation: of DNA testing providers 5.20–5.24, 5.27–5.29
- adopted children 2.6, 3.16, 10.24–10.26
- adoption
  - as alternative to deeming rules 6.17–6.20
  - conferring of parenthood 1.5, 6.3
  - contrasted with surrogacy 1.10
  - guardianship assigned by 3.7
  - by known donors 6.31
  - surrogacy formalised by 7.7–7.8, 7.23–7.28
- Adoption Act 1955 7.23–7.28
- Adult Adoption Information Act 1985
  - age for access to genetic information 10.82
  - contact rights n382
  - counselling for adoptees 10.91
  - publicity campaign that accompanied 10.89
  - retrospective application 10.8, 10.98
  - rights of access to genetic information 1.22–1.23
- adult donor offspring: importance of identity to 10.24–10.26
- age
  - for access to donor-identifying information 10.79–10.83
  - for children's consent to DNA parentage tests 5.42–5.44
- agreements, pre-conception *see* pre-conception agreements
- anonymous donor conception 2.6, 10.3, n163
- assisted human reproduction (AHR)
  - citizenship by rules of 3.16
  - counselling on using technology of 10.70
  - ethical issues 2.21
  - potential for change 1.29
  - presumption of maternity with use of 4.49
  - in relation to child outcomes 2.12–2.15
  - same-sex couples covered by rules of 6.2, 6.28–6.30, 6.34, 6.79, n95, n162
  - status of children conceived as a result of 3.4–3.5

atawhai 2.4, n259

## B

- Bill of Rights Act 1990: children's rights to equality 1.25
- biological parents *see* genetic parents
- birth certificates
  - annotated to signal other information 10.54–10.62
  - of children born of surrogacy 7.7, n276
  - "donor" recorded on 10.63–10.66, n183
  - dual certificate model 10.48–10.53
  - incorrect details on 4.17
  - information recorded on 10.45–10.47
  - intending parents registered on 7.8
  - as mechanism for disclosing genetic identity 4.5, 10.44–10.66
  - naming of fathers on 1.12, 10.115–10.135
- birth mothers *see* gestational mothers
- Births, Deaths and Marriages register 10.46, 10.61–10.62, 10.121
- Births, Deaths and Marriages, Registrar-General of 10.4–10.7, 10.9, 10.112
- Births, Deaths, and Marriages Registration Act 1995
  - children born of surrogacy n276
  - donor and surrogate details 10.112
  - known donor parents 6.62
  - presumption of paternity 4.3
- blood samples: for DNA testing 5.30–5.32
- blood testing 5.1
- buccal samples: for DNA testing 5.30–5.32

## C

- Care of Children Act 2004
  - children's welfare and best interests 1.18
  - conflict resolution 6.68
  - counselling in parentage testing disputes 5.69
  - de facto relationships defined 4.42
  - guardianship awarded to fathers 4.3
  - non-compliance with court orders 5.74–5.76

- parent–donor agreements 6.9–6.11, 6.66, 6.74–6.87
- parenting orders 4.47
- section 41 agreements 6.9–6.11, 6.66, 6.74–6.87
- child support
  - in cases of misattributed paternity 4.19, 4.46–4.47
  - claims against deceased estates 3.15
  - liability of donor parents 6.85–6.87
  - rules regulating 3.13–3.14, 3.20
- Child Support Act 1991
  - financial liabilities 3.14, 10.117
  - liability of donor parents 6.86–6.87
  - proof of parentage 5.27
  - requirements for declaration of paternity 5.8
- Child, Youth and Family: processes for adoption 7.23–7.25
- childhood: duration of guardianship 3.12
- children
  - advantages of legally recognised paternity 4.5, 4.8–4.10
  - benefits and protection from parents and guardians 1.2
  - benefits of more than one legal parent 6.95
  - best interests and welfare
    - in cases of mistaken implantations 8.12
    - parentage testing in 5.59–5.61, 5.67
    - as primary consideration in parenthood laws 1.18–1.19
    - recognised in Guardianship Act 1968 1.14
    - variations of agreements in 6.76–6.87
  - born outside marriage 1.4, 1.13, 2.2, n5
  - born through embryo donation 9.4–9.10
  - clarity on legal status of involved adults for 1.20–1.21
  - consent to DNA testing 5.42–5.44
  - equality ensured through legal parenthood 1.25, 3.20, 4.26
  - guardians’ relationship with 3.6–3.13
  - impact of proof of non-paternity on 4.46–4.47
  - “important matters” affecting 3.9–3.10
  - legal parenthood as protection for 2.20, 3.19
  - legal status in relation to parents 3.3
  - with more than two legal parents 1.8, 6.67–6.73
  - mothers’ genetic/gestational relationship with 8.8–8.9
  - with no father named on birth certificate 1.12, 10.115
  - with no genetic relationship to adults raising them 1.5, 1.30
  - outcomes in relation to family structure 2.10–2.18, 6.91–6.92
  - relationship with parents *see* parent–child relationships
  - rights
    - to know genetic identity *see* identity
    - taking over from parental rights 1.16
    - statutory entitlement to parents’ property 3.15
    - as wards of court for parentage testing 5.58
  - children born of surrogacy
    - age for access to donor-identifying information 10.5, 10.79–10.83
    - best interests as determinant of parental status 7.51–7.52, 7.75, 7.80
    - birth certificates 10.44–10.66
    - counselling in using donor information 10.91–10.92
    - genetic identity disclosed to 10.10–10.11, 10.40–10.43
    - importance of identity to 10.24–10.26
    - legal parents 7.30
    - records of birth identity 7.23
    - release of their information to donors 10.7 *see also* donor-conceived children
  - citizenship: rules regulating 3.13, 3.16, 3.20
  - Civil Union Act 2004 4.25
  - civil unions: presumption of paternity extended to 4.35–4.45
  - clinics *see* fertility service providers
  - closed stranger adopted children *see* adopted children
  - Code of Health and Disability Services Consumer Rights 5.43
  - cohabiting parties: presumption of paternity applied to 4.36–4.41
  - collaborative parenting 1.24
  - commercial surrogacy 1.10, 7.11, 7.12
  - Commissioner of Inland Revenue: determinations on parentage 5.8
  - commissioning parents *see* intending parents
  - conception method
    - as basis for legal parenthood 6.51
    - as factor in child outcomes 2.12–2.15
  - consent: to DNA testing 5.33–5.53
  - contact rights: in cases of mistaken implantations 8.15–8.16
  - counselling for
    - donors on voluntary register 10.93–10.94
    - families using donor gamete conception 10.70–10.76
    - offspring seeking donor information 10.91–10.92
    - parentage testing disputes 5.68–5.69
    - parties in known donor agreements 6.66
    - parties to surrogacy 7.15
    - unpartnered donor gamete recipients 6.100
  - court-appointed guardians 3.8
  - court rulings
    - in cases of mistaken implantations 8.11, 8.13–8.17
    - on child support liabilities 3.14

- on children's access to donor-identifying information 10.5
- on pre-conception agreements 6.76–6.87
- recommending DNA testing 5.54–5.76
- on surrogacy agreements 7.31–7.37
- court supervision: of DNA testing providers 5.18, 5.26
- custody orders *see* parenting orders

## D

- de facto relationships
  - defined for presumption of paternity 4.42
  - presumption of paternity extended to 4.2–4.4, 4.12–4.15, 4.35–4.45
- Deaths by Accident Compensation Act 1952 3.17
- deceased persons: DNA testing 5.71
- deeming rules of parenthood
  - adoption as alternative to 6.17–6.23
  - advantages and disadvantages of 6.12–6.16, 6.25–6.27
  - applied to known donors 6.55–6.57
  - applied to surrogacy 7.18
  - default position for donor conceptions 6.60
  - established in law 6.4–6.8
  - guardianship assigned by 3.7
- discrimination: protection of children against 1.25
- DNA testing
  - awareness-raising about approved system 5.29
  - in best interests of children 5.59–5.61, 5.67
  - of deceased persons 5.71
  - effectiveness and availability of 4.16, 5.1–5.5
  - to establish a genetic link 10.95–10.96
  - knowledge of and consent to 5.37–5.41, 5.45–5.53
  - of known donors 6.61
  - legislative provisions 5.5
  - mandatory 4.23, 4.31–4.32
  - objectives of proposals in relation to 5.9
  - protocols for providers of 5.44, 5.52–5.53
  - reasons why sought 1.11, 5.4, 5.8
  - recommended by court 5.54–5.76
  - refusals to agree to 5.55–5.57
  - regulation 4.34, 5.11–5.32
  - samples used for 5.30–5.32
  - sanctions for non-compliance with orders for 5.72–5.76
  - subsidising of 10.96, 10.133
  - use outside legal system 5.2
  - voluntary 5.33–5.53
- donor-conceived children
  - advantages and disadvantages of deeming rules for 6.12–6.16
  - age for access to donor-identifying information 10.5, 10.79–10.83

- birth certificates 10.44–10.66
- claims for citizenship rights by descent 3.16
- conceived before August 2005 10.8, 10.11, 10.84–10.87
- counselling in using donor information 10.91–10.92
- equality irrespective of conception method 10.114
- genetic identity disclosed to 10.10–10.11, 10.40–10.43
- importance of identity to 2.6, 10.24–10.26
- not conceived through clinics 10.11, 10.106–10.114
- release of their information to donors 10.7
- statistics 1.6
- status in relation to parents 3.4–3.5
- through embryo donation 9.4–9.10
  - see also* children born of surrogacy
- donor gamete conception
  - automatic transfer of parenthood *see* deeming rules
  - counselling for unpartnered participants in 6.100
  - existing legal landscape 6.2–6.6
  - guardianship for non-genetic parents in cases of 6.24
  - laws applied to surrogacy 1.10, 7.18–7.20
  - sole legal parenthood arising out of 6.88–6.100
  - transfer of parenthood by adoption 6.17–6.20
  - used by lesbian couples 1.7, 6.34
    - see also* embryo donation
- donors
  - attitude to legal parenthood 2.8
  - of embryos *see* embryo donors
  - of gametes *see* gamete donors
  - information identifying *see* identity
  - known *see* known donors
  - legal parental status 1.9, 6.5–6.8
  - named on birth certificates 10.63–10.66
  - vetting rights n190

## E

- education
  - on benefits for children of having fathers named 10.134
  - for families using donor gamete conception 10.67–10.69
  - on parenting a genetically unrelated child 9.10
  - on voluntary register of donor information 10.89–10.90
- embryo donation
  - draft guidelines 1.30, 9.3, n338
  - ethical approval 9.1–9.3
  - treated same as gamete donation 9.4–9.6



- embryo donors
  - retention and access to information
    - identifying 10.3–10.11
    - vetting of 9.8–9.10
    - voluntary register counselling 10.93–10.94
    - who gave prior to August 2005 10.8, 10.11
- embryo recipients 9.8–9.10
- ethical approval
  - for embryo donation 9.1–9.3
  - for surrogacy 7.13–7.17
- ethical issues
  - around surrogacy 7.9
  - of birth technologies and changing family structures 2.21
- ex-nuptial births 1.4, 1.13, 2.2, n5

## F

- families
  - changing nature 1.3–1.12, 2.21
  - best outcomes for 2.10–2.18
  - equality for children regardless of structure 1.25
  - functionality versus form in determining child outcomes 2.16–2.18, 6.91–6.92
  - impact of disclosing children's genetic identity 10.28, 10.32
  - in Māori customary practices 2.3–2.4
  - married two-parent 2.11
  - models 2.1–2.4
  - and presumption of paternity 4.7
  - rules for protection of 3.13, 3.19
  - same-sex parent 2.16
  - using donor gamete conception 10.67–10.76
  - using private donor gamete conception 10.110–10.114
- Families Commission Act 2003 1.4
- Family Court
  - declarations of paternity and non-paternity 4.6, 4.22, 4.33, 5.8
  - handling of parentage testing orders 5.54–5.58
  - ordering on legal parental status in surrogacy 7.73–7.81
  - role in appointing guardians 3.8
- Family Court registrars: to approve known donor parental status 6.58
- Family Proceedings Act 1980
  - consent of minors 5.42
  - counselling in parentage testing disputes 5.69
  - liabilities for registered fathers 10.117
  - parentage testing 5.5, 5.10, 5.54–5.55, 5.59
- Family Protection Act 1955 3.15, 4.33
- fathers
  - as donors in surrogacy 7.7
  - historical rights 1.14–1.15

- initiatives for more to be named on birth records 10.121–10.135
- knowledge of and consent to DNA testing 5.37–5.41, 5.45–5.53
- legal recognition of relationship with children 4.5, 4.8–4.10
- not named on birth certificates 1.12, 3.8, 10.115–10.120
- statutory definition 1.4, 3.5
  - see also* paternity
- fertility service providers
  - counselling of unpartnered donor gamete recipients 6.100
  - counselling protocols 10.71, 10.76
  - information recorded on donors 10.85
  - obligations in relation to identifying information 10.3–10.5
  - obligations in relation to surrogacy 7.16
  - statistics 1.6
- financial support for children *see* child support
- fraud in implantations 8.14
- full surrogacy *see* gestational surrogacy

## G

- gamete donors
  - automatic transfer of parenthood from *see* deeming rules
  - retention and access to information
    - identifying 10.3–10.11
    - voluntary register counselling 10.93–10.94
    - who donated prior to August 2005 10.8, 10.11
- gamete fraud and theft 8.14
- gay relationships
  - creation of families by people in 1.6–1.7
  - surrogacy as parenting option in 7.6
- genetic connection
  - as determinant of legal parental status 3.18, 7.50, 7.67, 8.8–8.9
  - when donor information not held 10.95–10.96
- genetic fathers
  - as legal fathers 3.3, 3.5
  - not recognised as legal fathers 4.17
  - in surrogacy 7.6
- genetic identity *see* identity
- genetic mothers
  - in cases of mistaken implantations 8.8–8.9
  - as legal mothers 3.3, 3.5
  - in traditional surrogacy 7.2
- genetic parents
  - access to information on 1.22–1.23, 2.6
  - children's right to know 5.61
  - combinations with non-genetic parents 1.6, n9
  - deeming rules 6.12
  - financial liability 2.7

- number of 3.2
  - parenting rights extended beyond 2.3–2.4
  - proof through DNA testing 1.11, 5.1
  - recorded on birth certificates 10.45, 10.58
  - in surrogacy 1.10, 3.2, 7.5, 7.14
  - who do not raise children 2.2
  - genetic testing *see* DNA testing
  - genetics: future developments in science of 1.32
  - gestation
    - access to information on 1.22–1.23
    - as determinant of legal parental status 7.68, 8.8–8.9
  - gestational mothers
    - bonding with children 7.62, 8.12
    - in cases of mistaken implantations 8.8–8.9
    - as legal mothers 3.3, 3.5, 8.9
    - as parents of children born through embryo donation 9.4–9.5
    - in surrogacy *see* surrogate mothers
  - gestational surrogacy
    - defined 7.4–7.6
    - ethical approval 1.10
    - legal parental status 7.81
    - NECAHR guidelines 7.13–7.17
    - post-birth parental orders 7.41
  - guardians
    - applications for children's access to donor information 10.5
    - counselling in parentage testing disputes 5.68–5.69
    - court-appointed 3.8
    - for donor offspring of sole legal parents 6.94
    - duties 3.9–3.11
    - statutory provisions for relationship with children 3.6
  - guardianship
    - as alternative to legal parenthood 6.24–6.27
    - assigned to adoptive parents 3.7
    - automatically accorded to legal parents 3.6
    - in cases of mistaken implantations 8.15
    - in cases of proved non-paternity 4.47
    - duration of 3.12
    - for known donors 6.24–6.27, 6.31
    - powers of consent to DNA testing 5.37–5.41
    - in relation to legal parenthood 1.2
    - in surrogacy 7.29
  - Guardianship Act 1968 1.14, 5.58
- H**
- half-siblings of donor-conceived children 10.6
  - High Court: declarations on paternity and non-paternity 4.6, 4.22, 4.33, 5.8
  - Human Assisted Reproductive Technology Act 2004
    - accessing identifying information 10.3–10.11
    - anonymous donor conception n163
    - children's welfare and best interests 1.18
    - counselling for prospective parents 10.71, 10.76
    - counselling of unpartnered donor gamete recipients 6.100
    - donor-identifying information 10.3–10.10
    - non-retrospective application 10.97–10.105
    - research into effectiveness of provisions 10.78
    - rights of access to genetic information 1.23
    - storage of embryos 9.2
    - surrogacy 7.12
  - Human Rights Act 1993: children's rights 1.25
- I**
- identity
    - accessing information on genetic 10.3–10.11
    - age for access to information on genetic 10.79–10.83
    - birth certificates as mechanism for disclosing 10.44–10.66
    - disclosure by parents of children's genetic 5.61, 10.27–10.34
    - education and counselling on 10.67–10.78
    - fathers' identification fulfilling children's rights to 10.115–10.135
    - importance of 10.23–10.34
    - issues for children not conceived through clinics 10.106–10.114
    - issues for people conceived before August 2005 10.84–10.105
    - legal duty of parents to disclose 10.40–10.43
    - legality of the right to know 1.22, 10.12–10.17
    - Māori views 10.18–10.22
    - submissions on right to know 10.35–10.39
  - illegitimacy: legal disabilities of 4.7
  - implantations, mistaken *see* mistaken implantations
  - implications counselling 10.74–10.75
  - inferences of parenthood 5.55, 5.63
  - infertility
    - donor embryo as option 9.1
    - donor gamete conception used in cases of 6.2, 6.14
    - feelings of shame about 10.27
    - reproductive procedures to address 1.6
    - surrogacy as option 7.1
    - whāngai practices addressing 2.4
  - inseminations, mistaken *see* mistaken implantations
  - intending parents
    - appropriateness of adoption for 7.26–7.28
    - legal parental status 7.18–7.21, 7.23, 7.30, 7.73–7.80
    - pre-conception education programmes for 10.67–10.69
    - registered on birth certificates 7.8
    - reneging on surrogacy agreements 7.22

requirements for approval of 7.14  
screening of 7.72  
intentional parenthood  
in donor gamete conceptions 2.8, 6.14,  
6.64  
in surrogacy 7.47–7.49, 7.65–7.66, 7.77  
interim pre-birth orders: on parental status in  
surrogacy 7.73–7.75, 7.82  
International Covenant on Civil and Political  
Rights 10.16  
IVF surrogacy *see* gestational surrogacy

## K

known donors  
agreements with parents 6.9–6.11, 6.28–  
6.30, 6.31, 6.74–6.84  
consultation with families created by  
6.33–6.36  
DNA testing of 6.61  
effect of being approved as parents 6.60–6.66  
existing conditions for legal parental status  
6.31–6.33  
guardianship orders for parental rights  
6.24–6.27, 6.31  
legal advice and counselling for 6.66  
legislative and judicial approaches to rights  
and responsibilities 6.37–6.50  
liability for child support 6.86–6.87  
rationale and principles for parental status  
1.8, 6.51–6.59  
as a second or third parent 6.59

## L

legal advice: for parties in known donor agree-  
ments 6.66  
legal benefits: from fathers being named on  
birth certificates 1.12  
legal fathers: as determined by Status of Chil-  
dren Act 3.3  
legal mothers  
as determined by Status of Children Act  
3.3  
surrogate mothers as 7.18–7.20  
legal parenthood  
automatic transferral of *see* deeming rules  
of parenthood  
of children born through embryo donation  
9.4–9.10  
clarity and certainty of status of 1.20–1.21  
court-ordered in surrogacy 7.73–7.81  
defined 3.1, 3.5  
ensuring equality of children 3.20  
existing status for known donors 6.31–6.33  
genetic versus gestational link for  
determining 8.8–8.9  
and genetics 3.18  
historical changes 1.13–1.16  
impact of embryo donation 1.30, 9.4–9.7  
interim pre-birth orders of 7.73–7.75, 7.82

legal right to make parenting decisions 3.17  
legislative changes applicable to future  
genetic developments 1.32  
non-exclusivity between genetics and 3.18  
powers and rights 2.19, 3.13–3.17  
principles behind law reform 1.17–1.25  
for protection of children 2.20, 3.19  
rationale for legislative changes 2.19–2.22  
in relation to guardianship 1.2, 3.6  
in relation to parenting 3.2  
rights to consent to marriage of minors 3.17  
sole 6.88–6.100  
sources that informed proposals for  
legislative changes 1.26–1.28  
in surrogacy 1.10, 7.18–7.30  
transferral in cases of donor gamete  
conception *see* deeming rules of  
parenthood  
transferral with adoption *see* adoption  
legal parents  
child support liabilities 3.14  
children's entitlement on intestacy 3.15  
defined 3.1–3.2, 3.5  
two-parent family model 3.2  
legal right to know identity *see* identity  
lesbian relationships  
creation of families by people in 1.6–1.7  
donor gamete conception used in 6.2, 6.16

## M

Māori customary law and practice  
on ex-nuptial births n18  
on families n3  
on identity 10.18–10.22  
on marriage and children 2.2–2.4  
parallels with surrogacy n259  
marital relationships  
as factor in transfer of legal parental status  
7.69–7.70  
paternity presumed from 1.4, 4.1–4.4,  
4.12–4.15, 4.24, 4.35–4.45  
marital-type relationships: presumption of pater-  
nity extended to 4.24, 4.35–4.45  
Marriage Act 1955 3.17  
married two-parent families 2.11  
maternity: presumption of 4.48–4.50  
mediation: in parentage testing disputes 5.69  
medical practitioner supervision: of parentage  
testing providers 5.19  
men: not automatically guardians 3.8  
minimum age: for children's access to genetic  
information 10.79–10.83  
minors  
consent to DNA testing 5.42–5.44  
legal parents' right to consent to marriage  
of 3.17  
misattributions of paternity  
minimising 4.36–4.41  
statistics and consequences 4.17–4.20

mistaken implantations  
 determination of legal parental status  
 8.10–8.17  
 occurrence 8.1–8.4  
 moral debates: around surrogacy 7.9  
 mothers  
 knowledge of and consent to DNA testing  
 5.37–5.41, 5.45–5.53  
 recognition of parenthood rights of 1.14  
 statutory definition 1.4, 3.5, 4.50  
 surrogate *see* surrogate mothers

## N

National Ethics Committee on Assisted Human  
 Reproduction (NECAHR)  
 draft guidelines on embryo donation 1.30,  
 9.3, n338  
 guidelines on surrogacy 7.13–7.17, 7.53–  
 7.54, 7.83  
 statistics on surrogacy applications n15  
 non-compliance with parentage testing orders  
 5.72–5.76  
 non-European customary practices 2.3–2.4  
 non-genetic parents  
 automatic transfer of parenthood to *see*  
 deeming rules  
 combinations with genetic parents 1.6, n9  
 guardianship as alternative for 6.24–6.27  
 parenting by 2.8–2.9  
 status given by adoption 1.5  
 status on basis of intention 6.64  
 non-genetic partners: of genetic parents 3.18  
 non-paternity  
 consequences of proof of 4.46–4.47  
 court declarations of 4.6, 4.22, 4.33

## O

older single women: use of donor gamete con-  
 ception by 1.9  
 one-parent households: frequency of 1.3  
 opposite-sex civil unions: presumption of pater-  
 nity extended to 4.35–4.45

## P

*P v K* [2003] 6.28–6.30  
 parent–child relationships  
 genetic connections in 2.7–2.9  
 impact of donor gamete laws on 1.10  
 in Māori customary practices 2.3–2.4  
 includes guardian–child relationships 3.6  
 parentage testing *see* DNA testing  
 parental orders  
 post-birth 7.41–7.45  
 pre-birth 1.20, 7.28, 7.73–7.75, 7.82  
 parenthood, legal *see* legal parenthood  
 parenting

legal parenthood provisions for decisions  
 on 3.17  
 in relation to laws on parenthood 2.20  
 parenting orders: in surrogacy 7.29  
 parents  
 agreements with known donors 6.9–6.11,  
 6.28–6.30, 6.31, 6.74–6.84  
 in cases of mistaken implantations 8.15  
 characteristics of best 2.10–2.18  
 counselling for implications of donor  
 gamete conception 10.70–10.76  
 counselling in parentage testing disputes  
 5.68–5.69  
 counselling on genetic identity for 10.34  
 disclosure of children’s genetic identity by  
 10.10–10.11, 10.27–10.34, 10.40–10.43  
 genetic–non-genetic combinations 1.6, 3.2,  
 n9  
 knowledge of and consent to DNA testing  
 5.37–5.41, 5.45–5.53  
 marital status 1.25  
 protection of children 1.16  
 relationships with children *see* parent–  
 child relationships  
 rights extended beyond genetic parents  
 2.3–2.4  
 rights to have children DNA-tested 1.11  
 statutory definition 1.4  
 partial surrogacy *see* traditional surrogacy  
 paternity  
 advantages to children of legally recognised  
 4.5, 4.8–4.10  
 by affirmative act of acknowledgment  
 4.27–4.28  
 by being named on birth certificates 4.5  
 court declarations of 4.6, 4.22, 4.33  
 DNA testing for 4.16, 4.23  
 misattributions *see* misattributions of  
 paternity  
 presumption of *see* presumption of  
 paternity  
 paternity fraud 5.37  
*Perry-Rogers v Fasano* 8.5–8.7  
 post-birth parental orders 7.41–7.45  
 pre-birth parental orders 1.20, 7.28, 7.73–7.75,  
 7.82  
 pre-conception agreements  
 in donor gamete conceptions 6.28–6.30,  
 6.74–6.84  
 in surrogacy 7.22–7.23  
 pre-conception education programmes: for  
 intending parents 10.67–10.69  
 presumption of maternity 4.48–4.50  
 presumption of paternity  
 application 4.1–4.4  
 benefits 4.7–4.10  
 extension and amendment of concept  
 4.35–4.45  
 issues with concept 4.11–4.24

options for reform 4.26–4.34  
privacy issues: with birth certificates 10.47,  
10.55–10.56, 10.62  
private donor inseminations: donor-identifying  
information 10.11, 10.106–10.114  
Property (Relationships) Act 1976: de facto  
relationship defined 4.42  
providers *see* fertility service providers  
publicity campaign: on voluntary register of  
donor information 10.89–10.90

## R

Registrar-General of Births, Deaths and Mar-  
riages 10.4–10.7, 10.9, 10.112  
reproduction, assisted human *see* assisted  
human reproduction (AHR)  
Reproductive Technology Accreditation Com-  
mittee code of practice 7.16, 10.71  
retrospective application of legislation 10.98  
on adoptions 10.8  
on donor-identifying information 10.97–  
10.105  
right to know identity *see* identity

## S

*S v T and Anor* [2003] 5.58  
same-sex parent families 2.16  
sanctions: for non-compliance with parentage-  
testing orders 5.72–5.76  
section 41 agreements 6.66, 6.74–6.87  
separated parents: child support liabilities 3.14  
siblings of donor-conceived children 10.6  
single parenthood 2.2  
single women: use of donor gamete conception  
1.9, 6.2, 6.15  
Social Security (Social Assistance) Amendment  
Bill 10.122  
sole legal parenthood 6.88–6.100  
sole parent beneficiaries 10.121  
Status of Children Act 1969  
children's rights to equality 1.25  
declarations of paternity 5.8  
definition of who constitute mothers 4.50  
establishment of parenthood 6.3  
history of 6.4–6.5  
intentional parenthood 6.64  
overriding of donor parenthood provisions  
6.60  
parental status of known donors 6.58–6.59  
presumption as to paternity 4.1  
proposed inclusion of "and Parents" in title  
4.51  
status of children in relation to parents 3.3  
Status of Children Amendment Act 1987  
assigning of parent and guardian status 3.7  
children born through embryo donation  
9.4–9.5

deeming rules 6.4–6.8  
Status of Children Amendment Act 2004  
children born of surrogacy n276  
deeming rules 6.7  
step-parents  
child support liabilities 3.14, 4.47  
compared with other non-genetic parents n9  
succession on intestacy: rules regulating 3.13,  
3.15, 3.20  
supporting counselling 10.74  
surrogacy  
appropriateness of adoption provisions for  
7.26–7.28  
considerations in allocation of parental  
status 7.53–7.77  
contrasted with adoption 1.10  
court order on parental status 7.73–7.80  
defined 7.1  
enforceable agreements 7.38–7.40  
ethical and moral debates 7.9  
formalised by adoptions 7.23–7.28  
gestational *see* gestational surrogacy  
incidence of 7.7  
judicial approaches to breakdowns of  
arrangements for 7.46–7.52  
legal parental status in 1.10, 7.18–7.30  
legislative approaches to parental status in  
7.31–7.45  
legislative intervention in 7.9–7.11  
parallels with whāngai 2.4  
regulations on 7.12  
reneging on surrogacy agreements 7.22  
research into effect of 7.10  
traditional *see* traditional surrogacy  
transferral of legal parental status in 7.23  
unenforceability of agreements for 7.22–7.23  
surrogate mothers  
extinguishing parental status of 7.74,  
7.78–7.79  
as legal mothers 7.18–7.20  
ongoing status as legal parents 7.23, 7.29  
of own genetic children 7.4  
protection for 1.19, 7.62–7.64  
requirements on 7.14–7.16  
by self-insemination 7.3

## T

*T v S and Anor* [2004] 5.65  
theft of gametes 8.14  
therapeutic counselling 10.74–10.75  
three-parent family model 6.67–6.73, 8.15  
traditional surrogacy  
defined 7.2–7.3  
legal parental status in 7.81  
statistics 1.10

surrogate mother identifying information  
10.11, 10.106–10.114  
transferral of parenthood by  
adoption *see* adoption  
deeming rules *see* deeming rules of  
parenthood  
two-parent family model 6.67–6.73

## U

United Nations Convention on the Rights of  
the Child 1.15, 1.18, 1.25, 5.42, 10.14  
Universal Declaration on Human Rights  
10.16  
“unknown”: in place of fathers’ names on birth  
certificates 10.63–10.66  
unpartnered donor gamete recipients 6.100

## V

voluntary register: of donor-identifying informa-  
tion 10.8–10.9, 10.11, 10.85–10.90, 10.96,  
10.105  
voluntary regulation: of DNA testing providers 5.17  
voluntary testing for parentage 5.33–5.53

## W

wards of court: parentage testing of 5.58  
whāngai 2.4, 3.15, 10.20–10.21, n259

## Y

young persons: consent to DNA testing  
5.42–5.44

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