



Précis Paper

Same-sex Parents Who Separate: Who Gets the Children?

Abstract – This paper discusses how same-sex couples can become parents and what happens in the event of a separation. The discussion is in conjunction with the application of the *Family Law Act 1975* (Cth) and relevant case law.

Discussion Includes

- How Same-Sex Couples Can Become Parents
- Adoption
- Surrogacy
- In Vitro Fertilisation (IVF)
- Same-Sex Couples and Separation
- Relevant Case Law
- Parenting Orders
- The Resolution Process

Précis Paper

Same-sex Parents Who Separate: Who Gets the Children?

1. In this edition of BenchTV, Reece Ramsden, partner, and Sophie Goossens, associate, discuss how same-sex couples can become parents and what happens in the event of a separation. This discussion coincides with the application of the *Family Law Act 1975* (Cth) and relevant case law.

How Same-Sex Couples Can Become Parents

2. In Australia, there are three main ways that a same-sex couple can become parents; adoption, surrogacy, and in vitro fertilisation (IVF).
3. Adoption is the process by which a child is adopted from within Australia or internationally. Surrogacy is the practice of a surrogate mother bearing and giving birth to a child for other parents. IVF is a procedure where a mother's eggs are fertilised by sperm outside the body and later transferred into the mother's womb.

Adoption

4. NSW law sets out that the person or persons seeking to adopt must be of good repute, a fit and proper person, over twenty-one years old, and eighteen years older than the child they wish to adopt.
5. There are two main types of adoption in Australia; Intercountry adoption, where a child is adopted from overseas, and local adoption, where a child is adopted from within Australia.
6. Australia has agreements with thirteen other countries to adopt children. However, only three of those participating countries will allow same-sex couples to adopt.
7. The primary adoption service provider in Australia is Adoption Services, which assists parties with the application process via the Supreme Court to apply for local or intercountry adoption.
8. When adopting a child, an application must be made to the Supreme Court, seeking an order for the adoption. Once the adoption order had been attained, the Births, Deaths, and Marriages registry can be approached, allowing the adopting parents to replace the biological parents' names with their own on the birth certificate.
9. The Supreme Court is quite strict in determining who can and cannot adopt a child. The Supreme Court uses a similar process to the Family Court to make sure that the adoption is in the child's best interests in the process as a whole.
10. Between 2019-2020 there were 334 finalised same-sex couple adoptions, with almost 300 adoptions being local adoptions. These figures show that it is much more difficult for same-sex couples to access intercountry adoptions.

Surrogacy

11. In Australia, only altruistic surrogacy is legal. This is a non-commercial arrangement where the surrogate mother is not paid and becomes a surrogate out of their own free will. Commercial surrogacy is illegal across Australia.
12. In NSW, the intended parents must be eighteen years older than the surrogate child, and the birth mother must be over twenty-five years of age. The couple must also show a medical need for it, for example, a male couple, as they cannot have children themselves.
13. Initially, the birth mother is recognised as the biological mother on the birth certificate and the partner who played a role in conceiving the child. In this circumstance, the surrogate parents will need to apply to the Supreme Court to seek a parentage order to have their names recorded as the parents on the birth certificate.
14. In 2016, there was an Australian Human Rights Commission inquiry into the regulatory and legislative aspects of surrogacy in Australia. In the inquiry, several submissions were made to determine whether the laws recognised the relevant variety of aspects relating to surrogacy. Overall, the inquiry did improve access for same-sex couples to access surrogacy.

In Vitro Fertilisation (IVF).

15. Section 4 of the *Family Law Act 1975* (Cth) defines IVF as:

"Artificial conception procedure includes:
 - (a) artificial insemination; and
 - (b) the implantation of an embryo in the body of a woman."
16. In same-sex lesbian couples, one person will elect to be the birth mother, and then the couple will find a donor male to take part in the procedure.
17. In NSW, IVF is regulated by the *Assisted Reproductive Technology Act 2007* (NSW) ('ART Act'). The ART Act has introduced numerous policies that support the IVF process. For example, there is a system of registration for the users and providers of IVF.
18. Generally, the biological parents will remain on the birth certificate until the new parents amend it. However, in NSW, the donor is not recognised on the birth certificate, and a lesbian couple would need to apply to have it changed to mother and mother.
19. The parties need to enter into an agreement with the service provider and sign a document detailing what would happen in the event of a separation. This is specified in s 19 of the ART Act, which details that it is prohibited for the service provider to destroy an embryo if the parties do not direct its destruction.

Same-Sex Couples and Separation

20. In *G and G* [2007] FCWA 80, the original IVF agreement detailed that in the case of a separation, the embryos held with the IVF service provider should be destroyed. The court found that the original IVF agreement should be upheld.
21. Under the *Family Law Act* 1975 (Cth), what happens in the event of separation varies depending on how the parties have become parents.
22. The 2008 Australian Human Rights Commission report 'Same-sex: Same Entitlements' prompted the Australian Government to amend eighty-five laws that discriminated against same-sex couples. It was also discovered that there were several breaches of the United Nations Convention on the Rights of the Child.
23. The *Family Law Act* 1975 (Cth) was amended by the *Miscellaneous Acts Amendment (Same Sex Relationships) Act* 2008 (NSW) to define same-sex relationships. De facto partner, parent, child, couple, and family were all amended to make reference to same-sex relationships.
24. The amendments introduced equal parenting rights for female partners of mothers not listed on the birth certificate.
25. Section 60H of the *Family Law Act* 1975 (Cth) establishes the automatic recognition of the non-biological consenting parent of a lesbian couple. However, this is inconsistent with same-sex male couples, as there is no automatic law that identifies the non-biological parents to a surrogacy arrangement.
26. There is a default position for male same-sex couples for a non-biological parent under the *Family Law Act* 1975 (Cth) s 65C, which states that even if you are a non-biological parent, you can make an application to the Family Court pursuant to an interest in the welfare of a child.
27. Regarding surrogacy, non-biological parents need to apply to the Supreme Court for a parentage order. This means that there are no automatic rights in some circumstances.
28. However, the Family Court affirms that there is no priority of biological parents over non-biological parents. This is because the court seeks to clarify that under s 64C of the *Family Law Act* 1975 (Cth), non-biological parents have the right to make an application to the Family Court pursuant to an interest in the care, welfare, and development of the child.
29. Section 65C of the *Family Law Act* 1975 (Cth) sets out who may apply for a parenting order.

Relevant Case Law

30. *Aldridge & Keaton* [2009] FamCAFC 229 is an example of a non-biological parent making an application to the family court under s 65C of the *Family Law Act* 1975 (Cth), as they have an interest in the care, welfare, and development of the child.
31. The court, in these circumstances, analysed whether priority was being given to a biological parent. The court affirmed in the judgement that s 65C of the *Family Law Act* 1975 (Cth)

does not imply a hierarchy of position. Each case must be determined on its own facts, and ultimately, the paramount consideration is the child's best interest.

32. In *Lusito & Lusito* [2011] FMCAfam55, the court considered the non-biological parents' role in the care of the child to be a paramount consideration in determining whether or not it is in the child's best interests to have time or orders made with the non-biological parent.

Parenting Orders

33. There are options for same-sex biological and non-biological parents to seek relief from the court if there is a separation, and determinations need to be made regarding children. The current legal mechanisms mirror those of heterosexual couples.
34. When the court is looking into care and parenting arrangements of any child, they will turn to the primary considerations in the *Family Law Act 1975* (Cth) s 60CC; the benefit of the child having a meaningful relationship with both parents, as long as the child is not subject to psychological or physical harm, abuse, neglect, or violence.
35. Suppose the court determines that the first primary consideration of having a meaningful relationship with the child is inconsistent with protecting the child from harm. In that case, more consideration is weighted towards the secondary consideration, protecting the child from harm of any sort.
36. There are thirteen other secondary considerations under the Act, such as; the child's wishes, age and maturity of the child, the nature of the relationship the child has with the parents, the financial capacity of the parents to care for the child, the competence of the parents to take care of the emotional and intellectual needs of the child, and the connection between the parent and the child.

The Resolution Process

37. As a child ages, the court will give more weight to the child's wishes. If a child is in their mid-teenage years, more consideration can be given to their view regarding living arrangements.
38. Once the child's best interests and the primary and secondary considerations have been assessed, the parental responsibility and whether or not there should be equal parental responsibility can be determined.
39. There are some inconsistencies in the law currently in the presumption of parentage and how to meet this requirement. Accordingly, the presumption of automatic parental responsibility does not always apply to non-biological parents. They would likely need to apply for parental responsibility as a party with an interest in the care, welfare, and development of the child under the *Family Law Act 1975* (Cth) ss 65C (c).
40. In the event of a separation, there is the pre-court process, including family dispute resolution. However, the first step would be to try and negotiate the best outcome for both

parties that is in the child's best interest while also assessing whether the child will be subjected to any harm.

41. The second step would be the family dispute resolution process, which can be a useful tool. However, in certain circumstances, an application would also need to be made to the court.
42. Finally, a parenting plan or a consent order, the same as that used in heterosexual relationships, can be used with same-sex couples.

BIOGRAPHY

Reece Ramsden

Partner, Ramsden Lawyers, Sydney

Reece practices solely in the area of family law. He has gained experience in all aspects, including property settlements, parenting disputes and domestic violence. Reece regularly advises on high net worth property settlements, including intricate trust structures, parenting disputes comprising of family violence, drug use, mediations and conciliation conferences.

Sophie Goossens

Associate, Ramsden Lawyers, Sydney

Sophie has worked exclusively in family law since 2015. She has experience and particular interest in complex parenting and property settlement matters. Sophie is actively involved within her professional bodies, including preparing and presenting CPD material within the family law realm.

BIBLIOGRAPHY

Cases

Aldridge & Keaton [2009] FamCAFC 229

G and G [2007] FCWA 80

Lusito & Lusito [2011] FMCAfam55

Legislation

Assisted Reproductive Technology Act 2007 (NSW)

Family Law Act 1975 (Cth)

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

Other

Australian Human Rights Commission, *Same-sex: Same Entitlements*, Final Report (Webpage 1 May 2007)

< <https://humanrights.gov.au/our-work/lgbti/publications/same-sex-same-entitlements>>

Australian Human Rights Commission, *Submission to Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements* (Webpage, 17 February 2016)

<<https://humanrights.gov.au/our-work/legal/submission/submission-inquiry-regulatory-and-legislative-aspects-surrogacy>>

Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)