25TH MILLER du TOIT CLOETE INC/UNIVERSITY OF THE WESTERN CAPE FAMILY LAW CONFERENCE

LOVE OR CONFUSION

BY STEPHEN PAGE

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"Will I be truthful yeah

In choosing you as the one for me

Is this love baby

or is – a just confusion?"

Jimi Hendrix: *Love or Confusion*

I had thought of using as the title the immortal words of Australia's oldest reported sperm donor, John Lindsay Mayger, 72 when the report was written in 2020 (but thought better of it):

"Some people fish, some golf … I masturbate."

It may seem quirky that I refer to Jimi Hendrix when I start talking about gamete donation, but he's got it right or had it right when he described whether it was love or confusion – what were the intentions of the parties?

Did they intend to have a relationship or indeed did they intend merely to be the donor and recipient?

The issue of intention came to the fore in the High Court of Australia decision in *Masson v Parsons* [2019] HCA 21. Mr Masson, a gay man, supplied a quantity of sperm to his friend the first Ms Parsons. On the second attempt (when Ms Parsons introduced her girlfriend, who assisted in the process of pregnancy) the attempt was successful. A girl was born. With his consent, Mr Masson was named on the birth certificate as the father.

Ms Parsons formed a de facto relationship with her girlfriend, whom she later married. The partner then became the second Ms Parsons.

A second girl was born to the first Ms Parsons, conceived from an identified sperm donor through an IVF clinic.

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[1] Stephen Page is a principal of Page Provan, Family and Fertility Lawyers, Brisbane. He was admitted in 1987 and has been a Queensland Law Society accredited family law specialist since 1996. Stephen is a Fellow of the IAFL, and of the Academy of Adoption and Assisted reproduction Attorneys, and an international representative on the ART Committee of the Family Law Section of the American Bart Association among other positions.

Both girls called Mr Masson *"daddy"*.

By the time the elder girl was aged about 10, both Ms Parsons announced to Mr Masson that they were moving to New Zealand from Australia with the children. He applied to the Family Court of Australia to restrain them from doing so.

Ultimately, he was successful.

The issue at trial was whether he was a parent. The matter finally ended up before the High Court of Australia which held unanimously that he was a parent. That decision turned not just on genetics, but also on the intentions of the parties, it being the express or implied understanding that Mr Masson, unlike many other sperm donors, wanted to be involved in the child's life, in fact that he wanted to parent. That is why he put his name on the birth certificate. He parented after the child was born.

Masson has highlighted the challenge in Australia of who is a parent and who is a donor.

Some years ago, I acted for the birth mother who had been in a relationship with the genetic mother for some years. At some stage their relationship broke down. The genetic mother offered one of her embryos to my client. On the second occasion, my client became pregnant. The question at trial in that case was whether the genetic mother was a parent (as she maintained her intention all along, or whether she was a donor) which my client maintained all along. My client was unsuccessful.[2]

Chief Judge Thackray in the *Baby Gammy* case, *Farnell and Chanbua* [2016] FCWA 17 deplored the use of intention. His Honour said[3]:

> *"It was said that in Blake, the sperm donor intended to be the 'social father', whereas in W & C the intention was different. In my view, any interpretation which makes the paternity of a child dependent upon the intention of the donor of the sperm would be a recipe for disaster. As W & C itself demonstrates, arrangements involving artificial fertilisation procedures come in a variety of forms. Some sperm donors intend to have no involvement with the life of the child; others intend to live with the child fulltime; and others intend to have an ongoing relationship with the child, falling short of living with the child fulltime. If the intention of the sperm donor was to be determinative, the question would arise, at what point in the spectrum does the father's intended involvement of the life of the child change his status from sperm donor to father?*
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> *If intention was to be determinative of paternity, what would happen where the intentions of the sperm donor and the birth mother differ? For example, in AA v Registrar of Births, Deaths and Marriages and BB (2011) 13 DCLR (NSW) 51, a lesbian couple advertised in the Sydney Star Observer[4] for a sperm donor who would become an 'uncle' figure to the child they ultimately had. However, the male who donated his*

[2] *Clarence & Crisp* [2016] FamCAFC 157.
[3] At [381]-[382].
[4] An LGBTQIA+ paper.

genetic material after the women responded to his advertisement in Lesbians on the Loose[5] *offering to be a 'father', wanted his own mother to know he had a child."*

Unfortunately, there are more than enough Australian cases where the intentions of the donor and that of the recipient or recipients has differed.

The worst outcome was in Re Patrick [2002] FamCA 193 where the gay man who provided his sperm to a lesbian couple resulting in the birth of a child was found not to be a parent, but time was ordered to occur between Patrick and the man. The birth mother reacted badly to the outcome and killed herself and Patrick[6].

The second worst case was that of *Masson*, where it was estimated that each side had spent A$1 million in costs by the time the matter had got to the High Court. The matter was then remitted to the Family Court for further hearing.

The status of sperm donor agreements in Australia is unclear. There have been few cases dealing with them. In one case the court took into account the sperm donor agreement to note the historical intentions of the parties[7]. In another case the court largely ignored the sperm donor agreement based on the statutory best interest criteria for the child[8].

One does not know what was in the sperm donor agreement in that second case, but one can guess the general tenor of the sperm donor agreement and why the recipient lesbian couple were keen to have it admitted into evidence, i.e., that the man was a donor not a parent. In that case, the man wanted to be identified as the father. Despite his having sent a text message right at the beginning of their journey:

"Hey does anyone want to be a surrogate for me or have a baby with me?";

one would think on receiving that text (which was only sent to one friend) being one of the women in the relationship, the respondents to the case, that it was crystal clear that the man wanted to be a parent. Nevertheless, somehow, the women thought that he did not want to be a parent but only to be a donor.

In 2020-2021 I saw a great increase in the number of sperm donor agreements. I thought, vainly, that this might be because intended parents might have had regard to the decision in *Masson* and wanted to set out clearly as to what the intention of the parties was. I was wrong. The answer that was given to me invariably by my clients (who are typically the intended parents) was that, courtesy of Covid, there was a shortage of sperm donors at IVF clinics and as a result, the intended parents started looking around to see amongst their friends' group who might be a suitable donor – with the added benefit that the child could have an ongoing relationship with the donor.

A feature in Australia is that because donors are not able to be paid a fee, and because the child is able to find out the name and identity of the donor after the child turns 18, there is consequently a great shortage of sperm donors in Australia. Most sperm available to

[5] Not surprisingly, a lesbian focused magazine.
[6] https://www.theage.com.au/national/battle-for-boy-ends-in-double-tragedy-20020803-gdugjx.html .
[7] *Packer & Irwin* [2013] FCCA 658. I acted for the birth mother, who had a close relationship with the donor.
[8] *Reiby & Meadowbank* [2013] FCCA 2040.

intended parents through IVF clinics in Australia is imported from the United States. An effect from Covid was a great reduction in US sperm donors[9], which had a knock on effect in Australia. Instead of having say a dozen prospective sperm donors to choose, intended parents were often told that only one or two were available. Hence, they found their own.

BEST PRACTICE

The approach I took about 10 or so years ago when I started to draft sperm donor agreements was how I managed to ameliorate risk. A sperm donor agreement in Australia can't eliminate risk. It remains unclear whether a sperm donor agreement is binding.

Instead, all it can do, as I said, is to ameliorate risk. One of the key steps I take is to make it plain in the oral and then the written advice I give to my clients is to that effect. I want to make sure that if something goes wrong later that they went into the deal wide eyed and well informed, and that they then don't blame me.

If the recipients are a couple, then typically under our *Family Law Act*, they will be recognised as the parents and the donor will not be a parent. However, as illustrated in *Masson*, if the recipient is a single woman, then the donor may or may not be a parent. Either way carries risk for both parties. The High Court in *Masson* left open the question of whether a child can have more than two parents. In the absence of clear statute or another case that determines the issue, the question of multiple parents remains hanging.

I have seen an increase in the number of multiple parent cases, albeit from a low base, in recent years, although my first case was 15 years ago. It occurs typically in the rainbow community where there might be a woman who wishes to have a child and she may have a partner. The sperm donor may also have a partner – and it may end up that all four wish, in effect, to parent.

Experience has taught me that in that type of arrangement, that if the child has a bond with one or both mothers from an early stage, then one or both fathers will to some degree be moved to the background. Recently, I saw one of my clients from 15 years ago who made those comments. Both women and both men and the two children lived in the same household for a year or so trying to co-parent the children. That didn't work. The men decided to cede the territory and moved interstate. Nevertheless, they remained actively involved in the children's lives, including financially. They continue to have a close relationship with the children.

In their frustration at not having sole agency as the parents of a child, the men decided to have a child via surrogacy as well. At a time when India was the place that Australians predominantly went to for surrogacy, they did so too. The result was that they ended up with three children- two with the mums and one on their own.

In ameliorating risk, the steps that I take are:

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[9] https://www.nytimes.com/2021/01/08/business/sperm-donors-facebook-groups.html .

1. **Have a written sperm donor agreement**. I do the same with egg donor and embryo donor agreements. I consider that there is much lower risk of something going wrong with an egg donor arrangement than with a sperm donor arrangement. In 2011 the American Society for Reproductive Medicine gave an estimate that the amount of time commitment required for a sperm donor, including counselling, was one hour, but that of an egg donor was 50 plus hours. They have moved away from that estimate since then, but have not given another estimate. Those estimates are probably about right. Certainly, an egg donor will often have to have daily injections self-administered in the stomach of the relevant hormones to enable her to provide an egg pick up. The egg pick up is minor surgery which of course can go wrong and has a remote risk of death. The same can't be said for a sperm donor.

   There must, therefore, be a much higher psychological level of connection on the part of the egg donor than that of the sperm donor.

   At a conference in 2022, I asked three egg donors who were speaking as to whether they had ever signed an egg donor agreement. They had been egg donors multiple times. They found the prospect funny and silly. They didn't see the need for there to be an agreement because of course they never intended to be a parent.

   Having seen the occasional surrogacy arrangement fall over (though thankfully none recently), there is a world of difference between a written (non-binding) agreement and an oral one, where in the words of one of the parties when the agreement fell apart: "Oral agreements are worth the paper they're written on."[10]

2. **Make sure the form of the sperm donor agreement is a deed**. Nothing in more solemn that that of a deed. Nothing is more solemn in my view that offering someone else genetic material to enable the other person to become a parent. Australia is a common law jurisdiction. Consideration is required for an agreement- unless the agreement is in the form of a deed. I struggled as to what consideration might apply- so have chosen to draft as a deed.
3. **Have a solid process in place.** Evidently there must be a written agreement signed by the parties. The agreement also sets out in a schedule all the relevant statutes, section by section. This is painstaking stuff, made not easier by Australia having eight different jurisdictions. I would be very thankful if we only had one! The statutes listed cover the obvious points that might arise about the donation:

   - The donation is altruistic- as federal and state laws require.
   - Federal and state laws about parentage.
   - State laws about inheritance.

   It is common for these agreements to cover Australians who reside in different States. Whilst I specify the law of which State is to apply to the agreement, because there may be criminal sanctions or issues of inheritance in different States, out of an

[10] I didn't design an oral agreement, but inherited a mess from another firm. My job was to try to fix the mess. Prevention is always better than cure.

abundance of caution, I cover statute law in the schedule to the agreement in both States.

I don't want to leave anything to chance.

When the agreement is first prepared in Word, it will be sent to my client in draft. What invariably happens at that point, whether I like it or not, is that my client will send a draft to the other side. They will then talk about it and make any changes that they feel are necessary.

One would think that there should be legal representation on both sides. Experience has taught me that although money isn't the object in most cases about whether the donor has legal representation, it really is the exception rather than the rule for the donor to have legal representation.

The agreement documents that both parties are aware of their right to legal representation- and documents whether they have chosen to obtain that representation and if so, from whom, or not.

When the final draft of the agreement is prepared, then each side get from me the list of all the legislation referred to in the schedule. My client of course also obtains comprehensive legal advice.

If my client wants to undertake an at home insemination (which is pretty common) I also cover this - that there is a lower risk going through an IVF clinic – but it's their choice.

Why there is lower risk going through an IVF clinic is two-fold:

1) Evidently IVF clinics check for inheritable conditions and STI's.

2) The other is that with any known donation in Australia, there is a requirement that the clinic ensures that there is mandatory counselling of all parties through an experienced fertility counsellor.

4. **The parties attend a fertility counsellor** and obtain a written report from the counsellor, irrespective of whether they are doing it at home or through a clinic. The purpose of the report should be that it sets out clearly the intentions of the parties as to whether or not the person who is providing their genetic material is a donor or is a parent. I insist on obtaining a copy of that report before the agreement is signed. I hate surprises. If there is an issue arising in the report- such as not being clear about the role of the donor- is it o be a donor or to be a parent, I raise that with the counsellor. I don't want to create a mess that I or someone else has to clear up later. I also want clarity about the expectations of the donor as to how often they expect to see the child, and whether they want to provide financial support for the child. Usually those who are of the view that they are donors do not want to provide financial support, and do not want the child to inherit from them.

5. **Both the donor and recipients and their partners all sign up**. If the recipient and partner are married or living in a de facto relationship then ordinarily they will be considered to be the parents- and the donor is not.

   Usually I would act for a couple when there is a couple who want to be parents. In one recent case, the intended mother and her partner had a newly formed relationship- and lived in different states. It was unclear whether a court would conclude that they were living in a de facto relationship. The agreement was drafted on the basis that they did not consider that they were in a de facto relationship, and that the agreement reflected the intended mother's long desire to become a mum through sperm donation. It also clarified that it was not their intention for the partner to be a parent at this stage, although it may be the case as their relationship evolved that they together might desire him to be a parent- which would likely necessitate a step-parent adoption application.

   The effect of reading our statute law that when the donor supplies their genetic material to a couple the donor won't be a parent, collides with what the High Court said in Masson that the door is possibly open to more than two parents. Therefore, while the donor to a couple would not be a parent, the donor's partner *might* be. It is therefore essential to ensure that the partner is also a party to the agreement.

   Long experience has taught me that all the critical players ought to be tied to the agreement, to reduce risk and to increase certainty. Sadly, I have seen some partners of donors in the past agitate that their partner is a parent- and demand parental "rights"- which incidentally do not exist in Australia- we have children's rights and parental responsibility, but not parental rights.

The case of the six F's

Fran and Felicia were in a relationship. They decide to have a child. They agree to have an at home insemination with Phil. A child, Philomena, is born to Felicia. Everything goes along swimmingly. Fran and Felicia have a happy relationship. Philomena sees Phil about once a month or every couple of months.

Fran and Felicia split up. Felicia finds love with Fabian. They marry. Despite the end of the relationship between Fran and Felicia, their relationship remains amicable. Philomena sees Fran every other weekend, and continues to see Phil about once a month or once every two months.

Phil finds a partner, Felix. Felix thinks he is very lucky, and presses Phil to have more time- as he is a parent, and is entitled to every other weekend.

Phil's lawyer writes to Felicia demanding to have every other weekend time, half school holidays, and demands that Phil is called "father" not "donor"- as to call him "donor" is evidence of alienation.

Felicia hands Fran a copy of the letter from Phil's lawyer.

Fran then retains me. I write to Phil's lawyer:

1. My client is the other parent with Felicia. She should have been written to.
2. Phil is not a parent, but a donor. The letter goes through the statute painstakingly at length.
3. My client is opposed to any change to the current arrangement.
4. The child is not to be sliced up like a salami or a waltz: weekend 1 with Felicia, weekend 2 with Phil, weekend 3 with Fran.

Phil did not take the matter further.

I've now been doing these agreements for about 13 years and I've done many of them. Not one of them has ever been litigated. It's clear that a donor is ordinarily, if not a parent, someone who would be considered to have standing to litigate which, in the jargon of our legislation is someone who is concerned with the care, welfare and development of the child. As seen in *Masson*, for example, it was quickly conceded by the two Ms Parsons that Mr Masson was someone concerned with the care, welfare and involvement of the child, but they submitted that he was not a parent.

As I said, none of my sperm donor agreements have ever been litigated which may be just an aberration, or it may be evidence in fact that having a very thorough process where the expectations of the parties are set very clearly, namely, that they are all in the same canoe and paddling in the same direction undertaking a very thorough, collaborative process means that the chances of something going wrong are greatly reduced.

Experience has taught me that being methodical, thorough, transparent and collaborative greatly reduces risk.

WHAT TYPE OF COUNSELLING?

I can't emphasise enough the need to have the counselling undertaken by an experienced fertility counsellor – someone who knows what they're doing and who has seen it all before.

I also can't emphasise enough to get a copy of that counselling report and to vet it thoroughly. I've seen some reports from fertility counsellors (and they don't tend to be long – often only one or two pages) – where it's left unclear about whether the donor is to be a donor or a parent or something in between.

Sometimes there is a description of the donor playing an uncle type role. What does that mean? So that there isn't any woolly headed thinking, there needs to be clarification of exactly what that concept means. One person's idea of an uncle might be quite different to another's.

A term that I've heard a number of recipient clients use is to describe the donor to the child as *"donor daddy",* which begs the question whilst he might be the genetic parent, was the intention for him to be a parent or merely that of a donor? Where "parent" is a legal concept, to marry donor and daddy into the same concept can and does result in some believing:

- He is the biological father, the donor; or
- He is a parent who provided his sperm that resulted in the conception of the child- like any other father.

Of course, being called "donor daddy" might then lead to permutations over time by the parties or child:

- "daddy Steve"
- "dad" or "daddy".

An assertion that someone is not a parent but merely a donor does not square with that person being called "dad".

Clarence & Crisp [2016]

An example of how a counsellor is not to do counselling was in that case of *Clarence & Crisp*[11].

The parties were seeing a psychologist, my client's psychologist. My client's evidence was that in the midst of one counselling session, her partner announced that the relationship was at an end and only after that point was the offer made to donate her embryos to my client.

The genetic mother denied all of that and said that the relationship continued at the time that the embryos were provided. She denied saying in counselling that the relationship was at an end.

I was first consulted by my client when she was pregnant. I didn't have any influence about any counselling that might have occurred. The horse had bolted.

Efforts to proof the counsellor were rather difficult. The counsellor was always busy but nevertheless an affidavit was prepared by her in which, in essence, she corroborated my client's version.

In the lead up to trial, I sought several times to obtain a copy of the counsellor's notes. They weren't provided. There was no evidence at that point that the counsellor was going to be obstructive. However, when the counsellor was told that she would be the subject of cross-examination, suddenly I learnt that she was undertaking a hiking tour of Japan and, as she continually told us, would not be available due to a lack of mobile phone coverage. She also promised, eventually, to provide her notes. She seemed never to be available when we phoned her ahead of the trial.

[11] [2016] FamCAFC 157.

The counselling notes were provided half way through the trial and appeared as though they had been altered in some way.

The trial had to be adjourned part-heard because of the unavailability of the counsellor. When she finally gave evidence, she was not an impressive witness. My client's case then imploded. For example, it was said by the trial judge[12]:

> *"Under cross-examination, it was put to the witness that originally the word used was 'give' rather than 'gift' in respect of the applicant's eggs. Clearly a change was made and the witness was not able to assist as to when that change occurred. There remained the possibility that the notes were changed after the event in circumstances where the witness was aware that she was to concentrate on relationship breakdown between the parties in gifting of the applicant's eggs to the respondent…."*

Further[13]:

> *"I remain unconvinced by the evidence of this witness. There are significant inconsistencies as between her affidavit … and the notes attached to her [latter] affidavit … the cross-examination has indicated error and omission. It is difficult to discern from the notes whether it is simply the subjective opinion of the witness or whether part of the notes reflect the direct speech of each of the parties, but in particular the applicant. Moreover, the witness has approached the matter from the foundation and the history as provided by the respondent and I consider that the potential for the evidence to have been distorted, particularly having regard to the focus that the witness had a result of the position put by the respondent and the instruction of her solicitor is such that I can place little or no weight on the notes and the matters raised unless reliable narrative is contained in the first affidavit.*
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> *I do not consider the evidence of this witness provides assistance to the respondent in respect of contention that as at [the date of the implantation] the parties were no longer in a relationship.*
>
> *It could also be argued that the very fact that the applicant's continued attendance with the respondent upon this witness may well be support for the contention that both parties were keen to explore and pursue a reconciliation. That was certainly the ongoing focus of the respondent even as late as December 2011 where the letter of the witness to her general practitioner refers to the respondent as 'yearning for her and her partner to be reunited and to have a family unit'."*

SPERM DONOR WEBSITES

In the last few years there has been a huge jump in interest in obtaining sperm from sperm donors via websites, rather than through IVF clinics. Part of the reasons I've heard from clients as to why they want a known donor has been that they want to have an ongoing

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[12] Crisp & Clarence [2015] FamCA 964 at [135].
[13] At [138].

relationship with the donor, that the child knows where they have come from and to avoid the medicalisation of the process.

The risks are significant.

Risk one- what type of donor. Donors with some sites can specify if they are NI (natural insemination i.e. sex) or AI (artificial insemination). Case authority in Australia pre *Masson* is that a natural insemination donor is a parent[14]. I note that there is a case from Canada where the court found that although the man had sex with the woman, the intent of the parties was that he was the sperm donor, and that therefore he was not a parent[15]. A South African case some years ago was where the woman argued that although they'd sex together, the man intended only to be a donor – but the court found that the intent of the parties was that he wanted to be a parent- and was therefore a parent[16].

Risk two- therefore are they a parent?

In Australia, *Masson* makes plain that who is a parent often may be determined based on intention.

However, this is not always the case. In the case of *Tickner & Rodda* [2021] FedCFamC1F 279, a gay couple entered into a surrogacy arrangement with a single surrogate whom they had met through social media. Early in the pregnancy, the surrogate terminated the surrogacy arrangement. The couple were told of the birth of the child after it occurred. At first, the surrogate agreed for the couple to spend time with the child for at least two hours a day, which with the benefit of mediation, then increased.

Although the surrogacy arrangement was not enforceable[17]:

> *"Nonetheless, the proceedings inevitably have the flavour of enforcement of that agreement. These proceedings themselves highlight the difficulties that can arise from such agreements, particularly where those agreements are between strangers. One of the dangers is that all parties to the agreement can become emotionally and psychologically committed to the child which can in turn be most damaging to one side of the agreement or other regardless of whether the child goes to live with the parties who sought the arrangement of the mother who bore him or her.*
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> *It cannot be stressed too highly that a child is not to be treated as goods subject to an agreement for sale. That is so even where the agreement is altruistic, as they must be in Australia to be legal."*

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[14] *B and J (Artificial Insemination)* [1996] FamCA 124.
[15] *MRR v JM*, 2017 ONSC 2655 (CanLii)
[16] *R v S* [2018] ZAKZDHC 23.
[17] [13]-[14].

The court took the view that the starting point was to focus on the child's best interests instead, in accordance with the statute. The court concluded that the first applicant was a parent[18]:

> *"(T)he first applicant provided the sperm for the conception of the child, on the basis that he would be the child's parent, that he would be registered on the child's birth certificate (which indeed he was) and that he would care for the child as his parent. He has done the latter and insofar that he is able under the interim orders as varied by the consent arrangement after mediation."*

It seems it was not argued that the second applicant was a parent:

> *"Given his relationship with the first applicant and his new relationship with the child, it is equally clear that the second applicant is a person interested in the welfare of the child for the purpose of this application, although it was not argued to the contrary."*

The only conclusion that can be drawn is that the court concluded that the chilod had two parents- the genetic father and the surrogate. Although the surrogate had no genetic relationship with the child, nevertheless the Court referred to as the mother.

It appears that an intention based approach, as seen in California, by which the second applicant was a parent too, was not argued.

In the two well known cases of the Supreme Court of California in *Johnson v Calvert* (1993) and of the California Court of Appeal in *Re Buzzanca* (1998), the intended parents through surrogacy were the natural parents of the child, based on their intention. The point, as made clear in *Johnson*, was that the implantation of the genetic material of Mark and Crispina Calvert into their surrogate Anna Johnson was not to enable Anna to be a mother, but for Mark and Crispina to become the parents.

Re Buzzanca took that approach one step further. An embryo belonging to John and Luanne Buzzanca was implanted into their surrogate. The embryo had none of John nor Luanne's DNA in it. John and Luanne split up. John argued that he was not a parent of the child. The Court found, based on intention, that he was a parent.

If that approach had been taken in *Tickner*, then the second applicant would have been a parent.

The Court concluded:

> *"21 The evidence does not suggest any reason why the applicants would not be appropriate, loving and caring parents of the child. The evidence discloses some difficulties with the mother's mental health, including instances of suicide attempts and drug overdoses but she retains the care of her other five children.*

[18] At [17].

22 There is difficulty in applying most of the considerations raised by s 60CC of the Act due to the very young age of the child.

23 Having regard to the consent of the respondent, in particular, and the approval of the Independent Children's Lawyer, there is nothing before the Court that suggests that it is not in the best interests of the child to make the orders that the child live with the applicants and that they have sole parental responsibility for him despite the disquiet I have already expressed.

24 Of more concern, is the absence of any continuing time the child is to spend with his mother. However, the child is very young and will most certainly retain no memory of his mother and the change in parenting will not be to his detriment.

25 The applicants accept that some continuing contact with the respondent in the future may be necessary. It is easy to envisage as the child grows older, he will want to know about the mother who bore him. However, given the physical distance between the parties, there is no practical means for providing for regular contact and there is no indication that such contact that may be made would be in the best interests of the child. In the absence of regular frequent contact, she would most likely remain a stranger to him.

26 Accordingly, with some reticence, I was satisfied that the orders proposed by the parties and the Independent Children's Lawyer were in the best interests of the child and made the orders as sought."

The Court adjourned the proceedings with the intention of subsequently making a parentage order for the child, which would result in both the applicants becoming the parents of the child, and therefore the surrogate no longer being a parent. If the court had concluded that the applicants were, by virtue of intention, the parents, and that the surrogate was not, there would have been no need to obtain a parentage order.

What that intention is, as Chief Judge Thackray made plain, may be hard to discern or there may be conflicts in intention.

For example, some years ago I had a single man who was keenly wanted by two couples to be a sperm donor. How he came to their attention was that he and his then female partner decided that they want to become parents, so they got tested. It turns out that the testing revealed he had very high quality sperm. The couple didn't remain together, but in the meantime he or she had spoken to others and as a result word had travelled widely that he had such wonderful high quality sperm.

As a result, he got approached by two couples:

- a heterosexual couple who wanted to enter into a formal sperm donor agreement with counselling whereby he would be a recognised known donor; and

- a lesbian couple who were insistent that they'd be able to proceed but only if he had sex with one of the women.

As you could imagine, my view of the latter was that he was at real risk of being named the father for the purposes of child support. He therefore only proceeded with the heterosexual couple.

Risk three- no cap on donation. Unlike Australian IVF clinics[19], donors through websites are not regulated and therefore have no cap on donations. A considerable risk is that children will be conceived who may go onto accidentally have relationships with their unknown genetic siblings. One such man who runs one of these websites, Adam Hooper, has already been the father or donor resulting in the conception of more than 20 children and last year was travelling to New Zealand to further donate[20]. His trip of New Zealand was just after he was going in his words on a *"baby making tour"* of Queensland[21], during his 10 day stay he intended *"to help multiple women get pregnant by providing 'instant specimens' to women who are ovulating during his visit."*

Mr Hooper boasted that his Facebook group, was responsible for around 900 pregnancies and the group had 1,500 members and matches willing donors with families. *Matches* is a loose term because the Facebook group merely provides a venue for intended parents and prospective donors to meet each other and then choose whether they want to proceed together. Matching in this context is not the process that might be seen when agencies match would be parents with donors.

Australia's most prolific sperm donor at least as of 2020, was Alan Phan[22], 40, who started donating through IVF clinics and then hit the cap. Nevertheless he liked donating so much that in 2020 he had fathered 23 children in a year. On one busy day he donated to three women and had two fall pregnant on the same day. He said:

> *"It can be a fulltime job. In turns of looking after yourself. Abstaining and exercising every day and taking vitamins. I take about 20 tablets a day. Different herbs I read on the internet to help fertility. It can get pretty expensive. The herbs aren't cheap. It depends on how dedicated you want to be to it."*

Mr Phan became involved as a donor after he and his wife went to a fertility clinic and he saw a poster for sperm donors. At first when he sought to be a sperm donor his wife was opposed to the idea, however, when he discovered a work colleague had to import donor sperm from Vietnam at a cost of $1,400 a vial and had run out of money, Alan agreed with his work colleague to help him convince his wife to let him become a sperm donor. She capitulated and the colleague then became pregnant.

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[19] There is a cap on the number of women that donors can donate to through IVF clinics. The cap varies from State to State from 5 women to a reasonable number, commonly seen as 10.

[20] https://www.newstalkzb.co.nz/on-air/heather-du-plessis-allan-drive/audio/adam-hooper-australian-sperm-donor-on-his-nationwide-new-zealand-donation-tour/

[21] https://www.kidspot.com.au/news/serial-sperm-donor-adam-hooper-going-on-babymaking-tour-of-queensland/news-story/b7465a4c01a2b3451e73f7072defedff .

[22] https://www.kidspot.com.au/birth/conception/ivf/australias-most-prolific-sperm-donor-has-fathered-23-children-in-a-year/news-story/4d163b3b0e64c8aeda1a96d25daf35b2 .

Following the news breaking that Mr Phan had broken the cap, a number of embryos of his sperm or straws of his sperm at various clinics had to be discarded.

The oldest sperm donor as of 2020 was the aforementioned John Lindsay Mayger[23] who was then aged 72. He started donating in 1978 when his wife had two miscarriages that traumatised him. By 2020, he had fathered 21 children *"that he knows about"* was banned from clinics due to his age but was now helping lesbians start families.

When he was banned, he said, *"I thought, 'who else might want sperm – lesbians might want sperm'"*, so he began to advertise in gay and lesbian magazines.

In his own words:

> *"Some people fish, some golf … I masturbate."*

As to why he donated, Mr Mayger said:

> *"Some reasons are spiritual, some are carnal. I'm a blood donor so donating is in my psyche. Also, I am a Christian. And I could emphathise with people who couldn't have children after losing two children. It is a big ego trip to spread your seed and I get a lot of physical pleasure when I interact with them when they climb all over me and call me dad."*

The prize for the most prolific Australian sperm donor is a man who used four aliases who has "fathered" over 60 children[24]. In the words of the report:

> *"The discovery was made after attendees at a community barbecue event for new parents noted how similar their children looked. While the identity of the donor has not been revealed, it is understood he is of mixed ancestry. Many of the parents who had used sperm from the donor were LGBTQ."*

However, the prize for sperm donor, however, still goes to a man known by a pseudonym as *Joe Donor* who came to Australia in 2019 with a mission to get as many women pregnant as possible[25]. He estimated that there had been more than 800 attempted inseminations which resulted in more than 100 children. He said:

> *"I'm basically only having sex to get women pregnant. I'm not chasing rainbows or fantasies."*

I was critical of Joe Donor:

> *"He's really playing the role of God, and he shouldn't be playing the role of God towards desperate women and their kids. I just think he's mad, and dangerous, and these women shouldn't be going anywhere near him."*

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[23] https://www.dailymail.co.uk/news/article-9087093/Meet-Australias-oldest-sperm-donor-fathered-50-kids.html .

[24] https://www.progress.org.uk/australian-sperm-donor-fathered-60-children-under-multiple-aliases .

[25] https://www.9news.com.au/national/60-minutes-joe-donor-sperm-ivf-pregnancy-children/bb45b667-9494-4684-8295-64945eb8f3b8 .

Joe donor got tested once a year for STI's, the rate of which he has unprotected sex could be putting all the women he sees at risk of any number of sexual communicable illnesses. I said:

> *"If he's having sex a number of times a year, and is unprotected, and the process he's not getting checked, what do you reckon? Sooner or later, the odds are he may well have HIV and transmit it to someone else. What a disaster."*

A CALL TO REGULATE THESE WEBSITES

In my view these sites need to be regulated. Despite Australia having nine systems of law, regulating these sites can be done relatively easily:

- federal legislation to regulate the sites. The federal Parliament would have the power to do so under its communications power. A federal regulation can specify the relevant State and Territory departments or prescribe the relevant State and Territory laws that authorise information sharing.
- State legislation to connect with the federal legislation- one State being the lead agency, such as the NSW Ministry of Health, and the others agreeing to share information.
- Until there is State legislation in place, the federal regulations provide that the lead agency be specified as the Reproductive Technology Accreditation Committee of the Fertility Society of Australia[26].

Regulating them will be difficult but not impossible. Those who run these sites should be required:

- the ID of the would be donors is supplied, for example, driver's licence or passport;
- a notice to be provided that it is an offence not to tell the truth (and making it an offence not to tell the truth) that they have to click on and confirm that what they are saying is the truth;
- information on the sites that must be navigated past before they can search for a would be donor or recipient: the uncertainty about whether or not donors are parents, the parties should get through medical screening (with a link to the Fertility Society of Australia and New Zealand), obtain legal advice, enter into written agreements, and have fertility counselling (with a link to the website for Australian and New Zealand Infertility Counsellors Association);
- would be donors disclose:
  - the last time they has STI screening and the results;
  - whether they have any of a list of inheritable conditions;
  - whether they have any criminal convictions, and if so what and when;
  - whether they were or are the subject of any domestic violence order, and if so when, and whether the order is current;
  - the number of women they have donated to. If the cap hits 9, other than their spouse or former spouse, they are not allowed to access the website/app. The number they have donated to would appear on their profile.

[26] Disclosure: I am the consumer advocate on the FSANZ board.

- the website/app owner or manager would be subject to criminal penalties for failure to comply.
- The website/app would be required to provide the name and ID of every would be donor to one co-ordinating State agency, such as the NSW Ministry of Health, which would be authorised to share with:
  - an agency in each other State and Territory and
  - the Reproductive Technology Accreditation Committee of the Fertility Society of Australia and New Zealand (which regulates all Australian IVF clinics). RTAC in turn would be authorized to provide that information to accredited IVF clinics. The purpose of the information sharing, which would require privacy consents, would be to ensure that the cap on donation in each State and Territory is not exceeded (which varies between 5 and a reasonable number of women, commonly believed to be 10).

If those measures are put in place, then the current risks, including no caps, will be reduced considerably. While bedrooms can't be policed, websites/apps can be. Kids deserve better than finding out that they have 60 genetic siblings.

Whilst there is underway currently a Senate Committee investigating universal access to reproductive healthcare, which certainly seems to have a keen focus on various aspects, including abortion accessibility, and the costs of reproductive healthcare, I haven't seen yet any intention to tackle these websites.

WHAT IF THE DONOR CHANGES THEIR MIND

Throughout all of Australia, except until recently in Victoria, the requirements of the various clinics is that if the donor changed their mind, it didn't matter once the sperm had been allocated to a recipient or embryos had been created. The control of the sperm after the point of allocation or control of the embryo were the recipients, not the donor.

Victoria was different to the rest. It gave the ability of the donor to be able to withdraw their consent in time, until immediately before artificial insemination or implantation of the embryo.

Sadly, a donor did that. It is a very difficult conversation to have with clients who have created embryos and have had them in storage for years, with one of the couple becoming pregnant and giving birth to a child from the use of that sperm, and the other planning the use of the same sperm to give birth to a genetic sibling – but learning they can't use any of it because the embryos have to be destroyed.

Thankfully, Victoria has amended its laws (although not retrospectively) so that in the future, there can't be a repeat of that pain.

QUEENSLAND DONOR INQUIRY

Last year there was an inquiry undertaken by Queensland Parliamentary Committee as to the rights of donor-conceived adults.

The committee recommended that there be a central register of all donor gametes when children are conceived and born, run by the State Government. There are currently central registers run by the Governments of Victoria, New South Wales and South Australia. Western Australia has one but it has been described as not being fit for purpose and I expect it will be shortly revisited and reformed.

In my evidence to the inquiry, I took the view that it is much better for the children to be able to contact a central register run by the State than having to track down clinic by clinic the records of where they might have been conceived. An even better idea would be a one-touch system so that if they contact the Queensland central registry, for example, then that would automatically trigger off searches with the other State central registries. Let's see whether that happens.

The inquiry recommended that there be transparency back to the beginning for all cases where children have been conceived through the use by clinics of donor gametes. The oldest clinic in Queensland noted that originally it brought together the talents of various doctors who were practicing in this area and that what was considered to be good practice many years ago today is beyond the pale. The records of those doctors in some cases are inaccurate or non-existent. Those doctors have long since retired. Whilst we are yet to see whether the Queensland Parliament will pass laws along the lines of those in Victoria allowing for full retrospective transparency, then if transparency were to occur, there's no guarantee that, by use of the records, the child will find out who the donor is.

The Queensland Government has not yet introduced a Bill, but has said that it supports the recommendations of the inquiry[27].

In the meantime, in the absence of such a central register, I have been contacted by a number of men where the child has found out that the man was their sperm donor. This has been done by the continued growth in the size of databases such as Ancestry.com and 23andme.com.

The reality is that anonymity is dead. The growth of these websites depends on those who sign up for tests to sign away their DNA. As the DNA database accretes, over time the ability to hide your DNA from such a database will be well-nigh impossible.

GOOD NEWS FROM THE NORTHERN TERRITORY

Finally, in December the *Surrogacy Act 2022* (NT) commenced. It marks the closing of the gap with surrogacy laws around Australia. Finally, each jurisdiction in Australia has laws that permit and regulate altruistic surrogacy and criminalise commercial surrogacy.

[27] https://documents.parliament.qld.gov.au/tp/2023/5723T231-FF1F.pdf .

I was very fortunate to be a part of the Northern Territory Government's surrogacy joint working group.

I was very concerned that there be laws regulating surrogacy in the Northern Territory. For Territorians, the absence of laws meant there could not be treatment in their local IVF clinic. There was also no ability to transfer parentage. They were then faced with a stark choice:

- go interstate, or
- go overseas.

Most intended parents in the Northern Territory who proceeded went overseas.

The risk for surrogates was even worse. Because there could be no transfer of parentage in the Northern Territory, the practice of surrogates was to travel interstate.

One surrogate some years ago drove from Darwin, whilst pregnant, to Melbourne where she subsequently gave birth. Most of that journey over thousands of kilometres was through empty desert. Thankfully, she and the baby did not die alone.

The passage of these laws means that Territorian surrogates can give birth close to home and not have to travel across a vast continent to give birth somewhere else for someone else. They can do so close to home with much lower risk.

That is very much a good news story on which to end.

Thank you.

Stephen Page
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3 March 2023