

Family & Relationship Law

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GLBTI* RELATIONSHIPS AND THE LAW: The Assisted Reproductive Treatment Act 2008 and the legal right of lesbians to access IVF

“In 2001, the Federal Court of Australia found that the requirement that a woman be married or in a heterosexual de-facto relationship to access assisted reproductive treatment (ART) in a Victorian Clinic was invalid because it was inconsistent with the Commonwealth Sex Discrimination Act 1986.” - *The Hon Mr Jennings (Victorian Minister for Environment & Climate Change)*

Prior to the introduction of the *Assisted Reproductive Treatment Act (the ART Act)* in 2008, the law governing Victorian women's access to IVF was limited insofar as there were eligibility requirements which a woman had to meet prior to being able to access IVF.

Under the previous legislation, a woman who did not have a male partner had to be deemed clinically infertile to be eligible for treatment. On the other hand, a woman with a male partner who could not conceive a child – regardless of whether or not she was clinically infertile – was entitled to access IVF to conceive. This resulted in women who were denied access to treatment in Victoria travelling interstate to

access IVF treatment facilities, often incurring unnecessary expense and inconvenience.

In addition, non-biological mothers (ie women whose partner is their child's biological mother) in Victoria did not previously have any legal rights over their child (or children), regardless of whether they were actively involved and jointly responsible for raising the child. Accordingly, children raised in these families lacked many of the rights and protections afforded to the children of heterosexual couples.

The implementation of the ART Act makes it illegal to discriminate against a person on the basis of their sexual orientation, marital status, race or religion. Of particular relevance to lesbian couples is that the ART Act:

* Gays, Lesbians, Bisexual, Transgender, Intersex

- provides legal recognition of a non-biological mother as a “legal parent”;
- relaxes eligibility restrictions, so that a woman without a male partner is now eligible for IVF treatment; and
- legislates that it is not an offence to self-inseminate.

Legal recognition of the non-biological mother

Prior to the introduction of the ART Act, the law recognised both married and heterosexual de facto couples as the legal parents of a child conceived through assisted reproductive technology, even if the child was conceived through the use of donor sperm or eggs. The legislation did not, however, recognise a woman as the legal parent of a child born to her female partner. This meant that children of same-sex couples were not afforded the same legal protection available to other children because:

- a non-biological mother could not be named on the child’s birth certificate;
- if a non-biological mother died without a will, any child born to her female partner was not automatically entitled to a share of her estate, even if she was responsible for the child’s care; and
- the non-biological mother had no legal rights to consent to medical treatment and other associated decisions relating to the child’s upbringing, such as education and religion.

Under the ART Act, there is no longer a distinction between the legal rights of parents in heterosexual relationships and parents in same-sex relationships. For women in a same-sex relationship who undergo IVF treatment to conceive, this now means that:

- the woman who gives birth is presumed to be the mother of any child born as a result of the pregnancy;
- the female partner is considered to be the legal parent, provided she and the child’s biological mother were living together as a couple on a genuine domestic basis when the IVF procedure was performed; and
- the female partner must have consented to the IVF procedure.

The ART Act also applies retrospectively in Victoria to children who were born to a lesbian couple before the ART Act commenced.

Status of donor

Previously, the status of a donor whose sperm was used to help a woman without a male partner conceive a child was unclear. Although the legislation stated that the donor did not have any rights and was not financially responsible for the child, it was silent as to whether the donor was still legally considered the child’s father.

The ART Act clarifies the status of a donor, stating that a man who donates semen to a woman without a male partner is

presumed for all purposes not to be the father of any children born as a result. This is regardless of whether or not the man is known to the woman and/or her female partner.

Non-eligibility for IVF

A new provision has been added to the treatment eligibility requirements where any woman who seeks to undergo ART, along with her partner (if any), must first undergo a police check and a child protection check.

The results of these checks may affect eligibility for treatment, as ART clinics are prohibited from providing fertility treatment where:

- a criminal record check reveals any convictions for offenses of either a sexual or violent nature; and
- a child protection order check reveals that either the woman or her partner have ever had a child removed from their care.

Birth certificate

When the ART Act commenced, amendments were made to the *Births, Deaths and Marriages Registration Act* to reflect the changes to the status of parents under the ART Act. Provision was made for same-sex couples to be recorded on the birth certificate of their donor-conceived child. The birth certificate now refers to the woman who gave birth to the child as the “mother” and to her partner as a “parent”. This applies whether or not the child was born prior to the legislation being amended. Birth certificates issued to children of a same-sex relationship will not differ to those certificates issued to children of a heterosexual relationship.

Our experience suggests that it is still prudent for same-sex parents to enter into “Minutes of Consent” with the Family Court of Australia. This provides a legal declaration that the non-biological parent is a “parent” pursuant to the *Family Law Act 1975* and has equal shared parental responsibility for any child born to the couple. It also ensures that same-sex couples have the best possible legal safeguards in place for their children.

If you would like more information about the *Assisted Reproductive Treatment Act 2008* and what this means for members of the GLBTI community, please contact a member of our Family & Relationship Law group on +61 3 9269 9000.

“It is now time for the law to be modernised to reflect the current social realities, in much the same way as the law was reformed in the 1970s to recognise the parentage of ‘illegitimate’ children. Allowing equal access to ART services regardless of relationship status and sexual orientation will contribute to making Victoria a fairer place to live. Legal recognition of social parenting arrangements will strengthen families and provide equal protections for all Victorian children.”

- *The Hon Mr Jennings (Victorian Minister for Environment & Climate Change)*

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