THE LAW SOCIETY
OF NEW SOUTH WALES

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Ms Michelle Gould
Manager, Production
NSW Registry of Births Deaths and Marriages
GPO Box 30
SYDNEY NSW 2001

By email: michelle_gould@agd.nsw.gov.au

Dear Ms Gould,

Review of Birth Certificates

The Elder Law & Succession Committee (the "Committee") of the Law Society of NSW represents the Law Society of NSW and its members in the areas of elder and succession law as they relate to the legal needs of people in NSW. The Committee is comprised of experienced and specialist practitioners drawn from the ranks of the Society's members who act for the various stakeholders in the areas of elder and succession law.

The Committee thanks you for the invitation to provide comments in relation to the Registry's review of birth certificates.

The Committee's position

The Committee's view is that the Registrar of Births Deaths and Marriages (BDM) should keep a register that encompasses all of the parents that a child can have, however defined. These details should include donor details. The Committee's view is also that the details kept on this register do not need to appear on the official birth certificate, but a birth certificate should be issued noting the person's current parents. The Committee's position is informed by the considerations set out below.

A. Background

The Committee understands that on 17 August 2011 the District Court of New South Wales made orders in the matter of *AA v Registrar of Births Deaths and Marriages and BB*[1] which required that the biological father of the child be removed from registration in the Registry as the child's father and that the former same-sex partner of the child's birth mother be registered in his place.

The Committee notes that the use of the term "parent" has expanded significantly as social structures and the concept of "family" has evolved.

[1] [201 1] NSWDC 100 (17 August 2011)

The Committee notes also that Walmsley J in *AA v Registrar of Births Deaths and Marriages and BB* stated, "No doubt a provision for registration of a third parent for a situation such as this one might be a neat answer to the problem this case presents".

B. Child's right to know parents

The starting point of the Committee's analysis is a child's right to know his or her parents. Article 7 of the United Nations *Convention on the Rights of a Child* states that a child shall have, as far as possible, "the right to know and be cared for by his or her parents".

The National Health and Medical Research Council *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* at paragraph 6.1 states "persons conceived using ART [assisted reproductive technology] procedures are entitled to know their genetic parents".

C. Who is a parent

It is possible for a child to have eleven "parents", for example:

1.	A sperm donor
2.	An ovum donor
3.	A Surrogate mother
4. & 5.	The people with whom the child lives and has a parenting order
6. & 7.	The people who subsequently adopt the child.
8. & 9.	Father and mother to a child born in a marriage relationship
10.	Father from a non-marriage relationship who either signs the registration forms or is subsequently proved by DNA testing and the like to be the father
11.	A single mother

These instances are discussed below.

Medical procedures in this area are evolving very quickly. The UK Human Fertilisation and Embryology Authority has launched a public consultation on whether the fertility techniques, currently only allowed for research, can be offered to women.

The result would allow genetic material from a mother to be removed with healthy mitochondria from another mother being used. Genetic material from two mothers would be used, resulting in a child having genetic material from three people; that is, two mothers and a father. This would result in parent number twelve.

These are extreme examples but still do not contemplate all situations where a person could be a parent.

The Committee notes that persons will be presumed to be parents of a child where any of the following circumstances apply:

1. Section 9 of the *Status of Children Act 1996* (NSW) ("*Status of Children Act*") sets out a presumption of parentage arising from marriage where:

    (a) a child is born during marriage (this includes defacto relationships);
    (b) a child is born within 44 weeks of the husband's death;
    (c) a child is born within 44 weeks after a marriage is annulled;
    (d) an estranged couple resumes cohabitation then separates within 3 months and a child is born within 44 weeks after the end of cohabitation and after the dissolution of marriage.

2. The presumption of paternity arising from cohabitation of a couple between 44 weeks and 20 weeks prior to birth under section 10 of the *Status of Children Act*.

3. The registration of the person's name as the child's parent in the Births Deaths and Marriages register under section 11 of the *Status of Children Act*.

4. A Court makes a finding before or after the death of the person under section 12 of the *Status of Children Act*.

5. The man formally acknowledges that he is the child's father under section 13 of the *Status of Children Act*.

6. The presumption arising from a birth resulting from a fertilisation procedure pursuant to section 14 of the *Status of Children Act*:

   '(1) When a married woman has undergone a fertilisation procedure as a result of which she becomes pregnant:

   (a) her husband is presumed to be the father of any child born as a result of the pregnancy even if he did not provide any or all of the sperm used in the procedure, but only if he consented to the procedure, and
   (b) the woman is presumed to be the mother of any child born as a result of the pregnancy even if she did not provide the ovum used in the procedure.

   (1A) When a woman who is the de facto partner of another woman has undergone a fertilisation procedure as a result of which she becomes pregnant:

   (a) *the other woman is presumed to be a parent of any child born as a result of the pregnancy, but only if the other woman consented to the procedure, and*
   (b) *the woman who has become pregnant is presumed to be the mother of any child born as a result of the pregnancy even if she did not provide the ovum used in the procedure.*

   Note. "De facto partner" is defined in section 21C of the Interpretation Act 1987.

   (2) If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using an ovum obtained from another woman, that other woman is presumed not to be the mother of any child born as a result of the pregnancy. This subsection does not affect the presumption arising under subsection (1A) (a).

7. A child born as a result of assisted reproduction technology treatment under the *Assisted Reproduction Technology Act 2007* (NSW) ("*Assisted Reproduction Technology Act*").

8. A child born as a result of artificial conception procedure under section 60H of the *Family Law Act 1975* (Cth) ("*Family Law Act*").

9. A child born as a result of sexual relations between parties to a relationship under section 57 of the *Succession Act 2006* (NSW) ("*Succession Act*").

10. As a result of adoption under section 95 of the *Adoption Act 2000* (NSW) ("*Adoption Act*").

11. A child born after death provided the child was "in utero" prior to death under section 39 of the *Succession Act*.

12. Step parents where step parents have responsibility for the long term welfare of the child under section 3 *Children and Young Persons (Care and Protection) Act 1998* (NSW).

13. The subject of a parentage order under section 12 of the *Surrogacy Act 2010* (NSW) ("*Surrogacy Act*").

The Committee notes that biological parents are not legal parents:

1. By reason of sperm donation to a woman (married or unmarried) who becomes pregnant from a man who is not her husband and the presumption is the donor is not the father (s 14(2) *Status of Children Act* and s. 60 H(1)(d) *Family Law Act*). This child will be offspring under the *Assisted Reproduction Technology Act*.

2. If the donated ovum resulting in a pregnancy, the donor is presumed not to be the mother of the child (s 14(3) *Status of Children Act* and s 60H(1)(d) *Family Law Act*). This child will be offspring under the *Assisted Reproduction Technology Act*.

3. After the making of an adoption order (s 95 *Adoption Act*).

4. After the making of a parentage order pursuant to section 12 of the *Surrogacy Act 2010.*

D. Importance for a child in knowing parents

The National Health and Medical Research Council acknowledged the importance of a child knowing their parents in its report *Ethical guidelines on the use of assisted reproductive practice and research.* The Council points out at paragraph 5.7 that "Good record keeping is an essential component of clinical practice and vital for ART because of the long-term consequences of procedures involving ART on the health and psychosocial wellbeing of the persons who are born and on the participants in ART procedures themselves (and their spouses and partners, if any)."

The Victorian Parliament Law Reform Committee in its *Inquiry into access by donor-conceived people to information about donors* also noted the importance to children in knowing who their parents were.

E. Risks of consanguinity

There is a public interest in allowing easy identification of one's parents. This may be for a range of reasons, such as to eliminate the risk of consanguinity for such things as marriage or having a sexual relationship. It would also allow for a person to trace their ancestry for reasons of genetic health.

Section 27(1) of the *Assisted Reproductive Technology Act* states that: "An ART provider must not provide ART treatment using a donated gamete if the treatment is

likely to result in offspring of the donor being born, whether or not as a result of ART treatment, to more than 5 women...". This limits a specific ART provider to five women (but not to the treatments per woman), but does not prevent a donor going to different ART providers. This limitation is extended in Victoria as their Act states that treatment cannot be provided to more than 10 women.

It is possible for a donor to provide gametes to more than one ART provider on more than one occasion. The Committee's view is that the possibility of having multiple children should not be underestimated and the risks of consanguinity are magnified by the potential number of children.

F. Evidentiary requirements

Evidence is also required of parentage for claims under the *Succession Act*. Children born under ART procedures are considered offspring, and not children for the purposes of the *Succession Act,* but children born from relationships and one night stands are considered children for the purposes of the *Succession Act*. These children have a right to know their parents, and are entitled to a proportion of their parent's estate should the parent die intestate.

G. Benefit to the child

The Committee notes that limiting information about parentage available to a child can have unintended consequences for the child.

In California, legislation has passed the Senate[2] and awaits an Assembly vote. The Bill seeks to reaffirm a family court judge's ability to recognise parent-child relationships based on the evidence and what is in the best interests of the child and intends to allow children to be legally granted more than two parents.

State Senator Mark Leno, the Senator who sponsored the Bill said he recognised a "problem" in the legal system in 2011 when an appellate court placed a girl in foster care when her legally married parents -- two lesbians -- could not care for her.[3]

The child was taken into state custody when one of her mothers was jailed and the non-biological mother was hospitalised.

Senator Leno said "The court did not have the authority to appoint the girl's biological father, with whom she had a relationship, as a legal parent. That third parent could have "benefitted the well-being of the child."[4]

H. More than two parents on a birth certificate

The Committee notes also that the law in comparative jurisdictions is evolving.

In addition to the Californian Bill noted above, the Ontario Court of Appeal (Toronto) in *A.A. v. B.B.*, 2007 ONCA 2, recognised a child could have more than two parents, which resulted in a child's birth certificate having three parents listed.

In England, *A v B and C* [2012] EWCA Civ 285 was heard in relation to a lesbian couple and the sperm donor father as to contact and long term responsibility for a child. Thorpe LJ, Black LJ and Sir John Chadwick allowed an appeal and referred the

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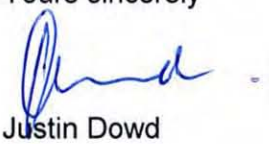
[2] SB 1476 is available online at http://info.sen.ca.gov/cgi-bin/postquery?bill_number=sb_1476&sess=CUR&house=B&site=sen (accessed 5 July 2012).
[3] Susan Donaldson James, "My Three Daddies: California eyes Multiple Parenting Law," ABC News, 3 July 2012, online at http://abcnews.go.com/Health/GMAHealth/california-considers-bill-multiple-legal-parents/story?id=16705628 (accessed 5 July 2012).
[4] Ibid.

case back to the Family Division for consideration. Some commentators believe this matter will ultimately result in three parents being recognised.

Thorpe LJ stated "It is generally accepted that a child gains by having two parents. It does not follow from that that the addition of a third is necessarily disadvantageous," In response to the question of the father having long term responsibility for the child Thorpe LJ said "...I would certainly not categorise him as a secondary parent."

Thank you once again for the opportunity to provide comments.

Yours sincerely



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