



Same-sex couples and parentage

As published on our official website
Written by HHG Legal Group lawyer, Biljana Radulovic

Same-sex couples and parentage

The question of parentage has become unprecedentedly topical in recent times, with current marriage equality laws drawing attention to the prevalence of same-sex couples in our community who already have children or are choosing to become parents. The emergence of artificial and assisted conception procedures has changed our perspective on how parentage exists. It is estimated that, globally, there are five million people conceived by IVF. The law has grappled to keep up with these developments, giving rise to some fascinating legal issues to consider for the future.

Another form of establishing parentage, individuals can also seek to deny their parentage; this can be a complex process for individuals in heterosexual and same-sex relationships alike. Whether an individual is considered a 'parent' in the eyes of the law is more important than you may think. If you are found to be a parent and thus have parental responsibility over a child, a court order will often make declarations aimed at protecting the interests of the child. This order can be cumbersome both in financial and time commitments.

When considering having a child with your partner, there are several questions you will want answered. At what stage of the process must you be with the mother to be considered a parent? What if you are not aware that your partner is attempting to become pregnant or if you have not agreed to parent a child together?

In the landmark US case of *CC v DD* the Supreme Court held that, just like heterosexual couples, same-sex spouses must be treated as the parents of children born during their marriage. This case concerned a woman, identified only as CC, who sought an order to sever her rights to her child after her wife, known as DD, was artificially inseminated whilst CC was on military deployment. The couple, who were married in 2013, had discussed the possibility of having children in the future. However, CC claims she never gave consent. Regardless, DD gave birth to the child in 2015, after the couple had begun divorce proceedings. The court rejected CC's attempts to argue that she was not the legal parent and did not accept her argument that she shouldn't have to pay child support because she was not biologically related to the child. However, this is an American state case which differs from the Australian approach.

Australian legislation concerning parentage and assisted conception has been extended to apply to married or de facto couples, and female same-sex couples. Currently in Australia, legal parental status applies to the birth mother and her partner (regardless of genetic connection) as long as they both consented to her being artificially inseminated (s 60H(1)). Legal responsibility attaches as both the woman and her partner are considered the parents of the child. Consent to the procedure is presumed but rebuttable (s60H(5)), which is important because it means that if your former partner has a child whilst you were together, it is your responsibility to convince the court you did not consent to having a child through assisted conception procedures.

Same-sex couples and parentage

To be regarded as a parent as defined in the relevant legislation, the individuals must be considered to be in a de facto relationship at the time of conception, as was held in the case *Keaton v Aldridge*. Although the female same-sex couple had been in a relationship for about 4 years before the child was conceived, they had not moved in together until a month before the child's birth.

The timing of conception is key, as the court may find that a de facto relationship existed, and order both individuals to be treated as parents nonetheless. As demonstrated in the case of *Clarence & Crisp*, you can be found to be in a de facto relationship even after moving out of your partner's house. In this case, the content and frequency of text messages convinced the judge that the two women were still in a de-facto relationship. It may be important to be careful when ending a relationship to make clear your expectations of the other party. The extent and regularity of contact after separation can be definitive in determining whether a relationship still exists.

The relevant case law makes it clear that with marriage equality, comes not only equal opportunity but equal responsibility. Much like how other married couples can walk away from each other, same-sex spouses can leave their partners but their obligations to their children remain unchanged.