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WE ARE A FAMILY: LEGAL ISSUES FOR LESBIAN AND GAY PARENTED FAMILIES IN NEW ZEALAND

Janette Kelly and Nicola Surtees¹

Abstract

This article summarises research commissioned by the New Zealand Families Commission to gain a better understanding and awareness of the legal position of gay parented families and donor parents compared to heteronormative families. The research and discussion raise issues about the limits and parameters of legal parenthood rights, responsibilities and liabilities and draws some analogies with English law in this respect.

Keywords: family relationships, lesbian and gay parents/parented families, non-biogenetically connected children, legal parenthood, donor parents

Introduction

The issues discussed in this article relate to a qualitative research project that the authors were involved in with two colleagues in 2008. The research commissioned by the Families Commission, an autonomous Crown entity, sought to create new knowledge about families in which lesbians and gay men parent dependent children in contemporary New Zealand society. The key research question this project addressed: *In what ways are lesbians and gay men creating families* was examined alongside other research questions including: *What successes, challenges and issues do these families experience?* The second question elicited both positive and negative responses from parents and partners about education, health, employment, the law and social services – including church and community. The publication, *We're a family – How lesbians and gay men are creating and maintaining family in New Zealand* (Gunn & Surtees, 2009) reported on three related themes: how the families had formed, how they were being maintained, and associated significant successes/challenges. In the context of this study, the term 'creating families' related to the ways in

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which adults established themselves as parents (or in parenting roles) in relation to each other and to dependent children, whereas 'maintaining family' referred to the ongoing process of family preservation over the long term.

Lesbian and gay parents' legal experiences, the subject of this article, have been written up in the *Journal of GLBT Family Issues* (Surtees, 2011) while experiences of the educational system in New Zealand, appear in a co-authored chapter by all four of us (Terreni, Gunn, Kelly & Surtees, 2010) in a text entitled *Delving into diversity: An international exploration of issues of diversity in education* (Green & Cherrington, 2010).

1 Social and Legislative Context

Lesbian and gay parents and their children are becoming increasingly visible in western societies. The growth in the numbers of these parents can be attributed to factors such as civil rights campaigns, agitation for parenting rights and advances in, and the increasing availability of, reproductive technologies. Surtees (2011) argues that '[d]onor insemination and newer reproductive technologies such as ovum retrieval, in vitro fertilization, and traditional or gestational surrogacy highlight the uncoupling of conception and heterosexual sex' (p.246). These techno-biogenetic routes offer parenting opportunities to lesbians and gay men. However, it remains the case that in New Zealand and elsewhere, parenting biogenetically connected children continues to be privileged over the parenting of non-biogenetically connected children.

In reality, despite this privileging (and its implications concerning the gravitational pull of settled normative practices concerning the constitution of 'family'), a wide range of alternatives are possible and there are expanding numbers of hybrid family forms. Indeed, Surtees (2011) highlights that in this arena we can envisage family relationships 'we don't yet have names for' (Silva & Smart, 1999, as cited in Surtees, 2011, p.247) and third parties acting as 'new procreative actors' (Edwards, Franklin, Hirsch, Price, and Strathern, 1999, as cited in Surtees, 2011, p.247).

Both these points are relevant for the Families Commission research project and its findings. In the literature, differentiations are often made between genetic and social parents; those previously thought of as being 'mother', 'father' and 'other people'. These distinctions were evident in the research study, which nonetheless also highlighted the complexity of family formations and parenting arrangements reflecting an expanding range of more complex family configurations. Relatedly, the introduction of 'third parties' is both important and challenging to the family innovations formed by lesbians and gay men as they seek to

establish workable boundaries and reliable agreements between all those involved in parenting children.

Key laws recognising the rights of lesbians and gay men form part of the wider legislative context in New Zealand. In 1986, the Homosexual Law Reform Act decriminalised homosexual relations between adults. This development was later followed by the Human Rights Act 1993 which banned discrimination on the grounds of sexual orientation. In 2004, same-gender couples were allowed to form civil unions (the Civil Union Act 2004) and in the same year the Care of Children Act allowed same-gender couples to obtain parenting and guardianship orders. The proposed legal reform of adoption and other areas, including 'marriage equality' currently being proposed in New Zealand includes same-gender couples. Nevertheless, despite progress in terms of legal recognition, issues related to lesbians, gay men and same-gender couples continue to be controversial among the general population, underlining the continuing privileging of settled (hetero-normative) family formations.

In the jurisdiction of England and Wales there have been legal developments broadly comparable to those in New Zealand. The Civil Partnerships Act 2004 came into force in December 2005, while the Human Fertilisation and Embryology Act 2008 came into force in three stages: in April 2008 the revised definition of parenthood (part 2 of the Act) came into force; in October 2009, the 'need for a father' was removed. In April 2010, the Human Fertilisation and Embryology Act 2008 Commencement Order No 3 brought into force the remaining provisions of the Act – including section 54, which enabled parental orders to be granted not only to married couples but also to civil partners and/or two persons living as partners in an enduring family relationship (provided certain conditions are met). On 22 May 2012 (two days before Kelly's presentation at the University of Plymouth) a draft version of the updated 2004 NHS guideline on the assessment and treatment of couples with fertility problems, was issued for public consultation by the English National Institute for Health and Clinical Experience (NICE). This document included people who are in same-gender relationships as potential candidates for in vitro fertilisation (IVF).

As lesbians and gay men establish families, issues of legal parenthood are likely to be of interest and/or concern in terms of 'boundaries and barriers'. In New Zealand, legal parenthood is governed by the Status of Children Act 1969. This Act sets out rules for ascertaining the legal status of children in relation to their parents. The rights, responsibilities, liabilities concerning, and the legal recognition of, children conceived through specified reproductive procedures involving donated gametes (sperm or eggs), however, are determined under the Status of Children Amendment Act 2004, Part 2. Gunn and Surtees (2009) clarified the implications of this legislation in order to provide a context for the findings

from the study of same-gender headed families. A woman who conceives with donated gametes and delivers a child is the child's parent under the law regardless of her genetic relationship to the child. On the proviso that her partner consented to the procedure, her partner is the child's other legal parent. Surtees (2011) argues that

lesbian couples creating family with the assistance of unknown or known donors are increasingly availing themselves of the option to jointly take up legal parenthood of any resulting child via the deeming rules (p.247).

Conversely, the donor's parenthood is extinguished under the legislation and they are prevented from becoming a legal parent to the child irrespective of the parties' wishes. The child will lose what would otherwise stem from a genetic parent, as the donor will have no rights, responsibilities or liabilities in respect of the child (Surtees, 2011). Hence, this legislation places boundaries between a lesbian couple and the necessary third party – the donor. This legal outcome, whereby the couple are deemed to be the legal parents and the donor is deemed not to be, predominantly suits situations where couples in a single household intend to share parenting, as was the case for a number of lesbian couples in the research study. However, as Surtees (2011) notes, 'a growing number of lesbian couples are choosing known donors with the express intent that they are donor fathers; that is, donors who will actively engage in fathering any resulting children alongside the couple' (p.247). From the research findings, Surtees identifies the fact that the legally established boundaries can be problematic in so far as they preclude the donor from being legally identified as the third parent, even with the legal parents' (that is, the couple's) agreement. Donor's rights are also poorly protected in this scenario, as the research findings illustrate. Clearly, the complex realities of changing family forms suggest the limitations of the current legal approach. New, hybrid parenting forms accordingly present a significant opportunity to re-imagine the legal framework.

New Issues in Legal Parenthood

Following the passage of the Status of Children Amendment Act 2004, Part 2, the New Zealand Law Commission posed the question: What legal recourse should/ does this 'hybrid form of parent' have? Following extensive consultation with government officials, agencies, non-governmental ethics bodies, fertility service providers, lesbian sperm recipients, and gay donor fathers who donated with expectation of parenting involvement, the Law Commission released a report (New Zealand Law Commission, 2005). One of a number of recommendations included the suggestion that donors who donate sperm or eggs on the basis that they would jointly parent with the birth-mother or couple should be able to become a legal parent with the same rights, responsibilities and liabilities as other parents. Whilst the

Ministry of Justice (2006) saw the concerns underlying this particular recommendation as valid, they deemed 'further policy and consultation work [to be] necessary ... To date, this issue remains unresolved' (Surtees, 2011, p.259).

Surtees identifies the four legal options that currently exist in relation to the concerns that genetic parents and prospective parents have in this arena, according to the Law Commission: entering into a relationship with the mother; adoption; applying to the Family Court to be appointed as an additional guardian under Care of Children Act 2004; and coming to a formal agreement with the legal parents of the child. Whilst this final option would not currently be legally enforceable on its own terms, Surtees (2011) notes that 'with consent of all relevant parties, the court can make a consent order that reflects some or all of the conditions of the agreement, and this could be enforced' (p.248).

2 Project Background

The Families Commission, established in 2003 as an autonomous Crown Entity, provides a voice for New Zealand families and promotes a better understanding of family issues and needs among government agencies and the wider community. The Commission website states that the Commission '*is New Zealand's centre of excellence for knowledge about families and whānau. We are a dedicated research, evaluation and knowledge organisation*' (www.familiescommission.org.nz). In 2008, a qualitative research study was undertaken for the Families Commission involving four researchers from three universities (including the co-authors of this paper). Data were generated from 20 interviews that took place in four cities. 19 families (33 parents and 36 children) were the subjects of the interviews.

The majority of interviewees were lesbian mothers who were either parenting as single women or in couples. Two of these couples were also parenting with single gay men, one of whom was interviewed separately to his children's mothers. One interview was carried out with a gay male couple who, unlike all the other interviewees, were not actively parenting at the time (Surtees, 2011). Snowball sampling of participants proved useful for accessing a traditionally difficult-to-reach population. Potential participants, once identified, recommended others to take part in the project. Open-ended, semi-structured interviews were used for the purposes of gathering data, and participants were assigned pseudonyms and guaranteed anonymity (Gunn & Surtees, 2009).

Complex formations

We noted that diversity in family formations exists even among same-gender parented families. Likewise, complex relationships and processes were revealed in the research

interviews. We identified the fact that the families had formed in one of four ways: donor families with both known/ unknown donors; blended and donor families – a combination of children from opposite gender relationships and known/ unknown donors; blended families – children from opposite gender relationships; *whaangai* families (an indigenous concept where a child is given to, or cared for and raised by someone other than her/his birth parents). In *whaangai* families, the child and caregivers are often related by birth, although in one instance in the study, they were not related. Caregivers are not recognised as legal parents without an adoption order. They may, however seek guardianship through the Family Court (Whitireia Community Law, 2008).

3 Findings and Discussion

Throughout the interviews, participants noted the existence and effects of heteronormativity, the concept that heterosexuality is an institutionalised norm and a superior and privileged standard. These families were sometimes perceived as being abnormal in a world that privileges nuclear families with just two opposite gender parents. Participants reported allegations, both spoken and implied, that they were unsuitable parents and that their children's best interests were compromised by their sexuality, including their primary relationships. Kirk reported someone saying to him, 'I'm not really sure gay people should be allowed to have kids' (Gunn & Surtees, 2009, p.29). Whilst Cindy and Candice had the experience of a teacher attributing their son's learning difficulties at secondary school to the fact that his mother was a lesbian (Terreni, Gunn, Kelly & Surtees, 2010, p.156). Additionally, Gunn and Surtees (2009) noted that:

Families were also subject to challenges about the validity of their family make-up ... Several faced challenges when they went to formalise roles and relationships. For the most part, turning to the law did not help constitute families or protect parents' access to their children and children's access to their parents (p.6)

A small number of 'non biological mothers' in lesbian-parented families noted, and appreciated, the extension of legal recognition of their parenthood under the Status of Children Amendment Act 2004, Part 2. Claudia and Andrea, for example, reported that they lived in a single household with their two children whose genetic father was an unknown donor. As their children were both born post 1 July 2005, they were their legal parents in practice and under the law. This situation was in marked contrast to the Anneke, Chloe and Kirk's family who had shared care arrangements across two households. Kirk, the known donor and children's father, was mindful of his lack of rights as the third parent.

Non birth mothers and the law

The benefits of the legal recognition of relationships between non birth mothers and their children were noted by a number of research participants. These women argued that their legal recognition as parents could be seen as 'a form of insurance that alleviated their fears and fostered empowerment by securing their right to parenting participation' (Surtees, 2011, p.250). This statutory recognition enhanced their ability to be involved in, and make decisions about, their child's daily care, development, health, education etc.. Regardless of biological connectedness to the child, these mothers felt that their parental status was equalised and that the work of parenthood was spread between them as women and as legal parents. In her summary of several women's views about legal recognition, Surtees reported that this recognition 'enhanced family security and functioning while reducing uncertainties about the impact of unplanned events, including the ending of couple relationships and any subsequent disagreements about plans for children' (p.251).

Five women (non biological parents to their children) from the 19 families in the study had secured legal parent status or guardianship (depending on the date of the child's birth and consequently on whether or not they were covered under the Status of Children Amendment Act 2004, Part 2). Notably, in one family, Heather's legal relationship with her two children differed as between them she was an additional guardian to their eldest and legal parent to the younger child born at a time of more favourable legislation.

Donor fathers and the law

In marked contrast, known donors or donor fathers gained nothing from the legislative changes introduced from 1 July 2005 when the legal parenthood of donors was extinguished by the 2004 Act. These men were aware that there was no mechanism in law for their appointment as either second or third legal parent. They were mindful that any parenting participation on their part was reliant on the continued desire of their children's mothers to support their participation, and thus that their relationships with their children remain insecure and vulnerable. Whilst Whitney and Louise had developed a contract with Mike, their child's father, Kirk learnt in discussions with a lawyer that without his name on the children's birth certificates there could be no certainties concerning his status as legal parent. Meanwhile, Caleb did not have a relationship with his son despite his best intentions.

Kirk, like several other fathers was reliant on an informal agreement with all involved and depended on the honouring of this agreement. He noted from his discussions with a lawyer that he did not

... think that the legislation is very supportive of my role ... I'd like to see something change in the legislation ... the law is more in terms of two women together and a donor who is not involved. It didn't seem to encompass two women together with a man actively involved, it didn't seem to stretch to that area (Gunn & Surtees, 2009, p.30).

Despite Caleb's informal agreement about multi-parenting arrangements, made with the boy's mothers at the time he agreed to donate sperm, he had no regular contact with his son. Caleb and his partner Damien, keen to progress a parenting relationship turned to the Family Court when they were prevented from active parenting by the child's mothers. They later withdrew from proceedings as they did not want the breakdown in relationship between the two couples to adversely affect the child. Caleb noted that they were not 'willing to go through that and to have a parenting experience marked by that sort of tension' (Surtees, 2011, p.258).

4 Conclusion and recommendation

Surtees (2011) argues that new 'delivery systems' of children into families complicates some parents' rights. She cites Hare & Skinner (2008) who 'point out that an adult oriented focus in law acts to dismiss children's reality' (p. 258). The realities of children and their parents' concern their lives and their relationships with their genetic and social parents; for example Caleb's son has three parents. His father wants to parent him and is hopeful that one day his son might also choose to have a relationship with him and his extended family who eagerly awaited the birth of the first child of this generation. The law does not currently reflect this kind of aspiration, or the realities of the more hybrid family forms it reflects. Surtees (2011) concludes that

despite the progressive nature of New Zealand family law, the rules of law that determine parental status and parent-child relationships have not kept abreast of the diversity in family structure deriving from social change and reproductive technologies (p.258).

This research clearly showed that the legislation passed in 2004 was helpful for lesbian couples sharing parenting with children in a single household. It contributed to the security of lesbian non birth mothers and to the stability of their family units. However, an area that we identified as needing further work is where there are three or more lesbian or gay parents across one or more households. Donor fathers need recognition and protection under the law, because legal invalidation of any parent-child relationship is not in a child's best interest (Surtees, 2011).

In the research report Gunn and Surtees (2009) concluded that

it is prudent to revisit the legal structures that currently prevent the recognition of multiple parents in planned multi-parenting families, with respect to legal parenthood, birth registration and additional guardianship (p.42).

Surtees (2011) recommends that

more than two parents should be able to be identified in law [and that this recommendation should be] inclusive of *any* family using third parties, subject to their wishes in this regard (p.259).

In making this argument, Surtees recognises that it is not only lesbian- or gay- parented families who utilise third parties with the assistance of reproductive technologies. Many heterosexual-headed families are multi-parented where 'hybrid parents' have donated gametes or acted as surrogate mothers. Within the past 30 years, a number of writers besides Surtees (2011) have advocated that there should be no upper limit on the number of parents a child might have (Bartlett, 1984; Polikoff, 1990; Ryan-Flood, 2009, as cited in Surtees, 2011).

However, politicians and lawmakers in New Zealand were unconvinced by the New Zealand Law Commission's report *New Issues in Legal Parenthood* (New Zealand Law Commission, 2005). They deemed that insufficient policy and consultation work had been done prior to conclusions or solutions being reached on this important issue, and were unwilling to take on board the recommendation contained in the report that with the agreement of all parties a third parent (bio-genetically connected to the child) should be legalised as such, with the same liabilities, responsibilities and rights as other parents (Ministry of Justice, 2006). Currently, this situation remains both unsatisfactory and unsettled. Indeed, it may even be the case that the political climate is now less receptive, for the time being at least, to the need to respond to hybridity in family forms. The original report (Gunn & Surtees, 2009) was scrutinised for legal inaccuracies by Crown Law before publication by the Families Commission, an autonomous Crown entity, and the launch of the report was seen as a possible opportunity to lobby for legislative reform. However, publication of the report was delayed by the Families Commission on advice from state sector bureaucrats. The 2008 General Election heralded a change of government and the incoming National (Tory) government was seen as much less supportive to the prospect of legislation to support the expanding number of hybrid family forms.

Concluding comments

Recent moves in England to extend publicly funded in-vitro fertilisation to same- gender couples has the potential to dramatically increase the number of children conceived through known (and unknown) donor insemination, and consequently to make more visible the presence of gay and lesbian headed families. It is hoped, therefore, that the issues explored in this paper, whilst originating from a different legal context and jurisdiction, will stimulate debate about parallels and differences between the legal situations for these families in the 'mother country' and in its former 'dominion'.

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Note: It is advisable for individuals to seek their own legal advice with respect to issues raised in report as individual circumstances may have bearing on how relevant family law is interpreted and applied.

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