

# NICHOLE'S NEWSLETTER

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NICHOLE'S  
Family Lawyers

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NEWSLETTER  
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## Starting 2010 with a bang!

2010 has already been a very busy year for our team at NFL!

We are very pleased to welcome another superb Senior Associate to our team, Kristina Antoniadou. Kristina brings a wealth of experience to the firm, having worked predominantly in family law since 2004. Kristina practises exclusively in family law and is an accredited family law specialist with the Law Institute of Victoria. As with all of our Senior Associates, Kristina will shortly be qualified to practice collaborative law. Kristina's practice includes marital and de facto law, including children's matter, with a specialised focus in same sex matters (both property and children's matters).

Another highlight for 2010 has been our principal, Sally Nicholes, travelling to Vietnam with the former Chief Justice of the Family Court of Australia, the Hon. Alastair Nicholson, to develop work being performed by Children's Rights International (CRI). CRI is a branch of the World Congress on Family Law and Children's Rights, and Sally is honoured to serve on their board. Sally has lectured to family lawyers on the Hague Convention on the Civil Aspects of International Child Abduction as well as Binding Financial Agreements. Eli Martel's relied on Sally's expertise in the her article "To go or stay"

## What's New:

In this edition we have focused on the various legislative developments and issues in Family Law which have a particular effect on the Gay, Lesbian, Bisexual, Transsexual and Intersex (GLBTI) community.

This includes changes in the law regarding parental responsibility in same sex relationships, the law surrounding Assisted Reproductive Treatment (such as IVF and surrogacy), and family violence.

Although these articles have been written with the GLBTI community in mind, the legal developments are broadly relevant and especially pertinent to those practicing in the social services.

As ever, please do not hesitate to contact our office if you require further information on anything raised in our newsletter - we look forward to assisting you!



commenting on the Global Financial Crisis and the impact on settlements published in the Herald Sun, Finance Section , on 5 February 2010!

## Parental Responsibility in Same Sex Relationships

### The rights of both biological and non-biological parents in gay and lesbian relationships

Pursuant to the Family Law Act 1975 ("the Act") both biological parents of a child are deemed to have joint responsibility for the care, welfare and development of the child irrespective of whether they are married, separated or never actually lived together.

Prior to recent changes to the Act, lesbian couples did not have the same parental rights as heterosexual couples, with the non biological mother excluded as the child's other parent. This meant that without a Court Order, the non biological mother had no legal right to make decisions regarding the child, including most importantly, medical decisions. Fortunately, this is no longer the position with law reform now bringing parental rights of gay and lesbian couples into line with those of heterosexual couples.

### Lesbian Partnerships

If a child is conceived through artificial insemination by a lesbian couple, the non biological mother is, subject to some conditions, now legally considered to the other parent of that child. The Act provides however provides that this is subject to the couples establishing that they have been living together in a domestic relationship at the time the child was conceived, and that there was informed consent by both

parties for the procedure to be undertaken. These conditions must be met in order for there to be legal recognition of the non-biological mother.

### Donors

Under the Act, a Donor has no legal responsibility for any child born as a result of artificial insemination. However, in circumstances where there is a known Donor, it would be prudent for both parties to execute a "Donor Agreement" which outlines the intention of the parties prior to conception.

Although a Donor Agreement is not legally binding, it provides evidence of the intention of all parties when the child was conceived and can be used by parties in Court proceedings where one (or both) parties question the role of the Donor in the child's life.

A Donor Agreement will to a certain extent, protect both the donor's rights and protect the rights and role of the non-biological parent. Although a Donor will still be able to bring an application before the Court seeking contact with the child, the Agreement can be used as evidence of the parties' intention at the time the child was conceived. This will limit the Donor's scope of argument, and more specifically any argument that he is in fact the biological father of the child. It also must be noted a Donor will legally be the biological father and liable for the child in circumstances where the child is conceived through sexual intercourse, regardless of the intentions of the parties.

### Gay Couples

A gay couple who conceive a child with a woman via artificial insemination are not legally deemed to be the parents of that child, even though the partner who donated the sperm is the child's biological father. Rather, the biological mother and her partner (if she has one) will be deemed to be the child's parents. This applies



regardless of the intentions of the parties. This scenario is common in situations where a gay couple and a lesbian couple seek to have a child together. In that situation, the gay couple has no legal rights to the child and will only be able to see the child would be by applying to the Family Court as a "significant person" in the child's life. The gay couple will not be deemed to the other parents of the child and their role in the child's life will depend on the circumstances of each individual case.

Although the law in relation to lesbian couples and parenting appears to now be in line with the laws applicable to heterosexual couples, this is unfortunately not the case for gay couples. If it was the intention of a gay couple to have a family, they would have to look at other options such as surrogacy, rather than artificial insemination, as legally they have no rights to see the child or be in the child's life.

At the moment, the only option available for gay couples wanting to start a family, is by adopting a child (which can be a long and expensive process) by obtaining a parenting order with the Family Court or by surrogacy.

## Summary

Gay and lesbian couples who are thinking about starting a family should first obtain legal advice. At Nicholes Family Lawyers, we have extensive experience in children's matters for gay and lesbian couples. We welcome your enquiries.

## The Assisted Reproductive Treatment Act 2010

### What Does This Mean for the GLBTI\* Community?

The introduction of the Assisted Reproductive Treatment Act 2010 ("the ART Act") makes it illegal to discriminate against a person on the basis of their sexual orientation, marital status, race or religion. Of significance with the introduction of the ART Act is that;

- It affords lesbian women and single women the right to access IVF;
- Legally recognises the role of the non biological mother;
- Allows non biological mothers to be registered on their child's birth certificate;
- Legislates against it being an offence to conceive a child through self insemination;
- Correctly recognizes the role of a donor.

Prior to the introduction of the ART Act, the Victorian law governing a lesbian women's right to access IVF was limited and could even be described as non-existent. Under the previous legislation, a woman who did not have a male partner had to be deemed clinically infertile in order to access IVF. This requirement made it impossible in most cases for lesbian women to access IVF. With this strict eligibility women began opting to access IVF treatment facilities interstate, often having to incur unnecessary expense and time.

In addition to this, and possibly most importantly, for those lesbian couples that were fortunate enough to bear a child, the non biological mother was not legally recognized as a parent of their child, and accordingly had no legal rights to their child. Children raised in these families lacked many of the rights and protections afforded to the children of heterosexual couples.

### Birth Certificate

Contemporaneously with the implementation of the ART Act, amendments were made to the *Births, Deaths and Marriages Registration Act* to



reflect the changes to the status of parents under the ART Act. There are no longer requirements for the donor to be recorded on the child's birth certificate as they are not legally considered to be the child's father.

There is now provision for the inclusion of the non-biological mother's details on the child's birth certificate, correctly referring to them as the other "parent" of the child. Accordingly, the birth certificate of any child born through IVF or assisted reproduction (including self insemination) will correctly reflect their parentage.

Most importantly, this legislation operates retrospectively, meaning that any child born to a lesbian couple prior to the implementation of the ART Act, will be able to have their birth certificate amended so that the donor's name is removed as the biological father, and the non-biological parent included as a parent of the child. Birth certificates issued to children of a same sex relationship will not differ to those certificates issued to children of heterosexual relationships. If you would like to amend your child's birth certificate please go to [www.bdm.vic.gov.au](http://www.bdm.vic.gov.au) and download the appropriate form.

If a child was born as a result of self insemination from a known donor, following the birth of the child, the mother and her partner, if any, and the donor must also submit a letter addressed to the Registrar, which gives the following details for the donor:

- full name;
- date of birth;
- place of birth;
- postal address;
- daytime phone number; and
- email address.

## Legal Recognition of Non-biological Parent

Prior to the introduction of the ART Act, the law failed to recognize the role of

the non-biological parent in lesbian relationships, despite recognizing the legal parental role of heterosexual couples who conceived a child through IVF (even when donor sperm or eggs were used). This clearly highlighted the difference in the law relating to parental responsibility between heterosexual couples and same sex couples. It elevated those rights of heterosexual couples in relation to child conceived through IVF above those of same sex couples.

In reality, this meant that the law failed to recognize the non biological mother as a parent of a child conceived through artificial insemination procedures.

Under the ART Act this distinction between the rights of heterosexual couples and those of same sex couples has been abolished. Under the ART Act, if a child is conceived through artificial insemination by a woman in a same sex relationship, this means:

- The non-biological mother is deemed to be the other parent of the child, where there is consent to the partner undergoing the IVF treatment and the parties are living in a genuine domestic relationship at the date of conception.
- The woman who gives birth is presumed to be the mother of any child born as a result of the pregnancy regardless of whether donor eggs were used; and
- The non biological mother will be named on the child's birth certificate as the other parent.

## Eligibility to Undergo IVF Procedure

Although the limitations in relation to lesbians access to IVF have been, to some extent, abolished, there has been the inclusion of a provision in the ART Act which outlines the ineligibility of women to undergo IVF. This provision outlines that a woman and her partner (regardless



of sexual orientation) must first undergo a police check and a child protection check prior to being able to have access IVF.

Under the ART Act, ART clinics are prohibited from providing fertility treatment in the following circumstances:

- If either party have any convictions for offences of either a sexual or violent nature; and
- If either party have ever had a child removed from their care from the department of human services (or like organizations).

## The Donor

The ART Act clarifies for the first time, the status of a donor when a child is conceived through assisted reproductive treatment. The ART Act clearly states that a man who donates semen to a woman who does not have a male partner (regardless of whether she is in a same sex relationship) is for all purposes not the father of any child born as a result. This is regardless of whether or not the donor is known to the parties.

This is a significant step forward as provides clarity to men who would like to become a donor whilst also protecting and recognizing the importance of the non-biological parent's role.

## Conclusion

This has been a significant and monumental step towards equality for the GLBTI community. For the first time in Victoria, the status of the non-biological parent is confirmed and recognized by the law. Most importantly, children raised by same sex parents no longer are discriminated against and their rights and protections are recognized as equal to those children of heterosexual couples.

Nicholes Family Lawyers have experience in this area of the law and we welcome any enquiries you may have.

## The Family Violence Protection Act 2008

### How Does This Impact on the GLBTI Community?

The Family Violence Protection Act 2008 (the Act) became operative in December 2008. For the first time the definition of "family member" has been extended to include same sex couples, and also importantly provides further protection to children of same sex parents, by allowing the non biological parent the right to apply and obtain an intervention order against the biological parent in circumstances of violence. The Act also provides protection to parties in same sex relationships, by including the action of intentionally revealing or threatening to reveal a party's sexual orientation, as a basis on which an Intervention Order can be obtained.

### Extended Definition of Family Member

The Act refers to a "family member" as a "person who is, or has been, the relevant person's spouse or domestic partner"; or "a person who has, or has had, an intimate personal relationship with the relevant person".

Further and most importantly, the definition of family member now includes "a child who normally or regularly resides with the relevant person, or has previously resided with the relevant person on a normal or regular basis". This affords non biological parents the ability to protect their children in circumstances of domestic violence.



## Definition of Domestic Partner

A 'domestic partner' is defined in the Act as a person who is in a registered relationship pursuant to the Relationships Act 2008, or an "adult to whom the person is not married but with whom the person is in a relationship as a couple where one or each of the persons provides personal or financial commitment and support of a domestic nature for the support of the other person". The Act makes it clear that the gender of the parties is irrelevant as is whether or not the parties reside under the one roof. This obviously extends the definition of domestic partner to ensure that a party is able to obtain an intervention order for an act of violence, or threatened violence, inflicted upon them. It provides broader safety and protection to the community.

## What is Family Violence?

Family violence under the Act includes physical or sexual abuse, emotional or psychological abuse, economical abuse, threatening behavior, coercion, or any other behavior which controls or dominates a party and causes them to feel fear for their safety or wellbeing. It includes behavior such as threatening to self harm (or suicide) if the relationship breaks down, refusing to financially assist a party (or freezing funds), threatening to reveal one's sexuality and verbal and emotional abuse. The definition has been extended to acknowledge the changing needs of society and to accurately reflect what constitutes family violence.

## What if I am Being Subjected to Family Violence?

If you find yourself in a situation where you are being subjected to family violence, then you must immediately seek assistance from the police and a legal representative. For the LGBTI community there are Gay and Lesbian

Liaison Officers (GLLO's) with Victoria Police that are sensitive and in touch with issues that the community face. For further information regarding the role of GLLO's within the community, please do to [www.police.vic.gov.au](http://www.police.vic.gov.au) and follow the links.

## What We Can Do For You

Nicholes Family Lawyers we have experience in LGBTI issues and the law, as well as having strong relationships with the GLLO members within Victoria Police. Should you find yourself in the unfortunate position where you require protection or you think you may require protection, please do not hesitate to contact us.

## What's new on the website?

Be sure to visit our website at [www.nicholeslaw.com.au](http://www.nicholeslaw.com.au) for the latest and greatest from Nicholes Family Lawyers, including past editions of this newsletter.

New on the website:

- Check out profiles of new staff members Kristina Antoniadis (Senior Associate), Andrew Sauer (Law Clerk), and Liz Hanrahan (Personal Assistant).
- Check out updated profiles for Sharyn Rowe (Personal Assistant) and Sophie Wolswinkel (Receptionist).



**NICHOLLES**  
Family Lawyers



a.Level 3, 224 Queen Street  
Melbourne Victoria 3000 DX294, Melbourne  
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au