A retrospective study of New Zealand case law involving assisted reproduction technology and the social recognition of ‘new’ family

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The New Zealand Human Assisted Reproductive Technology (HART) Act became law in 2004. In this article, we provide a retrospective analysis of New Zealand case law from September 1990 to March 2004, leading up to the creation of the HART Act. We examine the new understandings of parenting (developed through the routine use of ART in New Zealand) which the case law attempted to test. We examine these concepts against the previous understandings of family enshrined in the pre-existing legislation, which formed the basis for judicial rulings in the various cases to which we refer. In conclusion, we provide a brief summary of the 2004 HART legislation and draw comparisons between the old and new legislative and bureaucratic frameworks that define and support New Zealand family structure. We suggest that a change in cultural backdrop is occurring from the traditional western ideology of the nuclear family towards the traditional Maori concept of family formation, which includes a well-accepted traditional practice of guardianship and a more open and extended family structure. This ‘new’ structure reflects the contemporary lived experience of family kinship in western societies as individualized and open to choice.

Key words: case law/family/New Zealand/reproductive technologies

Introduction

The Human Assisted Reproductive Technology (HART) Act (2004) for New Zealand has been heralded as a ‘catch up’ legislation (Otago Daily Times, 2003; Dominion Post, 2004) in a field often dominated by medical and scientific decision-making in the determination of ‘appropriate’ uses of such technologies. Although previously the Status of Children Amendment Act (1987) had attempted some resolution of the legal vacuum surrounding parentage for New Zealand ART users, it had also attracted some criticism (Else, 1999; Parker, 2004). For example, it neglected non-traditional family structures in its provisions and thus failed to reflect the true nature of some children’s parental care arrangements. This oversight occurred through the legal assumption that gamete donation would occur in a clinic and would always be anonymous. For many ‘same sex’ couples or for families considering altruistic surrogacy, this was not the case. There was, however, no formal recognition of such known donors who might have made an arrangement with the commissioning couple as to future contact with, and responsibility to, the child (Henaghan and Cobcroft, 2003). Under the old legislation, ‘although multiple parents may be involved in the child’s upbringing, legal recognition of the adults’ parental responsibilities [was] limited to one, or a maximum of two, social parents’ (Phillips, 2004). As such, the law served to create a legal fiction. Indeed, by requiring no legal process to transfer parenthood, it effectively concealed a child’s genetic origin in its creation of legal parenthood. (With no legal record, for instance, of the biological father in a lesbian family, the genetic origin of a child was unable to be discovered unless the lesbian parents chose to disclose this.)

Despite such reservations concerning the outcomes of the existing legal framework, this general law was used until 2004 as a last resort in the resolution of disputed rulings on the uses of ART. Excluding these legally disputed uses of ART, local and national ethical committees had previously been the primary gatekeepers to the use of ART technologies in association with various professional regulatory bodies. Increasingly, however, the members of such committees had indicated their discomfort in deliberating on controversial aspects of ART as new applications of ART outstripped the development of ethical opinions on their usage. In the New Zealand experience, ART has continued since it was first introduced to become embedded within society, and ethics committees could only look forward to more consultation and deliberation on such issues rather than less. For this variety of reasons, the 2004 HART Act was formed through a process of consultation with legal, ethical, bureaucratic and scientific experts as well as public submissions. The Act was also informed by the existing case law in which citizens had previously attempted to use general law to resolve disputes in the existing regulation of ART.
This article considers one of the outcomes of the 2004 HART Act—the requirement for a national register of ART donors, donor offspring and donor siblings which is organized and monitored through the Department of Internal Affairs. (This department also organizes and maintains public records for births, deaths and marriages in New Zealand.) Our argument is that the creation of such a register demonstrates how the routinization of ART has affected contemporary New Zealand understandings of family formation. While general law may once have reflected dominant understandings of ‘normal’ families as genetically related and nuclear in their construction, the rigid and inherently conservative legal framework was altered in 2004 to reflect changing social understandings of the structure of the ‘normal’ New Zealand family. These changing ideas of ‘family’ have left a permanent social record in the case law arguments and decisions which were made in the years preceding the formulation of the 2004 HART Act. Retrospectively analysing these case law decisions (which display the law ‘in action’), one may observe the most frequent areas of social contention in the use of ART, where ‘old’ and ‘new’ ideas of ‘family’ collide. While these disputes have involved age-old and predictable parenting disputes around the issues of custody, guardianship, access to children and child support, they have been played out against ‘new’ understandings of the family involving same-sex couples, reproductive material donors and altruistic surrogacy. (Commercial surrogacy has not been allowed in New Zealand.) The case studies illustrate very strategic use by citizens of legislation to normalize ‘new’ family formations or to obtain an individual advantage in parenting disputes by the purposeful use of ‘old’ definitions of family in ‘new’ family circumstances.

In addition, this article brings together insights from two frequently isolated literatures—the anthropological study of kinship and the reflective literature on ART legislation from relevant scientific journals. The study of the interactive relationship between society and ART legislation by social scientists is of value to biological scientists working with human reproductive material, for it displays the cultural contexts in which ethical and professional decision-making around the appropriate uses of such technology occurs. These local cultural contexts constrain and modify the otherwise universalizing tendencies of ‘best’ professional practice.

Previous studies of ART legislation in an international context in the scientific literature have focused on the implications of (or the need for) legislation for specific technical procedures (Darlington and Matson, 1999; Ludwig et al., 2000a; Takeshita and Kubo, 2004) and clinical outcomes (Ludwig et al., 2000b; Feichtinger, 2004; Ragni et al., 2005; Saldeen and Sundström, 2005), as well as broader ethical debates (McGee, 1997; Sills and Palermo, 2002; ESHRE Task Force, 2005) and national legal idiosyncrasies (Bergues and Sele, 1997; Gottlieb et al., 2000; Ng et al., 2003; Schenker, 2003; Plachot and Cohen, 2004; Boggio, 2005; Gleicher, 2005; Janssens et al., 2006). Little work in scientific and technical journals assesses the causal links between a society’s contemporary values or culture and its resulting legislation in this area. Janssens et al.’s (2006) study of the social debate leading up to the regulation of donor identification in the Netherlands and Frith’s (2001) account of the debates over donor anonymity in the UK are exceptions. Pennings (2004) also presents a further exception in a paper which provides an interesting example of the manner in which the various anomalies between European Union (EU) member countries’ ART legislation have produced an unintended social phenomenon (reproductive tourism). Pennings argues that the restraining local cultural interpretations of what ‘normal’ family formation entails has not affected wealthier couples who wish to use ART in ways which are considered unorthodox within their own cultural group. Instead, such couples merely travel within the EU to another member country that does allow for the use of ART in the manner in which the couples prefer and obtain such services from the medical institutions within that nation. (For instance, Belgium allows the donation of ova for fertilization and implantation within another woman, while a country such as Italy does not.) Pennings’ work is thus an excellent case study of the manner in which legislation has led to a new social phenomenon called reproductive tourism. Our analytical focus, however, is in the opposite direction to Pennings’, as we are examining the effects of a social phenomenon (new understandings of parenting) upon the formation of legislation in the New Zealand context. While for the cultural context of the EU which Pennings describes, the appropriate argument is that legislation has produced new social behaviour, in the New Zealand cultural context we argue the other way round—that new social behaviour (i.e. new understandings of ‘family’, particularly the increasing public recognition of same-sex parenting) has produced new ART legislation. Specifically, we see people testing the old general law to the limits of its applicability as the use of ART within New Zealand increases until legal opinions gather on the undesirability of continuing to work with the existing legal definitions of family in view of the ‘creative’ use of the legislation which increasing numbers of ART users are making. The end result is a change in the legal definition of family to reflect contemporary and more diverse lived experiences of family formation.

Dolgin (1997) has made a similar study of US case law involving ART disputes and notes conflict and confusion in judicial decisions around ART. She argues that judgements in all three levels of the US judicial system make extremely varied appeals to the basis of biological ‘facts’ in order to produce surprisingly similar final decisions. These decisions have tended to support the claimant whose position most closely approximated the ‘one female mother, one male father’ (both married to each other) definition of family. At the same time, she argues that the manner in which the biological facts of reproduction can be used to support a wide range of specific legal arguments acts to destabilize the traditional family structure. A further destabilizing trend is the appeal to contract law in some of these decisions, rendering the child of ART rather more like a commodity than a human being. Reproductive technologies, she argues, collide with an ideological definition of ‘the family’ in North America which emerged from the 19th century in which family was understood to be a place of refuge and sanctuary from the working world and its associated commodity exchange system. From the next century onwards, however, its lived expression in the USA and the UK has
altered along the axes of increasing expression of individuality, choice and transience, and new reproductive technologies (NRTs) have accelerated this pace significantly (Dolgin, 1997). Unfortunately, the idealized model of family (however unrepresentative it eventually has become) has remained the nuclear model—a kinship arrangement which exudes extraordinary moral and symbolic force within the west and which is enshrined within western legal systems (Finkler, 2000). The recent advances in human genome sequencing collude with this moral force to reinstate biological connectedness (or ‘blood’ in the western folk idiom) as the preferred basis of kinship and work against more ‘social’ forms of kinship such as choice and individual self-expression (Finkler, 2000) which have become demographically more representative of the social experience of family life.

The destabilizing effects of ART on western folk beliefs regarding the biological basis of ‘blood’ as the stable organizing basis of kinship have been extensively discussed by the anthropologists Strathern (1993) and Franklin (1997). Indeed, the advent of ART has signalled a complete resurgence in kinship studies. This had previously been a rather outdated aspect of anthropology following Schneider’s insights into the Eurocentric thinking behind kinship classificatory systems. These had erroneously supposed that the biological ‘facts’ of reproduction were the basis of all human connectedness (Schneider, 1984). However, when allied with a critique of the unacknowledged power relations embedded within this Eurocentric thinking on kinship [such as Yanagisako and Delaney (1995), for example], an impressive new cycle of feminist kinship scholarship has emerged. This work has highlighted the mutable qualities of human reproductive material as both gift and commodity (Tober, 2001); the links between human and non-human reproductive technologies in the making of genealogies as forms of personal property (Franklin, 2003); women’s increased exposure to ethical decision-making in the use and outcomes of reproductive technology (Rapp, 1999); the complex uses of choice and duration as indicators of authenticity in definitions of gay families (Weston, 1991); and at a global level, the political economy of suffering behind unequal access to ART (Inhorn and Van Balen, 2002). The other significant contribution of anthropologists has been to highlight the surprisingly culturally specific manners in which ART is taken up around the world (Becker, 2000; Kahn, 2000; Kanaaneh, 2002). In summary, contemporary anthropological thinking about family formation notes the absence of any ‘logical’ or ‘natural’ conceptual break between social and biological ties in family formation. Culturally diverse peoples make artful and strategic use of either form of connection, forgetting or actively diminishing one and elevating another depending on the social capital to be acquired from such genealogical manoeuvres (Bourdieu, 1990 [1980]). In addition, recognition of the historically embedded and metaphorically saturated nature of biological knowledge claims as revealed by feminist scholars of science and technology (Schiebinger, 1993) allows for no easy distinction between biological and social ‘facts’ to be entertained. As the anthropologist Rabinow (1992) has noted, the contemporary prominence of biological scientific discoveries has had the disconcerting effect of causing social connections and the experience of society to be viewed through a biological prism; however, this has not altered the simultaneously socially constructed nature of such interactions. Rather, it simply makes their social basis a little more obscure. Legal definitions of parentage are a case in point, and we turn now to an analysis of New Zealand case law involving ART to demonstrate the complex interplay between biologized and social views of family formation in a society which has routinized the use of the NRTs.

New Zealand case law

The 12 cases on which this analysis is based were heard between September 1990 and March 2004 in New Zealand courts—the period when general law was the interpretive legal framework for disputes in parenting for ART users. Their relevance to our argument is that through their analysis, we can observe the significant disjunction between what claimants using ART clearly believe to be the meaning of ‘family’ in their own circumstances and the legal interpretations of ‘family’ of which they make artful use.

The descriptions of the cases were found in the New Zealand Family Law Reports (NZFLR), New Zealand Law Reports (NZLR) and Family Reports of New Zealand (FRNZ). The case reports were located using the databases, Briefcase, New Zealand Case Law Digest and Westlaw, which represent the primary law databases available to the University of Otago. Eleven of the 12 cases involved artificial insemination (AI) and the remaining case involved surrogacy. Eight of the 11 cases of AI occurred within homosexual relationships, and only three occurred within heterosexual relationships presenting quite a different case mix to the published US studies (Dolgin, 1997). The difference reflects the more liberal New Zealand social environment (i.e. legislative recognition of same-sex relationships) as well as the New Zealand ethical decision to disallow commercial surrogacy, which has been a significant source of legal dispute in the USA. Of the 12 cases reviewed, eight involved issues relating to custody, guardianship, adoption of children or access to children born by the use of ART. Claims to this effect were generally presented by (or on behalf of) either the lesbian partner of the woman who bore the children or the donor of the sperm. In one such case, the attempt to adopt was made by the intending parents of a surrogacy arrangement. Maintenance, or child support, was another common focus of the proceedings, and this issue arose in five of the 12 cases.

All of these cases involve contested and non-traditional definitions of parenthood, for although the term ‘parent’ has various colloquial meanings, reflecting a genetic, biological or social relationship with a child, the scope of the term ‘legal parent’ is far more narrow. It refers specifically to ‘the persons who are recognized in law as the mother and father of a particular child’ and ‘the powers, duties, rights and responsibilities that flow from that status’ (Law Commission, 2005:15) for the duration of one’s life. These, for instance, regulate succession on intestacy (Administration Act, 1969, s 77), family protection (Family Protection Act, 1955, s 3), citizenship (Citizenship Act, 1997, s 3) and child support (Child Support Act, 1991, s 7)
(Law Commission, 2005). Clearly then obtaining legal status as a parent has significant repercussions for all members of the social grouping of ‘family’ throughout the life course, and the grouping reflects the previously discussed western ideological model of the nuclear family. For New Zealand users of ART, however, the Status of Children Amendment Act (1987) became increasingly unsatisfactory as it denied legal recognition of parenthood to human reproductive tissue donors and conferred motherhood on the birthing mother in surrogacy arrangements.

The following cases provide multiple examples of how people worked around this legal framework through case law and attempted (in the vacuum of specific ART legislation) to apply their own diverse conceptions of parenthood to their legal situation, in order to confirm these perceived relationships in the eyes of the law. One common application of the concept of parenthood relates to the situation of AI by a sperm donor who was known to the recipient and addresses the nature of the relationship between the donor and the resulting child.

Of the cases studied here, one case (which was brought before the courts four different times in a succession of appeals) stands out. This case’s appearances before the courts include K v M [AI by donor] ([2002] 22 FRNZ 360); P v K ([2003] 2 NZLR 787); P v K and M ([2004] NZFLR 752); and P v K ([2004] 2 NZLR 421). This case involved two women living in a stable lesbian relationship who wished to conceive a child. One of the women approached a friend who was in a stable gay relationship with another man, asking him to donate sperm for this purpose. He agreed to do so. Before the birth of the child, the two couples involved in the procedure drew up a contract outlining their agreed upon conduct in relation to the raising of the child. This contract stipulated that the sperm donor would be named as the child’s biological father on the birth certificate, that the male gay couple would have some contact with the child if requested, that the sperm donor would contribute financially to childcare and that the lesbian couple would be the primary caregivers, with decisions concerning the child’s upbringing to ultimately remain with them, although the sperm donor was to be informed and consulted in such matters. (This contract was important to the analysis of the case, as it served as a demonstration of the intentions of those involved.) Shortly after the birth, the relationship between the two couples deteriorated, with the sperm donor wanting more involvement in the child’s life than the lesbian couple was willing to allow, causing conflict. The status of the sperm donor in relation to the child was a topic of much legal debate. If the sperm donor was to be treated by the existing law as a sperm donor, then according to the Status of Children Amendment Act (1987) (5(2)), he ‘shall not have the rights and liabilities of a father of any child of the pregnancy’ as the woman who gave birth was not married. (This was the interpretive stance of most judges, highlighting the inherent heterosexual bias in what was the existing legal definition of family.) However, as one judge noted in an effort to stretch the existing law to encompass the social reality in which he was being asked to rule, because the donor was known to the woman conceiving the child, the situation perhaps more closely resembled a simple conception outside of wedlock (which would grant the donor the status of a parent). Inglis QC stated, ‘One can understand that there might have been a natural reluctance on both sides to engage in the direct congress designed by nature to lead to the same result, but in the circumstances of the present case the reality is that the difference lies only in the process that was chosen’ ([2002] 22 FRNZ 360). Therefore, the legal status of the sperm donor in relation to the offspring was somewhat ambiguous. In the end, limited custody and guardianship were granted to the gay donor to be shared with the lesbian parents on the grounds that it was in the best interests of the child to know and have contact with his biological father. In such a decision, the biological ‘facts’ of kinship are prioritized in a manner which reflects the contemporary biologization of kinship ties, while at the same time, the decision provides legal recognition to a wider and non-traditional family unit of three homosexual parents. (This simultaneous reinforcement and destabilization of the traditional family unit is also observed by Dolgin (1997) in the US legal decision-making.)

A similar ambiguity arose in the case of M v C ([2004] NZFLR 695) in which the question was whether or not to locate and solicit the input of an anonymous sperm donor in the decision of guardianship of a child born to a lesbian couple using donor insemination. It was ruled that the anonymous sperm donor would be alerted to the guardianship proceedings on the basis that such action would result in the Court having a permanent record of the donor’s identity which ‘could be of some practical advantage to the child’ ([2004] NZFLR 695).

Again, a medicalized and biological form of kinship is being endorsed in such a ruling; however, the circumstances of the ruling, i.e. in a case between lesbian parents, simultaneously provide institutional recognition of the ‘new’ style family based on choice and technology rather than biology.

Another related social problem concerned how to describe the nature of the relationship between the (same sex) partner of the woman who conceived a child via AI and the resulting child. This situation also appeared before the courts in a number of manifestations. Significant uncertainty arose when legal recognition was sought after by (or for) the lesbian partner of a woman who conceived via AI (as in the cases of M v C—[2004] NZFLR 695; K v M [AI by donor]—[2002] 22 FRNZ 360; P v K—[2003] 2 NZLR 787; P v K and M—[2004] NZFLR 752; P v K ([2004] 2 NZLR 421); Re an Application by T—[1998] NZFLR 769; A v R—[1999] NZFLR 249; and T v T—[1998] NZFLR 776). In all but the last two cases cited, legal recognition of the lesbian partner was desired by the partner herself, the most frequent motivation being the wish for legal recognition of a daily reality in which the lesbian relationship functioned as a nuclear family, and child rearing was shared between the two partners.

In Re an Application by T ([1998] NZFLR 769), the lesbian partner of a woman who conceived and bore three children via AI desired to adopt the youngest child to achieve a degree of legal equality between the two partners and also to ensure that if the mother died, all three children would remain with the mother’s partner, rather than be raised by the mother’s family. Such convoluted appeals to both tradition and invention in gay kinship systems have been studied ethnographically in the USA by Weston (1991). Many contemporary same-sex relationships
thus reflect the choice options surrounding kinship, which Dolgin (1997) suggests is typical of most contemporary western family arrangements. This petition, however, was denied as the New Zealand Court considered that this would create an undesirable ‘legal fiction’ that benefited the adults but would not benefit the child in question. As the presiding judge observed, it is the inability of homosexual partners to marry that brings such cases to the court’s attention. ‘It is true that if the couple were a man and a woman, it may be possible for them to marry and thereby give the Court jurisdiction to make an adoption order in favour of them both. It is the inability to marry that is in issue in this case and the security and reassurance that the appellant seeks by the making of an adoption order is in reality an effort to obtain some legal recognition that would make up for the inability to obtain the legal advantages of marriage’ (Re an Application by T—[1998] NZFLR 769).

This same observation would apply, it seems, to many such cases, whether the lesbian partner seeks to adopt the child or simply requests custody or guardianship. The cases A v R [1999] NZFLR 249 and T v T—[1998] NZFLR 776 (the former representing the appeal of the latter) also occurred within a lesbian relationship and concerned the relationship between the mother’s partner and her children conceived via donor insemination. They also arose from the desire to legally define a relationship which would not have come into question had it been heterosexual. The difference lay in the motivation behind the claims. In this case, it was the mother who wished to define the relationship between her children and her ex-partner. She desired that her ex-partner be declared ‘step-parent’ of her children, so that she might be entitled to child support from her upon the dissolution of their relationship. In this case, the designation of ‘step-parent’ was granted, as the Child Support Act 1991 was able to be read in a gender-neutral manner, and thus applied to the homosexual relationship. Here, the judge ruled in favour of non-biologized understandings of parenting, emphasizing the social bonds of kinship instead, whereas it was the claimant who enterprisingly drew on law originally created for traditional heterosexual families to advance her interests in a new style, same-sex family.

The judgements on cases involving heterosexual relationships have been more straightforward than those involving homosexual relationships, as heterosexual relationships were assumed in the old legislation. Cases falling under this category include B v J—[2001] NZFLR 172, W v CIR—[1998] NZFLR 817 and N v N—[1990] NZFLR 188. The first two (B v J and W v CIR) revolved around issues of maintenance (child support) for children who were conceived using donor insemination. The latter (N v N) was a request for access to a child conceived by donor insemination, by the ex-husband of the child’s mother, with the secondary request by the mother that if access were granted by the Court, maintenance would also be required. In the first two cases, the ruling depended largely on whether or not the husbands were aware of and supported their wives’ attempts to conceive using AI. The law clearly provided that ‘where a married woman becomes pregnant as a result of AI and she has undergone the procedure with the consent of her husband’, then ‘the husband shall, for all purposes, be the father of any child of the pregnancy’ [Status of Children Amendment Act 1987, ss 5(1)(a)]. In such situations, after the dissolution of the marriage, the father is required to provide maintenance for the child or children. It was the husbands’ knowledge of, and consent for, the AI procedures that was thus called into question.

In the case of N v N—[1990] NZFLR 188, the ex-husband of a woman who bore a child using AI requested access to the child. (The marriage dissolved less than a year after the child’s birth, and the ex-husband had had no contact with the child for 2 years.) Again, because he had consented to the procedure, the ex-husband was legally considered the father, and access was granted and child support was required. Here, biologized kinship is negated in favour of a rather narrowly conceived social kinship. (The modifier ‘narrow’ is appropriate given the absence of the father from any type of parenting for 2 of the first 3 years of the child’s life.) The model of ‘the family’ which such a rulings favours is still traditional rather than contemporary. This is because social parenting has been recognized only insofar that it allows for the mimicry of even narrower definitions of appropriate biological parenting (the logic being that two parents, even if one is a social parent, are better for the child than one biological parent caregiving alone).

The issue of parenthood as applied to surrogacy arrangements also came before the courts. In this case [Re P (adoption: surrogacy) [1990] NZFLR 385], the ruling appeared fairly straightforward. Mr and Mrs P advertised in a newspaper for a child. M responded to the advertisement and agreed to enter into a surrogacy arrangement whereby she and Mr P conceived a child together with the intention that the child would be raised by Mr and Mrs P. When M was 6 months pregnant, she and Mr and Mrs P signed an agreement stating that Mr P was the father of the child and that the child was to be raised from birth by Mr and Mrs P who paid M a total of $15 000 for maintenance. At the time that this case was tried, no legislation existed that mentioned surrogacy specifically. Therefore, this case was dealt with as an adoption case as regulated by the Adoption Act 1955. As Mr and Mrs P were considered to be acceptable parents of the child, and M consented to the adoption, the adoption was allowed. This particular case was simplified by the fact that Mr P was the biological father of the child, and the birth mother did not contest the decision to give the child to Mr and Mrs P to raise upon the child’s birth. Far more fraught complications have occurred, for instance, in the USA, as Dolgin (1997) attests.

**Discussion**

While general law did provide some redress in New Zealand society for the new family arrangements, which the routine use of ART produces, through the vehicles of step-parenthood and adoption, the general legal consensus has been that these definitions of family formation do not adequately address the complexity of same-sex families. This has been a significant failure as these (along with single mothers) have made up the majority of users of DI technology in New Zealand (*Dominion Post*, 2004). As J. Heath, QC, noted: ‘While it is desirable to interpret statutes in a manner which does not discriminate on
grounds of sexual orientation, existing law does discriminate, in relation to guardianship between gay and lesbian couples. Interpretation of the statute cannot remedy that discrimination’ (P v K [2003] 2 NZLR 787 page 823). The discrimination occurs because of the need for gay male couples to engage a surrogate mother and lesbian couples the use of a sperm donor in order to conceive a child. In such cases, the old Guardianship Act of 1968 recognized only the birthing mother as the legal guardian of the child if she were neither married nor in a de facto relationship at the time of conception.

The general law also proved to be inadequate for defining parenthood within surrogacy arrangements, and the previously cited case of Re P (adoption: surrogacy) ([1990] NZFLR 385) provides an example of the problems that can result from applying existing legislature to situations for which it was not intended. One central issue of debate for this case of adoption by the intending parents following the birth of a child conceived within a surrogacy arrangement was that the intending parents had placed an advertisement in the Personal Column of a Sunday newspaper stating: ‘Nelson [a New Zealand town] couple desperate for a child—can you help.’ Because no legislation existed to regulate surrogacy arrangements, the Court was forced to view this case as a case of simple adoption, for which advertising is strictly prohibited. The Court acknowledged the difficulty of such an application: ‘Counsel commented that it would appear that the issue of surrogacy was not even contemplated when s 26 [of Adoption Act 1955] was enacted and that it is probably an inappropriate or even an outdated section in dealing with issues of surrogacy’ [Re P (adoption: surrogacy) [1990] NZFLR 385 page 388]. Adoption Act 1955 s 26 reads: ‘It shall not be lawful for any person...to publish any advertisement indicating—(b) that any person desires to adopt a child or (c) that any person or body of persons is willing to make arrangements for the adoption of a child’. Other sources have questioned the appropriateness of requiring that intending (and often biological) parents adopt a child created within a surrogacy arrangement, finding this inconsistent with both the nature and intent of surrogacy, and the legal response to other forms of assisted reproduction (Law Commission, 2005). As the law stands, ‘As the child’s birth mother, the surrogate mother is the child’s legal parent.... She has full parental rights and responsibilities for the child’s care, despite her intention to relinquish these at birth and the fact that in a gestational arrangement she will have no genetic relationship with the child’ (Law Commission, 2005:81–82).

The guiding principle of justice behind all of these judicial interpretations of (now) outdated general law when dealing with disputes involving ART has been the effort to make decisions with the child’s best interests being paramount to those of all other parties. Interestingly, however, during this period of reliance on general law, there was a dearth of peer-reviewed material in which children conceived through ART reflect on what their best interests might have been. ‘[A]n unpublished [‘amateur’] school project by a young DI offspring [Hewit, G. 2001. Missing links: Explorations into the identity issues of people conceive via donor insemination; available from DCSG, PO Box 53, Georges Hall, NSW 2198, Australia (unpublished)] is being hailed by donor consumer groups as the largest [46 participants] study of offspring thus far’ (Kirkman, 2003:2232), and ‘[m]uch of the literature on donor offspring tends to be strongly argued opinion rather than research’ (Kirkman, 2003:2232). The work of Turner and Coyle (2000) in an international study of 16 adult DI offspring questioned via email (though still small in scale) is an early and unusual attempt to provide some academic rigour to the discussion of offspring’s needs.] The court was therefore left to presume these interests in the light of traditional interpretations of these interests within ‘old’ style (heterosexual and nuclear) family formations. This, however, had the interesting effect of simultaneously endorsing the viability of social parenting in the ‘new’ style, same-sex families. For instance, in each of the cases requesting guardianship for the lesbian partners of the mothers of children conceived via AI (e.g. P v K and M [2004] NZFLR 752), the reality of the situations was that both partners raised and cared for the children, effectively sharing parenting responsibility. In each of these cases, therefore, the Court saw fit to reflect this reality in the legal standing of the partners in relation to the children. Such congruence between social reality and legal standing is thought to bring a measure of stability to the family and legally protect the relationship between parent and child [as required by the United Nations Convention on the Rights of the Child (UNCROC)], and therefore to benefit the child or children in question. In the case of A v R [1999] NZFLR 249, where the status of step-parent for a lesbian partner was sought for the purposes of child support, the court again attempted to rule according to the social reality of the situation, focusing on the relationship between the partner and the children, the assumption of responsibility for maintenance of the children and the nature of the relationship between the lesbian partners. Deciding that the relationship between the two women was clearly in the nature of marriage and that the mother’s partner had been legal guardian of the children in question and assumed financial responsibility for them throughout the duration of the relationship, the Court decided that such a designation would accurately reflect this family’s situation, and ruled in favour of step-parenthood. Likewise, in the case of adoption following the surrogacy arrangement [Re P (adoption: surrogacy) [1990] NZFLR 385], the Court found the intending parents, who had been actively parenting the child in question for some time and have been the only parents known to the child, to be suitable parents, and the adoption orders were appropriate to legally confirm parenthood and secure these relationships to the benefit of the child. On the contrary, in the previously discussed case where the lesbian partner of a woman who conceived via AI requested to adopt the youngest of her three children, the Court did not allow it. Even though this woman was seen to be a fit and proper person to have custody of the child, the Court determined that the arrangement was not seen to be in the best interests of the child. J Ellis, QC, argued, ‘An adoption order creates an artificial legal relationship. J’s natural mother would not be his legal mother, and his legal mother would not be his natural mother. In my view this is a complicated concept and its artificiality would be likely in my view to be a source of difficulty, if not embarrassment, for J from time to time’ (Re an Application by T [1998] NZFLR 769 page 774). The repeated turn of judgements
towards a recognition in ‘new’ (homosexual, donor and/or surrogacy) style family formations of the potential transferability of authenticity and meanings attached to ‘old’ style families indicates a social change in the meaning of family within New Zealand being reflected through these case law decisions. This is a different trend to the reaffirmation of traditional family structure (albeit on increasingly shaky appeals to the biological ‘facts’ of reproduction) which Dolgin (1997) notes in the US cases involving ART. This discrepancy reflects the far larger percentage of same-sex couples seeking judicial rulings in the New Zealand situation. This has had the effect of focusing judicial and public commentary on ‘new’ family formations and bringing issues such as legislative discrimination against ‘new style families’ into the public arena for further debate. The New Zealand public arena clearly offers more liberal interpretations of ‘suitable’ parenting than the USA.

It was into this increasingly recognized gap between the new social experiences of parenting which ART offers and the extremely narrow and outdated legal definitions of parenting in general law that the New Zealand HART legislation arrived. The legislation (Knowledge Basket, 2006a) has as its purpose the provision of ART within a general framework maintaining human health and dignity, while prohibiting certain unacceptable uses of ART and providing a robust regulatory environment within which ART procedures and research may proceed. It prohibits commercial transactions in human reproduction and requires ethical consultation before new ART procedures may be introduced. Of particular relevance to this article, however, is its requirement for ‘a comprehensive information-keeping regime to ensure that people born from donated embryos or donated cells can find out about their genetic origins’ (Knowledge Basket, 2006a).

In summary, while avoiding the use of the term parent and instead taking up the more neutral terms of donor and donor offspring, the resulting HART Register (which is administered by the Registrar General for Births, Deaths and Marriages) recognizes parenting and families to be made up of several possible combinations other than nuclear families. Specifically, it has required from 22 August 2005 onwards that details of donors, donor offspring, donor offspring guardians and donor offspring siblings must be recorded and maintained. (Donors will continue to retain their right to anonymity over reproductive material donated before 2005 should they wish to do so—however, they may also choose to waive this right and join the register). While written confirmation from the donor offspring is required before donors or other siblings of the donor offspring may contact the donor offspring, there is a compulsion for donors from 2005 onwards to always remain contactable by their offspring. Donors will have their personal details accessible in addition to information on their physical attributes, ethnicity, family background and cultural affiliation. All of this information will be issued (following certain guidelines to establish the authenticity of the applicant) to an enquiring citizen in the form of a certificate after payment of a small fee. [Visit the New Zealand Department of Internal Affairs Webpage (2006) to directly view the information available through the HART Register.] The Registrar General will notify donors when a request for access to such information is made. In those cases where permission to obtain contact is not granted or the parties involved are under age, there is a provision for non-identifying information to be given out. Medical practitioners on behalf of a patient can also search the register provided that two doctors provide satisfactory medical reasons for this access. The Registrar General also has the power to withhold information should it be considered likely to produce harm for the donor offspring. Clearly, there are currently far more New Zealanders who were involved with ART before 2005, and as previously noted, for these donors, donor offspring and donor offspring siblings, the requirement for registration is voluntary, with the ability to make certain restrictions on the information which is being held and the number of people to whom it may be dispersed. While the new legislation prioritizes the need to access genetic information as the rationale for the register, our readings of the case law leading up to the new act suggest that the register also follows the New Zealand trend to provide legal recognition of the wider (than nuclear) families which the routine use of ART has produced. For instance, it recognizes a potential relationship between half brothers and half sisters who share the same reproductive material donor/s but who are raised in completely different social families. Furthermore, the neutral language of ‘donors’ and ‘offspring’ expands kinship to donors without invalidating the social parenting in same-sex couples. This is entirely congruent with the prioritization of the interests of children produced through ART in decision-making through Family Law. New Zealand citizens may now have legally recognized two fathers (biological and social) and/or two mothers (biological and social) in a variety of heterosexual and homosexual relationships [catered for by the gender-neutral wording of the law and the arrival of civil unions—see Knowledge Basket (2006b)], with dual, solo or group parenting arrangements and responsibilities. The really interesting research will begin appearing in the future as the number of people compelled to be identified through the HART Register increases. Which New Zealanders will take up this new expanded family information and under what circumstances? Most particularly, what will be the nature of the kinship connections (if any) between people identified as biological kin through the register?

Conclusions

This new legislation and the resulting HART Register rest against a relevant cultural backdrop of ‘old style’ family formation in New Zealand, which has been bicultural. This reflects both Pakeha (people of non-Maori descent, often with European heritage) and Maori (the indigenous people of New Zealand) traditions. These contrasting traditions (while obviously subject to some individual variation) reflect (for non-Maori) traditions of nuclear family formation within less well-known genealogies and frequently diverse genetic histories, versus (for Maori) wider extended family formation (whanau); extremely well-known genealogies (whakapapa) with well-established genetic connections; and the well-accepted practice of guardianship (whangai) of children, i.e. the informal circulation of children through primary caregivers who are not necessarily the biological parents of the child. While a renewing of government commitment towards the Treaty of Waitangi has
more recently provided a moral force towards the formation of a bicultural society in New Zealand, the letter of the New Zealand law has (as demonstrated earlier in this article) previously remained true to its British antecedents reflecting a nuclear, truncated and highly biologized view of family according to Pakeha folk understandings, ignoring Maoridom’s traditionally more open family formations. For Maori, this has been a particularly pernicious practice in relation to the lack of recognition of the importance of the concept of whangai, and in cases of adoption and ART, the loss of whakapapa which orders an individual’s relationship with the wider social, material and spiritual world and forms the basis of one’s ethnic identity (Rimene et al., 1998). It is with not some little irony, then, that we note that the 2004 HART Act signals a turn towards a wider (possibly more indigenous?) contemporary legal understanding of ‘family’ within New Zealand society.

To return in conclusion to the international context, the routinization of ART and the resulting legal disputes over parenthood and its rights and obligations in new family formations have produced a variety of decisions on how to regulate information about the origins of donated reproductive material and the use of surrogacy. While some countries have favoured legislation promoting secrecy in the use of ART in family formation, and in doing so uses ART to ‘mimic’ the nuclear family, in New Zealand the reverse is true. While not uniformly endorsed by all, New Zealand society has tended towards a far greater degree of social acceptance of non-traditional family forms than certain other western societies (i.e. the USA). This has created a noticeably liberal environment in which same-sex couples, reproductive material donors and surrogates have been allowed full use of the legal system to argue for recognition of their role in new family formations and have felt empowered enough to do so. As Pennings (2004) has already argued in the case of reproductive tourism, there is a fascinating interplay between the social and legal worlds and the routine use of ART. In the New Zealand situation, the continued use of ART within a liberal social environment has resulted in a broadening out of the traditional nuclear concept of family to new, wider, post-ART family formations and their recognition in the national legislature and government bureaucracy. The moral and symbolic reign of the orthodox nuclear family over the contemporary experience of choice and individualism in kinship connections may be reaching its abdication point in contemporary New Zealand society.

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