

# Same-Sex Relationships and Family Law



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Pip Davis, Assistant Principal, Women's Legal Services NSW on 1 October 2015. This webinar can be viewed for free at [www.asklois.org.au/webinars/past-webinars](http://www.asklois.org.au/webinars/past-webinars).

This factsheet looks at:

- Are same sex relationships treated the same as opposite sex relationships in family law?
- Who is a legal 'parent'? How does the law view non-birth parents and sperm donors?
- Can same sex couples adopt?
- Can same sex couples seek orders in the Family Court?
- Can a person in a same sex relationship seek the protection of an ADVO?

## What is defined as a de facto relationship?

- A de facto relationship can exist between two people of the same sex, or of the opposite sex
- A de facto relationship is one between 2 people who are living together as a couple and who are not married to one another or related by family
- A de facto relationship can exist even if one of the partners is legally married to another person at the time
- If there is a dispute about whether two people were in a de facto relationship, the Court will look at:
  - the length of the relationship;
  - the living arrangements;
  - whether there is or was a sexual relationship;
  - the way finances were arranged;
  - whether the parties owned property together and how it was purchased;
  - whether the relationship was registered under state or territory law;
  - whether the parties had or cared for children together; and
  - the way the parties presented their relationship in public.

## Same-sex marriage and unions

- People in same-sex relationships cannot marry in Australia, and if they marry overseas, their marriage will not be recognized in Australia
- The Marriage Act was amended in 2004 to define marriage as *"the union of a man and a woman to the exclusion of all others, voluntarily entered into for life"*
- The Act also states that any foreign marriages of same-sex couples *"must not be recognised as a marriage in Australia"*
- Only the Australian Capital Territory provides same-sex couples with the right to access a civil union
- Same-sex couples have access to domestic partnership registers in New South Wales, the ACT, Tasmania, Victoria and Queensland.

## Same-sex parents

### Who is a legal 'parent'?

A person is automatically deemed a legal parent:

- where a child is conceived through sexual intercourse - the legal parents are the biological mother and father regardless of the parents' intentions at the time of conception; and
- where a child is born through assisted/artificial conception - the birth mother is recognised as the legal parent regardless of her genetic relationship to the child and the birth mother's partner – if she has one - (husband or male / female de facto partner) is recognised as the other legal parent as long as that person consented to the procedure

The Family Law Act limits a child to having two legal parents.



Legal parents have the power to make and responsibility for making decisions about their child's care, welfare and development. This might include things such as:

- medical treatment;
- education;
- religion;
- where their child will live;
- who their child will spend time with; and
- who their child will communicate with.

#### **So what is the legal status of donors?**

- A person who donates their sperm or eggs is not the legal parent regardless of their intended role in the life of the future child
- In NSW, a child has a right to have access to information concerning their biological heritage
- Donor details must now be registered on the NSW Donor Registry which gives the child the right to access the information once they turn 18
- Therefore, a donor is not a legal parent and does not bear any responsibilities at law for the child, including liability to pay child support

#### **What about the child's birth certificate?**

- As of October 2008, the legal parents of a child are entitled to be on a child's birth certificate, regardless of whether or not they are biologically related to the child
- This means that both same-sex parents of a child can be recorded on their child's birth certificate
- A sperm donor cannot be named on a birth certificate as a legal parent (where it is clear they were a donor)
- Where a child was born to lesbian parents prior to October 2008, the mothers can apply to have the birth register amended and a new birth certificate issued with both mothers listed. If the child's donor is listed, the donor's name can be removed by consent or by court order.

#### **What if a donor wants to have more time with the child?**

- While sperm donors are not deemed a legal parent, if they want to spend time with the child, they can make an application to the Court for orders relating to the child on the basis they are "a person concerned with the care, welfare or development of the child"
- Any decision is determined in the best interests of the child

#### **Same sex couples and adoption in NSW**

- Same sex couples have been able to adopt since September 2010 in NSW
- Previously, individuals could adopt but not as a same sex couple

#### **Same sex couples and the Family Court**

If a same-sex couple separate, former de facto couples can apply to the Family Court for:

- orders in relation to their children; and
- orders in relation to a property settlement where:
  - the relationship exceeded 2 years; or
  - there is a child of the relationship (adopted by both or one of the partners, conceived through assisted means by a lesbian couple or born through surrogacy and the parents have gone through a transfer of parentage process through the state Courts); or
  - one party made substantial financial contributions to the relationship and it would be an injustice not to make an Order adjusting the property



### Are same sex relationships treated the same as opposite sex relationships in family law?

- In 2008, 58 federal laws were passed to give equal recognition to same sex relationships
- This, in addition to amendments to a range of NSW laws, means that equal rights and responsibilities have now been (largely) extended to same sex couples and parents in NSW, the exception being marriage

### Domestic violence and same-sex relationships

- Domestic violence can also occur in same sex relationships
- ADVOs apply to people who are or were in a domestic relationship - this includes same sex de facto relationships

### Resources

For more resources on working with same-sex clients, see our past Ask LOIS webinar and factsheet on [Working With LGBTIQ Clients](#)

See also the **Ask LOIS LGBTIQ page** or visit:

- The Gender Centre: [www.gendercentre.org.au](http://www.gendercentre.org.au)
- ACON: [www.acon.org.au](http://www.acon.org.au)
- Another Closet: [www.anothercloset.com.au](http://www.anothercloset.com.au)
- The Safe Relationship Project: [www.iclc.org.au/srp](http://www.iclc.org.au/srp)
- Organisation Intersex Australia: [www.oii.org.au](http://www.oii.org.au)