The family law implications of early contact between sperm donors and their donor offspring

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Over the past decade, increasing domestic and international attention has been given to the rights of children conceived using donated sperm, eggs or embryos (Law Reform Committee, 2012; Legal and Constitutional Affairs References Committee, 2011; Nuffield Council on Bioethics, 2013). In particular, concerns have been raised about the psychological implications for donor-conceived people of being unable to access the identity of their donor(s) (Appleby, Blake, & Freeman, 2012; Blyth, Crawshaw, Frith, & Jones, 2012; Rodino, Burton, & Sanders, 2011). Donor linking—the process whereby donor-conceived people, donors and/or recipient parents seek access to each other’s identifying information—has emerged as a key response to these concerns. While Australia lacks a national framework for donor linking, three states (Victoria, NSW and Western Australia) have introduced legislation that prospectively prohibits donor anonymity. The legislation requires that all donors recruited in those states consent to having their identity revealed to their donor offspring when the children reach the age of majority.

While the primary purpose of donor-linking legislation has been to ensure that donor-conceived individuals can access their donor’s identity, the statutory regimes are increasingly being used by the parents of donor-conceived children to make contact with donors while their children are still minors (VARTA, 2015). Donors are not obliged to accept these invitations for early contact, but if a donor consents, contact can be made. In states without donor-linking legislation, early contact is also on the rise. In the absence of legislative options, parents are making early contact with donors through their fertility clinics, which are sometimes willing to serve as intermediaries between donor and parent. Parents are also using a variety of informal mechanisms to identify donors, including social media searches and online voluntary registers and forums.

The increasing prevalence of parent-initiated early contact with sperm donors, in many cases facilitated by state legislation, has proceeded in
the absence of any discussion of the family law implications of the practice. This omission is concerning. If a donor and parent who make contact while the child is a minor subsequently experience conflict, it is possible that the donor may be able to exercise some rights in relation to the child. If the woman is unpartnered, recent case law suggests that a sperm donor may even be able to assert legal parentage. Yet there is little evidence that parents seeking early contact, or even professionals working in the field, are fully aware of the legal ramifications of their choices. This article draws on the donor linking experiences of 25 unpartnered Australian women who conceived using donated sperm or embryos to explore the possible family law implications of early contact.

**Donor linking in Australia**

Donor linking in Australia consists of a complex web of state legislation, clinic-based services and informal linking mechanisms. Three states—Victoria (1998), Western Australia (2004) and NSW (2010)—facilitate donor linking through formal mechanisms created by statute. South Australia and Tasmania are currently considering the introduction of similar legislation. Though not identical, the Victorian, NSW and WA statutes all established Central Registers managed by state government agencies, which record identifying and non-identifying information about the parties involved in donor conception. Donor-conceived people who were conceived after anonymity was abolished in each state, and who are 18 (Victoria and NSW) or 16 (WA), can request their donor’s identifying information from the Central Register in their state. In Victoria, parents of donor-conceived children can also apply for identifying information through the Central Register and, in 2015, were the most frequent applicants (VARTA, 2015). Victoria and Western Australia also have Voluntary Registers, which allow donor-conceived people whenever they were conceived, as well as donors and parents, to register voluntarily, enabling “matches” where both parties are open to information exchange. While donor-conceived children must wait until they turn 18 to apply to a Voluntary Register, applications by recipient parents can be made prior to the child turning 18. It is therefore possible for a parent in Victoria or WA to make contact with a donor through the state’s Voluntary Register when the child is still a minor. NSW does not have a Voluntary Register. However, donors, as well as donor-conceived people conceived prior to 2010 and who are at least 18 years of age, may voluntarily place their details on the Central Register.

In February 2016, Victoria expanded its donor-linking framework, becoming one of only two jurisdictions in the world to retrospectively open the donor records of anonymous donors. Under Victoria’s new legislation, which will come into force in March 2017, a donor-conceived person who was conceived prior to the abolition of anonymity (1998) will now be able to access their donor’s identifying information, provided it still exists. Similarly, a donor may apply for information about any donor offspring. If an application is made, the other party will be informed and given the option of putting in place a “contact preference”, which enables parties to indicate that they do not want contact or to specify the type of contact with which they are comfortable.

The three Australian states with legislation represent some of the most comprehensive donor-linking regimes in the world. However, in jurisdictions without statutory schemes, or where donor records are incomplete, other mechanisms for donor linking have emerged. A recent analysis of donor linking practices conducted across several jurisdictions, including Australia, identified several common forms of informal linking, many of which were initiated by the parents of donor-conceived children (Crawshaw et al., 2015). One of the most frequently used informal practices identified by Crawshaw and colleagues (2015) was where recipient parents or donor-conceived adults requested donor information from their fertility clinic or gamete bank. While many requests were met with blanket refusals, some clinics agreed to act as intermediaries between the applicant and donor. For example, clinic staff were sometimes willing to forward a letter from a recipient parent or donor-conceived adult to the donor or to contact the donor directly to ask if he or she was interested in contact.

A second common form of informal linking identified by Crawshaw and colleagues (2015) was what they termed “offspring and/or donor-conceived people of being unable to access the identity of their donor(s).”
contained in the donor’s profile, such as their occupation, where they attended university and the activities in which they are involved. In a similar vein, Crawshaw and colleagues (2015) identified online genealogy websites and direct-to-consumer DNA testing services, such as FamilyTreeDNA, as other online linking tools increasingly used by parents and donor offspring to locate donors (see also Dingle, 2015; Sample, 2005).

The study

Over the past 20 years, Australia has been at the forefront of statutory donor-linking initiatives. It is therefore surprising that there remains a dearth of evidence on how linking is practised “on the ground” in Australia. The aim of this study was to begin to fill this gap by producing a qualitative account of the donor-linking practices of a particular subset of Australia’s donor conception community: single mothers by choice (SMCs). While there is no single definition of SMCs, for the purpose of this study they are defined as unpartnered women who choose to conceive a child using assisted reproduction with the intention of being their child’s sole parent from the outset. The focus on SMCs was for three reasons. First, they are the fastest growing user group of Australia’s fertility clinics, making up more than 50% of those using fertility services in some states (VARTA, 2015). Researching the donor-linking habits of SMCs is therefore key to understanding current and future trends. Second, while donor linking is increasingly popular amongst all users of donated gametes, SMCs are more likely than any other user group to seek information about donors, and to do so when their children are comparatively younger than the children of other families who engage in donor linking (Beeson, Jennings, & Kramer, 2011; Hertz, Nelson, & Kramer, 2013; Jadva, Freeman, Kramer, & Golombok, 2010). Finally, because of the lack of clarity around the legal status of sperm donors to single women under the Family Law Act 1975 (Cth), donor linking by SMCs raises some unique concerns for family law (Family Law Council Report, 2013; Kelly, 2015).

Women were eligible to participate in the study if they had conceived a child using donated sperm and were unpartnered at the time of conception. The 25 women who participated were largely recruited via the Single Mothers by Choice and Donor Conception Australia Facebook groups and the Solo Mothers by Choice Australia online forum. Interviews were semi-structured, face-to-face and took between 1 and 2 hours. Each interview was recorded, transcribed, manually coded and analysed.

In total, the 25 women interviewed had 36 donor-conceived children. The children ranged in age from 4 months to 18 years, with an average age of 5 years. Twenty-three of the women had conceived using donated sperm, five had also used donated eggs, and two women conceived using embryos created with donated gametes, one in Australia and one overseas. Twenty-three of the women had conceived in Australia. Four states (Victoria, Queensland, NSW and South Australia) were represented within the sample, providing a cross-section of jurisdictions with and without statutory linking. An additional two women conceived overseas using gametes from foreign donors in jurisdictions where donor anonymity is permitted and statutory linking is unavailable.

Connecting with the donor

Donor linking was extremely popular amongst the women interviewed, mirroring the findings of previous international research on the donor-linking habits of SMCs (Beeson et al., 2011; Jadva et al., 2010). Sixteen of the women had engaged in some form of linking, though they had not all been successful in locating their child’s donor(s). An additional four, two of whom had newborns, had plans to engage in donor linking in the near future. Fourteen of the 25 women knew the identity of one or both of their child’s donors, and 11 were in contact with a donor and regularly interacted with him or her. Five of the women were in contact with their child’s sperm donor, five with their child’s egg donor, and one of the embryo recipients.
had formed relationships with both donors. As the women, themselves, are required to recruit their egg donor, their identities were known prior to conception. Nine of the women who had made contact with donors had spent time with them face to face (four sperm donors and five egg donors). In all of the families where a donor had been identified, the child was under the age of 18.

Consistent with Crawshaw and colleagues' (2015) research identifying the multiple pathways to donor linking, the women had used a broad range of mechanisms to identify their child's donor(s), including formal statutory linking (where available), linking via fertility clinics and informal linking achieved via the Internet.

**Statutory linking**

Three of the 14 women who had identified their child's donor had done so via Victoria's statutory linking regime. Two of the women applied for early contact via the Central Register, while the third made contact using the Voluntary Register. Cynthia,\(^6\) for example, made an application to the Central Register when her son was 1 year. After she underwent counselling to ensure that she understood the process, the register contacted her donor to inform him that a parent had requested his information. The donor agreed to his identity being released. As Cynthia recounted:

I had to go to counselling first and then I got a registered mail and it was so thin. It was two A4 pieces of paper and I thought, oh, it's a “thank you very much and he's not interested”. I opened it up and it was literally an A4 piece of paper with a Word table on it with his information. “Thank you for applying for this information. Here it is.” It was full on. And so I sent him a letter that I'd agonised over writing and then he and his wife wrote back.

Cynthia and her son and the donor and his wife now meet approximately twice a year. In a twist to the story, Cynthia donated her unused embryos to a friend, Maneesha, who went on to have a little girl. Maneesha, who was therefore aware of the identity of both her sperm and egg donor prior to conception. She and her daughter also have regular contact with the donor and his wife, which was initially facilitated by Cynthia. Maneesha and Cynthia also share a close relationship and, their children, though young, have been told of their shared genetic heritage.

**Clinic-based linking**

Two of the women had made contact with their sperm donor via their fertility clinic, though four others had attempted to do so but had been refused by the clinic. The women who made contact had both written a “thank-you letter” to the donor soon after their child was born and requested that the clinic notify the donor of its availability. The women did not necessarily expect the donor to respond but included an email address that did not reveal their identity so he could make contact if he wished. Erica, for example, who conceived at a Queensland clinic and thus had no statutory linking mechanism available to her, decided to send a thank-you letter to her donor just before her son's first birthday. As she explained:

I just sent it to [the clinic] thinking, you know, if they can pass it on, they can. If they can’t, that's okay by me. And behold … I got a letter back from him, which included a photo, which is double wow.

Erica, whose son is now 3, continues to exchange regular emails with the donor but they have not met.

Janet also pursued contact with her donor through her fertility clinic, which is located in NSW. Janet had never considered attempting to contact the donor until she attended a meeting of the Donor Conception Support Group and met a couple who had used the same fertility clinic. The couple told her that clinic staff had been willing to pass on a letter for them. Janet decided to send a letter of her own, including an email address and a suggestion of yearly contact. The response was almost immediate:

The letter I sent, with the email included, was replied to really quickly and we just started talking via email, which we did for a couple of years before we met … I met him for coffee when she was 5 years old, on my own, and then [my daughter] met him later in the year with me.
Janet considered herself extremely lucky to have met the donor as his donation was made at a time when anonymity was still permitted, meaning that her daughter had no legal entitlement to identifying information when she turned 18.

**Informal linking**

Three of the women had identified their child's donor (one egg donor and two sperm donors) via the Internet using information contained within the donor profile, though none of them had made contact. Susie, who had conceived using sperm imported from the United States by a NSW clinic, was part of a group of seven families who had used the same donor and identified each other through the online Donor Sibling Registry. One of the mothers in the group was able to identify the donor using a photograph he provided in which he was wearing an athletics uniform that named his college. This mother told Susie what she had discovered but they decided not to tell the other families or contact the donor. As Susie explained:

The other mum was going to contact him. I thankfully talked her out of it. I think it would scare the hell out of him, plus it’s kind of stalkerish, which is what would freak me out. So we’re keeping mum about it, but enjoying knowing he’s real and we know enough about him. I’m surprised how easy it was to find him. However, I kind of wonder whether he wanted to be found given the pictures he included in his profile. Of course, if you add stuff like that, people can find you.

The second woman who identified her sperm donor through the Internet had also found it exceptionally easy. While Australian donor profiles are not nearly as detailed as those from the United States, Helen was able to locate her donor online within minutes, using information about his occupation and the fact that he donated to a small, regional clinic. She even found a newspaper article about him in which he mentioned being a sperm donor.

While neither Helen nor Susie had contacted their donor, both women continued to “monitor” him online. Their donors had already consented to having their identities revealed when the children turned 18, but the women were not confident about the identity release process. Susie, for example, noted that she was already aware of more than 30 donor siblings and was therefore concerned that her children might “miss out” on getting access to the donor.

**Implications for family law**

While the donor-linking habits amongst the women interviewed for this study may not be representative of all single women who use donated gametes to conceive, it is clear that a significant number of them are engaging in donor linking prior to their child turning 18. They are, of course, supported in doing so via legislation in three states. What is less clear, however, is what the family law implications of this new trend might be, particularly for single women. Could previously anonymous sperm donors have parental rights in relation to their donor offspring?

Early contact between sperm donors and their offspring pose two difficult questions for family law. The first is whether the donor could ever be declared a legal parent. The second is whether the donor, even if he is not a legal parent, could still successfully apply for an order to spend time with the child under the Family Law Act (FLA) on the grounds that he is a “person concerned with the care, welfare or development of the child” (FLA, s 65C(c)) and it is in the child’s best interests.

**Is a sperm donor ever a legal parent?**

There is a lack of clarity in Australian family law around the legal status of men who donate sperm to unpartnered women (Family Law Council of Australia, 2013; Kelly, 2015; Millbank, 2014). Section 60H of the FLA defines legal parentage where assisted conception is used. While section 60H expressly states that a sperm donor to a couple (whether opposite or same-sex) is not a legal parent, there is
There is only one Family Court decision, *Groth v Banks* (2013), which has dealt with the legal status of a (known) sperm donor to a single woman, though it draws on a substantial number of cases that interpret section 60H. In *Groth*, Justice Cronin adopted what is often referred to as the “expansive” approach to section 60H (see Kelly, 2015), which treats the provision as a non-exhaustive definition of parentage. The expansive approach allows a judge to go beyond section 60H and consider the parenting provisions of the FLA as a whole to determine the “ordinary meaning” of the term “parent”. Applying the expansive approach, Justice Cronin concluded that the ordinary meaning of parent is a biological parent: “The whole Commonwealth statutory concept as outlined in Part VII of the Act is one in which biology is the determining factor unless specifically excluded by law” (*Groth v Banks* at [14]). Justice Cronin also concluded (at [15]) that because Part VII contains multiple references to the parents of the child as “either” or “both”, the “logical presumption” was that the legislature envisaged two parents. The sperm donor, as the second biological parent, was thus declared a legal parent.

While *Groth* dealt with the legal status of a known donor, Justice Cronin discussed the implications of his decision for an anonymous donor to a single woman. It was Justice Cronin’s view that his conclusions did not apply to anonymous donors because they do not “intend” to become parents, and that rights and responsibilities only flow to donors with such an intention. Justice Cronin also held that anonymous donors should not be concerned because “the Act does not impose obligations on an unknown person who has donated biological material” (at [12]). Unfortunately, Justice Cronin provides no statutory support for these assertions and neither is easy to sustain. While it may, in most cases, be possible to distinguish between known and anonymous donors on the basis of intention, what a donor intends is not a relevant criterion for determining parentage under the FLA. Rather, section 60H is based on a series of presumptions that are either applicable or not. It is not the absence of an intention to parent that makes a donor a legal stranger to his offspring when the donation is made to a couple. Rather, it is that section 60H(1)(d) creates a presumption that a donor to a couple is not a legal parent and, notably, makes no distinction between known and anonymous donors. In light of these conclusions, it is difficult to accept that Justice Cronin’s decision in *Groth* has no implications for anonymous donors because they do not “intend” to be parents. In fact, in *Re Mark*, a 2003 decision that touched on the legal status of anonymous donors, Justice Brown acknowledged that the expansive approach to section 60H “might lead to the imposition of responsibilities or entitlements on a class or classes of people who previously considered themselves immune” (*Re Mark*, 2003 at [81]).

Justice Cronin’s second assertion—that the FLA does not impose obligations on an unknown donor—is also difficult to sustain in cases where the woman is unpartnered. As the Family Law Council of Australia (2013) noted in its report on legal parentage, the FLA is silent on the legal status of any donor to a single woman, whether known or anonymous. Thus, while there may be strong policy reasons for not imposing rights or responsibilities on anonymous donors in these circumstances, the FLA fails to address the issue. In the absence of statutory guidance, an anonymous sperm donor who becomes known to a single mother may well be able to rely on the expansive approach to section 60H, championed in *Groth* and other related cases, to support an application for parentage (Family Law Council of Australia, 2013; Kelly, 2015; Millbank, 2014). As the second biological parent of the child, a donor will likely satisfy the “ordinary” meaning of the term parent. Justice Cronin, however, fails to see this risk because he presumes that anonymous donors remain anonymous. As this study demonstrates, that is no longer the case.

**Can a donor apply for “parenting time” with the child?**

Even if a donor is not a legal parent, it may still be possible to apply to the Family Court for an
order to spend time with the child (“parenting time”). Under the FLA, it is not necessary to be a legal parent to apply for a parenting order. Rather, any “person concerned with the care, welfare or development of the child” may apply (FLA, s 65C(c)). It has been held that this “threshold question” requires more than being “concerned about” or having a mere “interest” in the child. Rather, the “degree or strength of nexus” of the concern will be assessed on the facts (KAM & MJR, 1998 at [3.1.16]; Aldridge v Keaton, 2009 at [83]). While there has not yet been a case involving a previously anonymous donor applying for parenting time under section 65C(c), known donors who play a role in the lives of their donor offspring have had little trouble meeting the threshold test.3

Once it is established that a donor may apply for parenting time, the success of the application will turn on whether such an order is in the child’s best interests. Unfortunately, there is no case law involving formerly anonymous donors applying for parenting time. However, in cases where known sperm donors have applied (typically against the wishes of the child’s mother(s)) they have met with considerable success. In fact, the authors are not aware of a single case in Australia where a known sperm donor has been unsuccessful in seeking orders for time with his donor offspring, with judges often unable to see beyond the genetic relationship. It is therefore likely that an anonymous donor who has developed a relationship with his donor offspring would also be successful.

Conclusion

None of the women interviewed for the study had experienced any conflict with their child’s donor(s). They had each been able to negotiate an appropriate arrangement for contact that satisfied each of the parties. It is unrealistic, however, to presume that this will always be the case. At some point, a donor and mother will experience conflict and the Family Court will be called upon to resolve the legal issues raised. It is therefore concerning that none of the women, even those who engaged in statutory linking, were aware that making contact with their child’s donor may pose some legal risk to their parental autonomy.

This study suggests that early contact with donors is common amongst single mothers in Australia. Even where legislation does not support early contact, mothers are finding ways to identify their child’s donor(s). It is therefore important that they are made aware of the legal risks that early contact might present. It is also important that, where possible, those risks be minimised. As the Family Law Council recommended in its report on legal parentage, the FLA should be amended to clarify that donors to unpartnered women are not legal parents (Family Law Council of Australia, 2015). This will ensure that women who choose to have a child on their own are able to engage in donor linking without putting their sole parentage at risk. It will also ensure that single women who conceive using donated gametes are treated identically to couples in the same situation.

The issue of a previously anonymous donor applying for parenting time is more complex. The purpose of allowing a non-parent to apply for parenting orders is to ensure that an important adult in a child’s life, with whom the child has developed a meaningful relationship, is able to maintain that relationship. It may be that it is in a child’s best interests to have ongoing contact with his or her donor where a positive relationship has developed, even if it is against the wishes of the child’s mother. It is therefore recommended that donors continue to be able to apply for time with their donor offspring as individuals concerned with the care, welfare and development of the child. However, concern remains about the ability of judges to assess these cases in a sufficiently nuanced matter, particularly in light of the increasing prioritisation by Family Court judges of genetic relationships. In light of these concerns, it is vitally important that women engaging in donor linking are made aware that donors may have rights in relation to their donor offspring.

Endnotes

1 Groth v Banks [2013] FamCA 430
2 Assisted Reproductive Treatment Act 2008 (Vic.) s 57–60; Human Reproductive Technology Act 1991 (WA) ss 49(1a), 49(2d) and 49(2e); Assisted Reproductive Technology Act 2007 (NSW), Part 5.
3 Assisted Reproductive Treatment Amendment Act 2015 (Vic.)
4 Ethics approval for the study was granted by the La Trobe University Human Ethics Committee (No. 14/78).
5 SMCs may also become mothers via adoption. However, due to the study’s focus on conception using donated gametes, adoptive mothers were excluded.
6 Pseudonyms have been assigned to participants referred to and quoted in this paper.
7 See, for example, Re Patrick [2002] Fam CA 193; Wilson and Anor & Roberts & Anor (No. 2) [2010] Fam CA 75A; Reilly & Meadowbank & Anor [2013] FCCA 2040; Gear & Anor & Faraday & Anor [2015] FCCA 5165.
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