

Options for prospective gay male parents



When a gay couple or single man starts thinking about trying to make a family, there are a lot of issues to consider. Many relate to how you might go about creating your family. Is overseas surrogacy an option? What about altruistic surrogacy in Victoria? What relationship might your family have with your egg donor or surrogate? Would you consider co-parenting with a single woman or lesbian couple? How about fostering?

Thinking it through

Many factors will influence your decisions. The main ones fall into two groups: the relevant laws, and your personal values and circumstances. The latter will determine what your options might be, as we discuss. Following that we outline what is involved with different forms of surrogacy, and with fostering and permanent care. We then explore ideas around co-parenting, including how it differs from being a known donor. Finally we touch on what can happen if relationships break down, and provide links to further information.

This kit makes many references to what might happen if things go wrong, whether between couples, between parents and their donors or surrogates, or between co-parents. This is not because conflict is necessarily more likely to happen in rainbow families than in any other. It is because this is what much of family law, in particular, is about: what should happen if things go wrong.

However, it is also important to acknowledge that while same-sex parents have been successfully raising children for decades, our diverse family formations are in many ways still relatively new, and the law is still coming to terms with them. As a result, parents, co-parents and donors can be vulnerable to confusion and differing expectations, which can sometimes contribute to conflict. Every family has issues to talk through from time to time, but only a tiny proportion need to attend mediation or family court. Nevertheless, it is critical to understand and talk through the

implications of the relevant laws, not least because it might influence how you go about creating your family.

All that being said, having children is one of most wonderful, heart-expanding experiences in the world – we wish you the very best with your journey!

Your values and circumstances

Only you can decide how to create your family. Personal values and circumstances play a big role. Who do you think should be involved in raising children? Do you think children should ideally grow up having a relationship with the woman who contributed to their genetic origins? And if your child was conceived through 'gestational surrogacy', what about the woman who carried and gave birth to them?

Some men might want to welcome other people into helping raise their children, and decide to explore co-parenting with a lesbian couple or single woman. The issues are complex, but there are many successful examples of rainbow families with two, three or more co-parents.

Some men decide that rather than being parents themselves, they prefer to have children in their lives by becoming the known and involved donors for a lesbian couple or single woman. We explore the possible role of known donors briefly below, and in more detail in the information sheet 'Information for prospective sperm and egg donors, and surrogates'.

If you are considering being a known donor or donor/s, is it absolutely critical to be sure that this is what you really want. Too many men compromise their deepest desires to be parents/fathers, and become known donors instead. You can be very involved in a child's life as a donor, but it is a very different role from parenting. If what you truly want is to be a parent/father, explore ways that you can make this happen. The options available for gay men to become parents are not easy, but the number of gay dads is increasing, and there are support and discussion groups available. If you compromise on this issue, but do not 'make peace' with your decision, the evidence is that it can too often result

in heartache for everyone concerned: you, the mother/s, and most importantly the child or children.

Some men decide that they don't want to bring other adults into their family – that one or two loving fathers (and any extended family) are all the family their children will need. Some decide this by default, because they do not know anyone suitable, with whom they have a close enough relationship to co-parent. Some men decide to pursue overseas surrogacy. Some investigate fostering. Some explore altruistic surrogacy in Victoria.

To conceive through altruistic surrogacy, you need to know (or find through your personal networks) a woman willing to be your surrogate. You also need an egg donor. Some men may ask sisters or other relatives they are close to. Some men will have little contact with their donor and/or surrogate after their child is born and legal parentage established (see below). Some men might welcome one or both women into their lives long-term, with the levels of contact varying from very occasional to significant time together. Some may start with an agreement to minimal contact, but an openness to seeing (and a process for deciding) where the journey might lead them.

Any of these decisions is absolutely legitimate. The most important thing is that you base your choices on your own values. Try not to let fear – for example of what other people might think – dictate this critical life decision. In particular, try to challenge the idea (even within yourself) that 'all children need a mother and a father'. Three decades of rigorous Australian and international research show that children of same-sex parents are not disadvantaged, and are in some ways – such as in their capacity for empathy – better off!

Gay men have been creating and raising families in many ways for many years, and will continue to do so. Laws and social attitudes have improved a great deal, and will continue to do so as our numbers grow.

Altruistic surrogacy and egg donation in Victoria

The word surrogate means 'one that acts in place of another'. Surrogacy is when a woman agrees to conceive, carry and birth a baby for another person or couple to raise.

The Victorian *Assisted Reproductive Treatment (ART) Act 2008* (in effect since 1 January 2010) effectively legalised the option of altruistic (unpaid) surrogacy in Victoria, opening this up as an option for gay men to become legal parents through Victorian fertility services. It removed the requirement that a woman be medically infertile to access the fertility services needed to be a surrogate, and allowed for recognition of the legal parentage of the 'commissioning' parent/s.

All surrogacy arrangements in Victoria must be altruistic. That is, the surrogate cannot be paid to act as a surrogate. However, she can be reimbursed for costs she incurs as a direct consequence of entering into the surrogacy arrangement. To be a surrogate, a woman must be at least 25 years old, and have previously carried a pregnancy and given birth to a live child. A friend or relative may be able to act as your surrogate, but you are not allowed to advertise for a surrogate, for example through television, radio, the internet or other public means.

In addition, only 'gestational' surrogacy is allowed in Victoria. This means that you will also need to have an egg donor, as you are not allowed to use the surrogate's own eggs to conceive. Some clinics may have egg donors available. However, clinics often find it difficult to recruit egg donors, so you are likely to need to find your own. You are allowed to advertise that you are seeking an egg donor, but must have approval from the Minister of Health, under Section 40 Of the *Human Tissue Act 1982* before doing so. Egg donation must also be altruistic, although the donor can also be reimbursed for actual medical and associated travel costs incurred.

All surrogacy arrangements must be approved by the Patient Review Panel. The Panel must be satisfied that all 'parties' have received counseling (from a fertility clinic, see below) and legal advice, and that they are 'prepared for the consequences if the arrangement does not proceed in accordance with their intentions' – for example if the commissioning parents decide not to accept the child, or the surrogate refuses to relinquish them. The experience in countries where surrogacy has long been an option is that while such disputes might be the subject of midday movies, they are extremely rare in reality.

In addition, you might have compromised fertility yourself, and require a sperm donor. Fertility clinics have clinic-recruited sperm donors available; donors are required to be 'identity release' – that is, the child has the right to identifying information about them at age 18, or earlier with parental permission or if judged mature enough by a counsellor. As their parent, you can also request this information, although the donor must consent for it to be released to you. Alternatively, you might prefer to ask someone you know. The issues for a known sperm donor will be much the same as for an egg donor – see the information sheet 'Options for prospective sperm donors, egg donors and surrogates' for information about the process involved.

Asking a prospective surrogate or egg donor

Just as it can be difficult for men to decide whether to be a sperm donor, it might be hard for a woman you ask to be your surrogate to decide whether she is willing. There are certainly women who want to be surrogates, and who find it a very fulfilling role. Sometimes women will make the offer themselves, and sometimes there

might be a woman in your life willing to do it, whom it might not at first occur to you to ask. In the case of altruistic surrogacy, surrogates are usually a very close friend or relative of the commissioning parent/s.

Remember, you might ask a woman who loves you dearly and supports your desire to become parents, who still might feel that carrying a baby for you is something that she cannot do. Trying to conceive, pregnancy and birth is hard on most women, physically and emotionally, and even if you are willing for her to be very involved with your family, she might find it difficult to imagine not actually parenting a child to whom she has given birth. It might be worth trying to find stories from families (same-sex and otherwise) who were created through surrogacy, including in Australia and elsewhere, when talking to a prospective surrogate. In addition, we have written an information sheet 'Options for prospective sperm donors, egg donors and surrogates' that it might be helpful to give her.

The issues might be similar in some ways for prospective egg donors. Egg donation is not anywhere near as arduous as carrying and birthing a child, but the process of egg donation involves taking hormones and undergoing a medical procedure. Probably more importantly, as with prospective sperm donors, helping someone to create a child by donating is a profound act, and there might be many reasons that she (and/or her partner, if she has one) does not feel that this is a role she wants to take on, many of which are likely to be very separate from your relationship with her, or her feelings for you. It might be challenging, but try not to take a refusal too personally.

Becoming a client of a fertility service

To conceive a child through altruistic surrogacy, you need to use a fertility service. Victorian law requires everyone involved in the arrangement to have sought legal advice, and to go through a number of procedures (the clinic will assist you with these):

- a police check, to ensure neither of you has ever been convicted of a violent offence or charges have been proven against either party in relation to a sexual offence
- a child protection order check, to ensure neither of you has had a child removed from your care, and
- clinic counselling, to ensure you both understand the implications of donor conception and consent to the procedures involved.

An overseas police check is required if either party has resided overseas for a consecutive 12 month period in the past 10 years. There is a presumption against treatment for anyone who does not pass these checks and treatment must not be provided. If barred, you can appeal to the Patient Review Panel, and subsequently to the Victorian Civil and Administrative Tribunal

(VCAT).

The intending biological father will also undergo standard health checks, including for HIV.

The journey with your egg donor and surrogate

The donation process and storage of donor information

The process of conception with an egg donor in Victoria involves a fair amount of contact, even with a donor you did not know previously. The minimum is counselling of all the parties, separately and jointly. The medical procedures are lengthy and invasive; essentially the first half of an IVF procedure, hyperstimulation and 'harvesting' of multiple eggs from her ovaries. Awaiting the results can be nerve-wracking for everyone, and if no eggs from her first donation lead to a successful birth, you may all go through this multiple times.

A key principle of Victorian law is that people conceived via donation in Victoria to have the right to identifying information about their donor at age 18, or earlier if they have parental consent and a counsellor has judged that they are able to handle the information. All Victorian donor information is lodged, stored, managed and released by the Victorian Registry of Births, Deaths and Marriages. If you conceive via egg donation at a Victorian clinic, they will give your child's donor information to the Registry. For more information see the information sheet 'Donor information and registers'.

The surrogacy process

Your contact with the surrogate during the processes of trying to conceive, pregnancy, birth and after will necessarily be much greater than with your egg donor. The surrogate's menstrual cycle is pharmaceutically 'managed' to enable transfer of an embryo (at least for the first egg successfully fertilised from any donation cycle) – at the appropriate time. Then you wait for a pregnancy test two weeks later, and if that is positive until 12 weeks, when the highest risk of miscarriage abates.

The processes of attempting conception, pregnancy and birth are amazing for everyone involved, but potentially exhausting and stressful. Your relationship with your surrogate (and her partner) will determine the extent to which you have contact and give support to each other during these processes.

Everyone will need to talk openly, perhaps many times, about their hopes for the birth and early infancy. What sort of birth does the surrogate want to have? What professional and other supports will she need at this time? Is she willing for you to play a role, and if so what? Would she be willing to breastfeed, at least during the period when her body is producing colostrum? Is this what you would want? When and how will you take home the baby, and what sort of contact might she have with your family in the early days?

Options for ongoing contact

Historically, same-sex couples have tended to be more open with their children about the circumstances of their conception than heterosexual couples; after all, it is obvious that same-sex couples needed some help to create their families! If you had a prior relationship with your donor and/or surrogate – or even if you did not – you may also decide to welcome one or both women into your family's life in a variety of ways. You will probably have some ideas about whether you would like to have ongoing contact with your egg donor or surrogate, after they have helped you create your family. This is something you should discuss in detail and agree on before you decide to go ahead. It is worth reading the information sheet 'Options for prospective sperm donors, egg donors and surrogates' to see which issues might be relevant in your situation.

Altruistic surrogacy in Victoria is a new option for gay men. It remains to be seen what choices men who create their families in this way will make around ongoing contact with their donor and/or surrogate. Many couples who conceive through overseas surrogacy choose to have ongoing relationships with their surrogates, at least. Some have contact with their egg donors, but this may not be an option if egg donation in that country is generally anonymous. The relationships between men and their Victorian egg donors and surrogates are likely to be different; because they live in the same country, because they are altruistic, because men must usually know or find them, and because of the laws around release of donor information.

One possible parallel is the variety of relationships that lesbian couples and single women create with their donors. Some known sperm donors are just happy for the child/ren to know their name, see their photos, and perhaps meet up when the child/ren are old enough to show an interest. Some live in another state or country, and may exchange cards, emails and the occasional visit. Some may visit a few times a year, others more often. Some become a significant part of family life, spending regular time, perhaps holidaying together and becoming regular baby-sitters. Some children call their known sperm donor 'Dad', even though the man (and his partner, if he has one) does not share parenting responsibilities. Some do not. The diversity of people's choices is endless, as are the diversity of options open to you and your donor and surrogate to negotiate.

It is also important to bear in mind how family law works in Australia. If you use altruistic surrogacy in Victoria, you will be your child's legal parent/s once your substitute parentage order has been processed (see 'Establishing your legal parentage'). However, anyone with 'an interest' in a child's welfare (such as a grandparent, step-parent, donor or surrogate) can apply for a court order creating contact or other arrangements with regard to the child. You can make an

agreement with your donor or surrogate about a whole range of issues, and we recommend that you do. See the discussion about making agreements with known donors on the information sheet 'Options for prospective lesbian parents' for issues to consider. However, these agreements are not legally binding, should there be a dispute. You cannot make a legally-enforceable contract or agreement (written or verbal) about a child.

If a dispute arose, a court cannot change your status as your child's legal parents (once the substitute parentage order is made), but it will make its judgement – on things like who has contact with a child, who lives with them, and who makes decisions about their lives – on the facts of the case, and what they see as a child's best interests. Courts can award contact, and even, in some cases, might award some parenting responsibilities, to someone other than the legal parents, if they think this is in a child's best interests.

Establishing your legal parentage

At the time of writing, the only way that both men in a same-sex couple can be recognised as their child's equal legal parents in Victoria is if the child is conceived and born through altruistic surrogacy here. This is done by transferring legal parentage from the surrogate (and her partner, if she has one) to you through a Supreme or County Court order.

When a baby is born in Victoria, the woman who gives birth is deemed to be its mother, and is recorded as such on the birth certificate. Her partner, if she has one, is recorded as the father or parent. As the commissioning parent/s of a child conceived through a surrogacy arrangement and treatment procedure (that is, IVF) in Victoria, you then apply to the Supreme or County Court for a 'substitute parentage order' naming you as the child's legal parent/s. You must live in Victoria when you make the application, and make it no less than 28 days after a child's birth but before six months.

The Court will make the order once it is satisfied:

- that the order is in the child's best interests,
- that the surrogacy was commissioned through a fertility clinic and approved by the Patient Review Panel
- that the child is living with you, the commissioning parent/s when the application is made
- that the surrogate (and her partner if she has one) received no material benefits from the arrangements, and
- that the surrogate and her partner freely consent to the order.

Overseas surrogacy

Even if altruistic surrogacy in Victoria sounds like a great option to you, it might well be very difficult to find both an egg donor and surrogate. Commercial surrogacy – whereby the surrogate is paid a fee beyond the cost of her medical bills – is illegal in Australia. However, you might be able to consider using the services of a commercial surrogacy service in another country. For some men, this is their preferred option.

There are gay couples and single men in our community who have created their families through commercial surrogacy services in countries including Canada, the United States and India. The costs can vary, but at the time of writing they ranged from approximately \$40,000 to \$200,000. The fees paid to women who act as surrogates do not make up a large proportion of these costs; the remainder goes to the clinics, lawyers, medical fees and egg donors (if used).

It may be possible, in some countries and jurisdictions, to access 'traditional' surrogacy, where the surrogate uses her own eggs. It is more common to be able to access only 'gestational' surrogacy, using donor eggs. This is generally more expensive, as it requires complex medical procedures and usually a fee to the egg donor.

The medical procedures involved in conception through commercial surrogacy are pretty much as described above, although there might be considerable differences in the way that IVF procedures, for example, are managed in different countries. If 'traditional' surrogacy is offered, conception is (usually) achieved through the simpler process of artificial insemination, unless there are fertility problems, for example with the biological father's sperm.

There are, however, many other procedures involved in overseas surrogacy. They include the contract process, choosing a donor, the surrogate matching process, consultation and sperm donation with the clinic, and the potentially complex procedures around obtaining a birth certificate, citizenship and passport for your child to bring them home. You can find much more detail about the extensive procedures involved with commercial surrogacy on the Gay Dads Australia website – see the contacts section at the end of this sheet. It is also well worth talking to men who have been through the process before you begin your own journey.

Contact with your donor and surrogate

Some men who conceive through commercial surrogacy are able, and choose, to have ongoing contact with their surrogate after the child is born. Women who choose to do commercial surrogacy generally have very altruistic motivations, and are often interested in some form of ongoing contact with the families they helped create, for example through the occasional exchange of emails and photos.

However, there may not be the option of a relationship with your donor, if you use gestational surrogacy and an egg donor. Although you will often receive very detailed biographical and medical information about your donor from the donor agency, clinic-recruited egg and sperm donors may have agreed to complete anonymity when they donate (as in many clinics in the US). This means that children will generally have no option for obtaining identifying information about their donor. This might be an issue to consider in choosing a clinic. Check the websites of relevant surrogacy services and donor agencies, or contact them for details of their policy and the relevant laws where they operate.

Recognition of parentage

Some countries where commercial surrogacy is available can provide birth certificates listing both fathers, while others do not. Even where this is possible, it does not at present translate into legal parentage in Australia.

Gay male couples whose children were conceived via overseas surrogacy – whatever their birth certificates states about parentage – currently require court parenting orders to recognise the parenting role of both the biological and non-biological father. These parenting orders continue (although they may need some amendment) if a couple separates. See below under 'If relationships break down'.

Parenting orders can allow you to consent to things like school excursions or medical treatment. All parties who have parenting responsibilities under court order are required to give their consent for a child to obtain a passport. Parenting orders can include many rights and responsibilities of legal parentage, but end at age 18, and don't include things like inheritance and superannuation in most situations. So it is important for those who require parenting orders to, for example, ensure they specifically recognise children in their wills and seek legal advice about choices in relation to making financial provision for children (including a choice not to make provision, which may be subject to legal challenge in very limited circumstances, even if you are not a legal parent).

Fostering: another way of welcoming children into your family

Foster care agencies have long recognised that gay couples and single men can provide loving, stable homes for children requiring short or long term foster care or those on permanent care orders. Many same-sex couples and single people (including many who already have biological children) welcome children needing foster care into their families. This can be a very positive experience for everyone involved – something that is demonstrated by the fact that many foster carers themselves grew up in homes that welcomed children needing foster care.

Foster care includes respite (occasional) care, short-term/emergency care and long-term care. Permanent care is generally the preferred option for children and young people requiring long-term care. In these cases the Victorian Government has determined that the child cannot return home, but the biological parent/s have not relinquished them for adoption. Permanent care orders are similar to court parenting orders in that they cease at 18 years; although permanent care and fostering legally ends then, most people have life-long relationships with their foster carers/parents.

Both foster and permanent carers receive a modest fortnightly payment to assist with meeting some of the financial needs of the child. In addition, foster and permanent carers are eligible in most cases to qualify for Centrelink Family Tax Benefit (FTB) and Child Care Benefit (CCB) payments.

What if a child being fostered or on a permanent care order becomes available for adoption?

At the time of writing, same-sex couples are not permitted to adopt in Victoria. The *Adoption Act* does however make provision for 'individual' people to adopt 'only in special circumstances'. The definition of special circumstances has until recently only been granted to single people who wish to adopt a relative, and in one case a lesbian foster carer who sought to adopt a child with extreme "special needs". In August 2010, a Victorian judge ruled in favor of one member of a gay male couple, who along with his partner, had been the long term foster carers of a child. In this case the child's birth parents relinquished the child, and had no opposition to the carer adopting the child. It is anticipated that this case will set a precedent for one half of a gay or lesbian partnership – or a single gay or lesbian person – to adopt a child who is in their care.

Rainbow Families Council hopes that the Victorian government will act to extend the eligibility definition to include both members of a same sex couple and single people specifically. We also seek them to permit all gay and lesbian people or single applicants to apply for, all forms of adoption including inter-country, infant, familial and the adoption of foster or permanent care children.

Gay and lesbian foster carers, permanent carers and kinship carers in Victoria are eligible to join the Gay and Lesbian Carers Support Group, which provides information, telephone support and social opportunities for gay and lesbian carers and their children. See below for contact details.

Exploring co-parenting with a lesbian couple or single woman

Some men are interested in creating their family as co-parents with a lesbian couple or single woman. Co-parenting means sharing all significant parenting

responsibilities, such as living with (whether in one household or two), providing for the child, and making both day-to-day and longer-term decisions about them, for example around medical treatment, spirituality/ religion, educational choices and every aspect of how they are raised.

A brief note on language: in this section we talk about mother/s and father/s, as those are usually the roles people have in co-parent families. Co-parent families do not fit neatly into any available 'box', in terms of the law, social security, tax and so on. 'Co-parent' is a social term, not a legal one. Since the recent reforms, a child's legal parents (and the only people legally able to be listed on the birth certificate) are their birth mother and her partner if she has one, although other co-parents can have their roles recognised through court parenting orders (see below). In addition, children born via a fertility procedure (whether conceived via a clinic or home insemination) must have their biological origins registered by the Victorian Registry of Births, Deaths and Marriages. Thus the details of the child's biological father (legally their donor) will be included in the child's birth record (but not on their certificate) if they were conceived by home insemination, or in the Central Donor Register if they were conceived via a clinic.

At present, co-parenting is a less commonly-chosen option than being a known donor to a single woman or lesbian couple, or becoming parents through surrogacy, fostering or permanent care. There are certainly happy, successful families in our community with two, three, four or more co-parents. However, co-parenting challenges the very strong notions that mainstream Australian culture, at least, has about family. It is difficult enough, sometimes, to negotiate parenting in a couple, let alone with people with whom you are not in an intimate relationship.

Co-parenting is a lifelong connection and commitment to each other and your child/ren. Being co-parents requires a deep level of trust, respect and goodwill towards one another, and a commitment to shared values and maintaining your family relationships when times get tough, as they can do for every family.

Make sure it is what you all really want

When considering co-parenting, it is critical to be sure it is what everyone involved truly wants. Do you want to share every aspect of parenting, from daily life to the big decisions? The options for gay men to have a baby without female co-parents are not easy; overseas surrogacy is prohibitively expensive, and altruistic surrogacy in Victoria requires men to find both a surrogate and an egg donor. But it is important to ask yourself: would you choose co-parenting if you (and your partner, if you have one) had an easy option to become parents on your own?

Be very clear that this is what your prospective female co-parents want too, whether you are single or a couple, before going too deeply into negotiations.

Try to challenge any beliefs, even deep within yourself, that 'all children need a mother and a father'. You may well decide that this is what you want, but in particular remember that three decades of research clearly show that children are not disadvantaged by being raised by two mum or two dads, and that the disadvantage that children of single parents (most often mothers) experience is related to the poverty many are forced into, as well as conflict between their separated parents.

Ask questions of as many people as you can whose families include co-parents. Read books and websites, seek out groups and online forums, and go to counselling. Try not to be influenced by fear of what other people might think of your decision, including your prospective co-parent/s. This is a critical life choice, and it has got to work for you.

You might decide you don't want to co-parent because you want to parent on your own, whether you are single or a couple. On the other hand, you might decide that you want children in your life, but don't necessarily want all of the responsibilities of parenthood. You might decide you actually want the role of known donor.

How does co-parenting differ from being a donor?

Co-parenting is about sharing every aspect of what parenting is: day-to-day life, and the responsibility for raising small human beings to adulthood. Being a known donor is very different. As described above, the term 'known donor' covers a huge variety of relationships and levels of contact. Some are just happy for the child/ren to know their name, see their photos, and perhaps meet up when the child/ren are old enough to show an interest. Some live overseas or interstate, and may exchange cards, emails, Skype chats and the occasional visit. Some may visit a few times a year, others more often. Some become a significant part of family life, spending regular time, perhaps holidaying together and becoming regular baby-sitters. Some children call their known donors 'Dad', even though they do not share parenting responsibilities and are not legal parents or fathers. Some do not. Again, the diversity of people's choices and journeys is endless. Find out more in our information sheet 'Options for prospective sperm donors, egg donors and surrogates'.

If you are a known donor, rather than a co-parent, this does not mean that your role in a child's life is not important or protected by the law. Australian family law clearly protects the relationships between children and significant people in their lives other than their legal parents. As a known donor, you can make any agreement you like with the woman or couple you donate to, and we recommend that you do make

an agreement. These agreements are not legally enforceable, but they are an important tool for ensuring you all agree on the key issues. If a dispute should arise, they also show everyone's initial intentions, which is an important (though not the only) factor in a court's decision-making. As a donor, you and the parents have the option of seeking parenting orders by consent (without a dispute arising) that recognise your role, for example your level of contact with the family. And in the event of a dispute, a court could grant you contact, and in some cases, even some parenting responsibilities, if they consider it in the child's best interests. See the information sheet on 'Information for prospective sperm and egg donors and surrogates' for more information.

If you are thinking of being a known donor, take your time deciding whether that is what you really want. Talk to men and women who have made families as parents, co-parents and known donors. You can be very involved in a child's life as a donor, but it is a different role. However much you might see the child/ren, you will not have parenting responsibilities or be their legal father or parent. If what you actually want is to be a parent/father, find a way to make it happen, through co-parenting, surrogacy, fostering or permanent care. If you compromise a deeply-held desire to be a parent by becoming a donor, but do not 'make peace' with your decision, the evidence is that it can too often result in heartache for everyone concerned: you, the mother/s, and most importantly the child and children.

Finding and talking to prospective co-parents

Some men explore the possibilities of creating a family with someone they have known for many years. Others find someone through friends, colleagues, support groups, personal advertisements or the internet. Any of these options can work, but it is very important to get to know each other well (perhaps for about a year) and have talked through all of the issues many times before you decide to go ahead, and certainly before you begin trying to conceive. We also highly recommend making an agreement (see below). If you find yourself growing uncomfortable with your prospective co-parents as you talk things over and get to know them in this context, it is critical that you do not go ahead. You can find someone else, or explore other options. It might be wise to seek assistance with this process, for example from a counsellor. Some fertility clinics offer a paid service of a counselling 'information session' prior to committing to any treatment, which could be useful.

Some people who have an existing friendship with their prospective co-parents may be less likely to really thrash through the more difficult issues, because they feel that 'they can always work it out'. However, this is not always the case, and sometimes the most intimate, longstanding friendships can end, or even turn into bitter disputes in this context. You may feel impatient to make a baby, but remember that this decision is critical

and irreversible. If you conceive a child with someone, you are connected to them for life. Most importantly, the decision you make will affect not only you, but also the one or more children whom you create.

So take your time to get to know each other in this new context, reflect on your own needs and feelings, and talk about the issues many times before beginning. It might be useful to put on 'different hats' when engaging in these discussions. It is very different talking as friends than as prospective co-parents. You need to be able to be honest about where your views differ without feeling that it reflects on your care for each other.

Having discussions and making agreements

It is critical to be very clear (including with each other, if you are a couple) on what you want before beginning negotiations with the prospective mother/s. What is your ideal? What is negotiable, and what is not? Your ideas might change, but it is important to begin by clearly communicating them, so that your prospective co-parent/s can think about where your vision coincides with theirs, and where it might differ. If you are all clear with each other, there is less likely to be confusion that can lead to conflict.

It is a good idea for everyone intending to create a co-parent family to make a written agreement, even though it is not legally binding. Australian law does not allow you to make a legally-enforceable contract or agreement about a child, written or verbal. We recommend each of the 'parties' – mother/s and father/s – seek separate legal advice on what will work for you all before making any decisions or attempting conception. This advice can inform your discussions, and the agreement you make about your intentions.

Agreements can be very useful as a record of your intentions and what you agreed to at the time. Some people make their agreement, then put it in a drawer and never look at it again. Many find their agreement a very useful tool, and revisit it when they conceive, when their child is born, when it comes to trying for any subsequent children, and when any major life changes happen that have possible implications for the relationship (such as someone moving interstate or overseas). And in a conflict, a written agreement demonstrates your intentions, which might be one (but certainly not the only) factor a court would consider.

Most people make agreements that are legally clear in language, but heartfelt. Think about how your children might feel if they read it, as they may well do later in life. The most valuable thing an agreement can do is encourage you all to sit down and talk about the important issues. Your agreement should clearly state all your intentions, and what each person's role will be.

A key part of the agreement relates to how you negotiate changes, and what you will do in case of

conflict. The only certainty in life is change. Children change, people's circumstances change, and so do their feelings. The feelings of everyone involved – including children as they grow – will inevitably change over time. This does not mean that your arrangements will shift, although they often do. The key is to agree on clear processes to negotiate change, and to deal with conflict (such as through a counselor or mediator), so that whatever happens you can stay out of court.

Specific topics to discuss

There is so much to discuss with your prospective co-parents, and it is easy to get pre-occupied with your dreams of family and forget about some of the nuts and bolts issues. These include:

- How you will attempt conception: the options include home insemination with fresh semen, home insemination with sperm 'donated' to the woman or couple through a fertility clinic, and clinic-based insemination (or other fertility treatment, such as IVF, if needed due to fertility problems in the intending biological mother, father or both). Remember that you will need to be available at short notice if you are using fresh semen for home insemination. The processes are exactly the same as for known donors, so please read the detailed information on 'The process of donating' in the information sheet 'Options for prospective sperm donors, egg donors and surrogates'.
- Fertility: consider having a sperm test early in the process, as problems are not uncommon. If you are a couple, and the intending biological father has fertility issues, then the other man may consider taking this role. If this is not possible, you might need to explore other methods of conception such as IVF; talk to a fertility specialist. There are also diet and other lifestyle changes that the intending biological father and birth mother can make to support your changes of conception.
- Health screening: insemination with fresh semen carries similar risks of infection to unprotected sex. You should be tested for gonorrhoea, chlamydia, HIV, syphilis, Hepatitis B and Hepatitis C and CMV (cytomegalovirus), plus blood group and antibody tests. If you or your partner are exposed to any risk of infection, you must re-test, to ensure you do not put the prospective birth mother, her partner or the baby at risk.
- What if you need to use IVF? Does anyone involved have issues with IVF, for example if there are unused embryos at the end of the process? What will you do if there is a likelihood of your unborn child having a profound disability or serious medical issue? People can have very strong (and different) feelings about such things.

- Everyone's different roles and needs for support during the processes of attempting conception, pregnancy, birth, breastfeeding (if you choose to, and the birth mother can breastfeed) and early infancy. Talk about the values that might inform your choices during these early stages, for example with regard to birth, breastfeeding or sleeping. You will probably all need to research, think about and discuss these things much more deeply than most parents before your baby is born, to ensure that the choices you make work for all of you.
- Where a child will live, and how the arrangements will change over time. A child's needs change enormously from birth to six months and beyond. What co-parenting looks like for a child under six months or a year may be very different from when they are 18 months old, four years old, and so on.
- How will you make decisions about your children's lives, for example about things like educational choices, healthcare, religion and spirituality, and all aspects of your children's upbringing?
- What will your financial arrangements be? Who will be financially responsible for the child? You will also need to be clear about inheritance, superannuation, insurance and wills, including specifically naming children in your will if you are not their legal parent (see under 'Recognising parentage').
- Financial power and support. The reality is that the income and wealth gap between men and women is still very wide in Australia. If there is financial support involved, including sometimes the purchase of a home, it is particularly important to put all arrangements in writing, including what will occur if you get into conflict. It is important to seek legal advice around these kinds of arrangements.
- The role of non-biological co-parents. Try to involve all parties in the discussions – for example the prospective birth and non-birth mothers, and the prospective biological and non-biological fathers. It is easy for non-biological co-parents to feel marginalised at this stage, and throughout the process.
- If one or both co-parents are single. People's lives can change in many ways. One of the biggest issues for co-parents can be if one or both later partner with someone they want to parent with; this can be very challenging for everyone involved, including the new partner.
- Will you involve your families of origin, and to what extent? This is a major issue for many LGBTI people, who might have had to deal with their parents' feelings (on coming out) that they are unlikely to be grandparents. Some extended families might continue to be homophobic, and it

can be difficult to know what to do then. But people can and often do change, especially when it comes to children and grandchildren.

- Ensure you understand the legal requirements with regard to the birth certificate and registering information about the child's biological origins, and spell them out in the agreement.
- As we have said, it is critical to have agreed processes (such as seeing a counsellor or mediator) for negotiating changes in life circumstances. What if someone wants to move, including interstate or overseas? What say might the child/ren have, when they are old enough to have an opinion? Make sure you have processes for negotiating changes in your arrangements, and dealing with any conflict that may arise.

Recognising parentage

At present, the law does not allow for equal recognition of more than two legal parents. Both Victorian law, through the *Status of Children Act*, and federal law say that if a child is born through a treatment procedure (including home insemination), then the birth mother (and her partner at the time of conception) are the legal parent/s, and able to be listed on the birth certificate. To list anyone else is to make a 'false declaration'. The exception is if the child is conceived via sex between the mother and biological father, in which case they are both legal parents and not the non-birth mother (if there is one).

The role of co-parents other than the legal parent/s can be recognised via court parenting orders by consent (without a conflict arising – see below). The biological origins of a child conceived via a treatment procedure (including through a clinic or home insemination) must be registered by the Victorian Registry of Births, Deaths and Marriages. Contact the Registry for more information about your situation.

Prior to the recent reforms, some co-parent families chose to list the biological mother and father on the birth certificate. This is no longer a legal option. Historically, however, many have chosen to list the birth mother on the birth certificate, and seek parenting orders for the other co-parents. One reason for this is because listing the biological father on the birth certificate would have created implications for social security, tax and other matters that may not fitted the family's needs.

It is important to note that if a conflict arises, legal parentage is only one factor in determining the outcome. A court can award full residence and parenting responsibilities to parties other than the legal parents. See under 'If relationships break down' below, and seek legal advice about your situation.

Court parenting orders

You should seek legal advice about your situation, including which adults (even if there is no dispute) require court parenting orders (in this case called 'consent orders') to legally recognise their role/s. All parties who have parenting responsibilities under court order are, along with a child's legal parent/s, required to give their consent for a child to obtain a passport. Parenting orders can include most of the rights and responsibilities of legal parentage, but end at age 18, and don't include things like inheritance and superannuation in most situations. So it is important for those who require parenting orders to, for example, ensure they specifically recognise children in their wills and seek legal advice about choices in relation to making financial provision for children (including a choice not to make provision, which may be subject to legal challenge in very limited circumstances, even if you are not a legal parent).

We strongly recommend that each of the 'parties' – mother/s and father/s – seek separate legal advice on what will work for you all before making any decisions or attempting conception.

If relationships break down

If parents separate

If you are a gay male couple recognised as your child/ren's legal parents (for example, if you conceived through altruistic surrogacy in Victoria) and your relationship ends, then you both remain their legal parents. You can negotiate your own shared care arrangements, as many parents do very successfully.

If you cannot agree, you have access to the same resources as heterosexual parents to help you work it out: family therapy, mediation, or as a last resort, the courts. The court will recognise you both as parents, and must start with the presumption that it is in your child/ren's best interests to have an ongoing relationship with both of you. However, each case is determined on the specific facts of the situation, and what the court believes is in the child's best interests, for example when it comes to issues such as where a child lives, who makes decisions about the child's life, and what level of contact a non-residential parent has. One option may be shared care, if the court thinks that the relationship and communication between the separated parents is strong enough to negotiate this.

If you are a separating couple who originally required parenting orders to recognise the your parenting roles (for example if you conceived through overseas surrogacy), your situation will, in practice, be similar.

Conflict between parents and donors, and between co-parents

The escalation of conflict is not good for anyone. Most importantly, a breakdown in relationships between adults in a child's life always has a negative impact on the child. Every family has issues to deal with from time to time. Ideally, you will be able to talk them through. It can be useful to involve a third party, such as a counsellor or mediator. Well before things get too difficult. Issues around family and children can get very emotional very quickly. Try hard to see each others' points of view, to maintain a sense of mutual goodwill and common purpose, and above all to keep the focus on the child/ren.

Australian family law, like the rest of our legal system, is based on an adversarial model that is particularly poorly suited to the complex and emotional nature of conflict over parenting and children. Going to court is extremely stressful and very costly.

The court will not change a child's legal parentage (the only circumstances in which this happens is in the case of children conceived via surrogacy in Victoria or adoption). A court makes its judgement – about things like where a child lives, who makes the decisions (parenting responsibility) and who has contact with the child – on the facts of the case, and what they see as the child's best interests. As mentioned, legal parentage is only one factor; a court can certainly award contact, and sometimes some parenting responsibilities, to parties other than the legal parent. This could include, for example, a co-parent, a known sperm or egg donor (and their partner, if they have one), a surrogate, a grandparent, a step-parent or anyone else significant in the child's life. A court could even award full residence and all parenting responsibilities to someone other than a child's legal parents, if they think that is in the child's best interests.

If people other than a child's legal parents 'formalised' recognition of their parenting role through a court order before the relationship broke down, the order provides strong evidence of their role and relationship with the child. But even if there was no such order, unless there is a good reason (related to the child's safety) why not, the court is likely to make a decision which maintains the child's relationship with all of the significant people in their life. As always we recommend you seek legal advice on the specifics of your situation.

Many factors will come into play, such as your arrangements to date and your original intentions (for example, as documented in an agreement, or even notes from your discussions). Previous cases also have an impact, although family law is less bound by legal precedent than other parts of Australian law, and this area of law is still emerging.

Stand by for more information

In October 2010, Rainbow Families Council received a referral to a major law firm facilitated through PILCH (Public Interest Law Clearing House). The Council has asked for pro bono legal advice and research to be undertaken in response to the question "The issue of two men being legally recognised as parents in their own right on a state and federal level – can it happen, and how?". Please check the website for updates on the referral, and answers to other FAQs related to rainbow families at www.rainbowfamilies.com.au.

Disclaimer

Rainbow Families Council produced this information kit in October 2010. We have made every effort to ensure the kit is correct, but accept no liability for information given. Information will be regularly updated on our website. We strongly advise that you seek medical and legal advice and specialist counselling relevant to your specific situation.

Find out more about:

- the federal reforms affecting same-sex couples and parents at www.wearitwithpride.com.au and www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_SameSexReform
- applying to the Patient Review Panel re a surrogacy arrangement at www.health.vic.gov.au/prp
- more about what is involved in altruistic and commercial surrogacy at Gay Dads Australia's website, www.gaydadsaustralia.com
- latest information about options for parentage, and what other gay men have done, by joining support groups or online email groups such as the Gay Dads Vic yahoo group, at groups.yahoo.com/group/GayDadsVic/
- becoming a foster or permanent carer, by calling the foster care hotline on 1800 013 088 or visiting www.fosterabrighterfuture.com.au

- the Gay and Lesbian Carers Support Group, for gay and lesbian foster carers, permanent carers and kinship carers in Victoria, by contacting Tracey on 0427 811 186.
- registration and management of donor information under 'Rainbow families: donor registers and information' in this kit, or from Births, Death and Marriages. Phone 1300 369 367 or visit their website: google 'Victoria births deaths and marriages', click on 'Births', and then 'Donor treatment registers'.
- a good, detailed guide to all forms of fertility treatment, including surrogacy, in 'IVF and Beyond for Dummies' by Karin Hammerberg, published in Australia in 2010
- fertility clinics in Victoria at www.fertilitysociety.com.au/rtac/accredited-units/victoria/
- how to apply for a court parenting order in the Family Court of Australia Consent Orders Kit at www.familylawcourts.gov.au/wps/wcm/connect/
- where to seek legal advice about agreements and other matters through the Law Institute of Victoria's Directories at www.liv.asn.au/Specialists
- parenting orders and child maintenance, on Victoria Legal Aid's website under Children & Parenting, www.legalaid.vic.gov.au/childrenparenting.htm
- The Victorian Assisted Reproductive Treatment Authority, for information about telling a child about their donor origins at www.varta.org.au.

What else is in this information kit?

- Introduction and definitions
- Recognising pre-existing families
- Options for prospective lesbian parents
- Options for prospective sperm donors, egg donors and surrogates
- Donor information and registers
- Resources and links