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ADMISSIBILITY OF PARENTAGE TESTING EVIDENCE IN FAMILY LAW PROCEEDINGS

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Introduction

1. This paper is an overview of the law with respect to the admissibility of parentage evidence (colloquially referred to as DNA evidence) pursuant to subdivision E of Division 12 of Part VII of the *Family Law Act 1975* (Cth) ("the FLA").

2. The objectives of this paper are as follows:

    a. to review the statutory law with respect to presumptions of parentage;
    b. to review the statutory law that empowers a court to order parentage testing;
    c. to review regulations that apply where orders for parentage testing have been made;
    d. to review the case law with respect to the making of parentage testing orders and the consequences of contravention of such orders.

Sociological and legal background – the importance of certainty of parentage

3. Parentage evidence has become a "hot button topic" in family law. An SBS documentary provided the estimate that between 3 - 4% of all children are not the biological children of their "parents," particularly of their father: "*Who's Your Daddy*" aired 26 March 2014 available online from SBS Australia website.

4. The common law has long recognised the importance of parentage. Parentage affects and determines specific legal rights such as under the *Succession Act 2006* (NSW) but also more broadly can determine a person's sense of self identity in society with long-

term consequences for self-esteem and relationships with family. Parentage testing clinics in Australia offer their services as "peace of mind" tests and promote testing services independently of court orders.

5. The importance of parentage testing and certainty as to parentage cannot be underestimated. This importance is reflected in the following statements by courts in both Australia and in the UK. Fogarty J of the Family Court of Australia in *G v H* (1993) 16 FamLR 525 stated as follows:

> "Society is entitled, through the legislature and the courts, to an inexpensive, prompt and virtually certain procedure to decide this question. Paternity is no mere *inter partes* issue. The child and society have a vested interest in the correct outcome. The reasons for that are many, including heredity, the sense of identity and the private and public obligation of financial support directly relevant in this case and so emphasised by the legislature over the past decade."

6. The necessity for the truth of parentage based on reliable and proved testing was emphasised by Lord Hodson's comments in *S v McC (formerly S)* [1972] AC 24 at 57-58 as follows:

> "The interests of justice in the abstract are best served by the ascertainment of the truth and there must be few cases where the interests of children can be shown to be best served by the suppression of truth. Scientific evidence of blood groups has been available since the early part of this century and the progress of serology has been so rapid that in many cases certainty or near certainty can be reached in the ascertainment of paternity. Why should the risk be taken of a judicial decision being made which is factually wrong and may later be demonstrated to be wrong?"

7. The necessity for certainty of the courts in making declarations as to parentage was made clear by Denning MR in the decision of *S v McM (formerly S)* [1970] 1 All ER 1162 at 1165 as follows:

> "In my opinion, when a court is asked to decide whether a child is legitimate or not, it should have before it the best evidence which is available. It should decide on all the evidence, and not half of it. There is at hand in these days expert scientific evidence – by means of a blood test – which can in most cases resolve the issue conclusively. In the

absence of a strong reason to the contrary, a blood test should be made available. The interests of justice so require."

8. The English Court of Appeal considered an application for a paternity test in *Re H and A (paternity: blood test)* (2002) 1 FLR 1145 (UK) and confirmed the principles to be drawn from the English authorities are as follows:

   a. the interests of justice are best served by the ascertainment of the truth; and

   b. the courts should be furnished with the best available science and not confined to such unsatisfactory alternatives as presumptions and inferences.

9. It is against this background of the importance of determining parentage that a review may be conducted of the law of Australia with respect to parentage testing based on the most reliable evidence, being DNA evidence.

What is DNA?

10. DNA is the acronym for deoxyribonucleic acid. DNA is a molecule that carries most of the genetic instructions used in the development, functioning and reproduction of all known living organisms and many viruses. DNA molecules consist of two biopolymer strands coiled to form a double helix. DNA contains biological information that is passed from the natural parents. DNA is contained in semen, blood, saliva, hair and skin.

11. DNA profiling was developed in 1984 by Sir Alec Jeffreys, British geneticist, and first used in forensic science to convict Colin Pitchfork in the 1988 Enderby murder cases to show the original accused man was innocent and Pitchfork was guilty. DNA parentage testing is 99.99% reliable and has supplanted older tests such as blood group typing (available from the early 1900's), serological testing (available from the 1930's) or using human leukocyte antigens (available from the 1960's). These earlier forms of testing were based on blood and protein comparisons. In contrast to DNA testing, these other tests had higher margins of error.

12. The reliability of DNA parentage testing is based on the fact as a consequence of sexual reproduction, the DNA of both parents is brought together to create a unique genetic material in a new cell. As a consequence, the nuclear genome (or genetic material) of a person is derived in equal amounts from the biological parents. There can be no third party involved to contaminate the test results (unless contamination is due to human error in the testing process, something the law is cognisant of and will be addressed later in this paper).

13. DNA testing is performed by collecting buccal swabs on the insides of the subject person's cheek via a swab stick. The testing process is therefore not physically invasive or traumatic. DNA testing of a child can only occur in tandem with a sample taken from one or both parents.

Provisions of the FLA with respect to presumptions of parentage

14. Part VII of the FLA deals with "Children" and contains divisions directly effecting children including "Parenting orders" (Division 5) and "Child maintenance orders" (Division 7). Division 12 of Part VII deals with "Proceedings and jurisdiction" relating to children. Division 12 (which contains the subdivision dealing with parentage orders) is discrete from Division 5 which deals with "Parenting orders" and this has led to uncertainty as to whether a court in making a parentage testing order must take into account the best interests of a child.

15. Subdivision D of Division 12 of the FLA contains the statutory presumptions as to parentage within sections 69P-69T. Section 69P creates a presumption of parentage arising from marriage. Section 69Q creates a presumption of paternity arising from cohabitation. Section 69R creates a presumption of parentage arising from registration of birth. Section 69S creates a presumption of parentage arising from finding of courts, including those of a reciprocating jurisdiction outside Australia. Section 69T creates a presumption of paternity where a man has executed an instrument acknowledging he is the father of a child.

16. Pursuant to s.69U of the FLA these statutory presumption of parentage may be rebutted by evidence on the balance of probabilities. This rebuttal is independent to the provisions of the FLA that deal with parentage testing.

Provisions of FLA with respect to parentage testing and evidence of results

17. Subdivision E of Division 12 of Part VII of the FLA contains ss.69V-69ZD and the provisions which enable a court to make orders compelling adults and a child under the age of 18 to attend parentage testing. The jurisdiction of the courts is defined by ss.69H and 69J of the FLA. Pursuant to s.69H, the Family Court of Australia, the Family Court of a State invested with federal jurisdiction (the Family Court of Western Australia being the sole example), the Supreme Court of the Northern Territory and the Federal Circuit Court of Australia (formerly known as the Federal Magistrates Court of Australia) are invested with jurisdiction to make parentage orders.

18. Section 69V of the FLA provides that if parentage of a child is a question in issue in proceedings under that Act, the court may make an order requiring any person to give evidence as is material to the question. Section 69VA provides that after receiving such evidence, as well as deciding the issue of parentage of a child for the purposes of proceedings the court may issue a declaration of parentage that is conclusive evidence of parentage for the "purposes of all laws of the Commonwealth". An issue that has arisen for discussion amongst practitioners is whether this declaration is effective in respect of "laws of the Commonwealth" as a discrete polity (i.e.: Federal laws passed by the Commonwealth of Australia that have Federal application) or all laws of the constituent members of the Commonwealth of Australia being the Commonwealth, States and Territories. In other words, is a declaration under s.69VA binding on State laws or may a State Court dealing with an issue of parentage disregard a declaration under s.69VA of the FLA and make a separate order for parentage testing to resolve an issue central to such a case (for instance in a criminal trial for incest under s.78A of the *Crimes Act 1900* (NSW) or a civil claim by an alleged child of a deceased testator under succession legislation)? I have been unable to find any case law to decide this issue. Section 2H of the *Acts Interpretation Act 1901* (Cth) is of limited assistance as it defines a reference to "a law of the Commonwealth" as taken to "not include, and is taken never to have included, a reference to a law in force in a Territory so far as the law is so in

force because of an Act providing for the acceptance, administration or government of that Territory". This does not address "all laws of the Commonwealth" in the plural as it appears in s.69VA of the FLA and does not address the issue of State laws.

19. Section 69W is the keystone section of subdivision E of Division 12 of Part VII of the FLA. Section 69W was amended by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) commencing 1 July 2006. It has been held by the Full Court of the Family Court that cases guiding parentage testing orders prior to this amendment are of limited assistance. Section 69W(1) provides that if the parentage of a child is a question in issue in proceedings under the FLA, the court may make a parentage testing order requiring a parentage testing procedure to be carried out for the purposes of obtaining information to assist in determining the parentage of a child. Parentage testing orders may be ordered by the court on its own initiative; on the application of a party to the proceedings; or an application of an independent children's lawyer. A parentage testing order may be made in relation to a child; a person known to be the mother of a child; or any other person if the court is of the opinion that if the parentage testing procedure were carried out in relation to the person the information that could be obtained might assist in determining the parentage of a child.

20. Section 69X provides that where the court makes a parentage testing order under s.69W, the court may also make orders as it considers necessary or desirable to enable the testing to be carried out or to make the testing procedure more effective or reliable. Those orders may include an order requiring a person to submit to a medical procedure; an order requiring a person to provide a bodily sample; and an order requiring the person to provide information relevant to the person's medical or family history. The court may also make such orders as it considers just in relation to the carrying out of the parentage testing procedure and the preparation of reports relating to the information obtained.

21. Pursuant to s.69Y, if a person who is 18 or over contravenes a parentage testing order or an order under s.69X (being an ancillary order), the person is not liable to any penalty in relation to the contravention. Pursuant to s.69Y(2) the court may draw such inferences from the contravention "as appears just in the circumstances".

22. Pursuant to s.69Z, where a child who is under 18 is the subject of a parentage testing order or an ancillary order under s.69X, the procedure must not be carried out in relation to the child under the order without the consent of a parent of the child or a guardian of the child or a person who under a parenting order has responsibility for the child's long-term or day-to-day care, welfare and development. As with s.69Y, the court may draw inferences as appears just in the circumstances from the failure or refusal to consent.

23. Section 69ZA(1) provides that there is no liability on the part of a person who carries out or assists in the proper carrying out of a medical procedure or other act in relation to a child under a parentage testing order. In particular that person is not liable for any civil or criminal action if the procedure or act is carried out with the consent of a parent of the child, a guardian of the child or a person whom, under a parenting order, has responsibility for the child's long-term or day-to-day care, welfare and development.

24. Section 69ZA(2) provides that the Act does not affect any liability of a person for an act done negligently, or negligently omitted to be done, in relation to carrying out the medical procedure or act. As such, liability in tort with respect to negligence is preserved in respect of the medical practitioner or assistant who carries out the procedure.

25. Section 69ZB provides that regulations may be implemented for the carrying out and reporting on parentage testing procedure. Section 69ZC provides that a report made in accordance with the regulations may be received in evidence in any proceedings under the FLA.

26. Section 69ZC provides that a report received into evidence in proceedings under the FLA may result in the court making an order requiring the person who made the report or any person whose evidence may be relevant in relation to the report to appear before the court and give evidence in relation to that report. Such an order may be made on the initiative of the court or on the application of a party to the proceedings or an independent children's lawyer.

27. Subdivision E of Division 12 of Part VII of the FLA has application to international agreements. Section 69XA provides that the Secretary (being the Secretary of the

Attorney-General's Department as defined by s.111CA of the FLA) may commence or continue proceedings under s.69W seeking a parentage testing order if necessary or convenient to do so for the purposes of an international agreement or arrangement. Section 69ZD provides that parentage testing may be conducted by a court that is conferred with jurisdiction by the regulations in a foreign country and for the purposes of carrying out any of Australia's obligations under an arrangement with reciprocating jurisdiction; a convention under the FLA; the *Convention of the Recovery Abroad of Maintenance* signed in New York on 20 June 1956; the *Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* signed at The Hague on 2 October 1973; the *Agreement between the Government of Australia and the Government of New Zealand on Child and Spousal Maintenance* signed at Canberra on 12 April 2000; or pursuant to the *Agreement between the Government of the United States of America and the Government of Australia for the Enforcement of Maintenance (Support) Obligations* which was concluded and entered into force on 12 December 2002.

***Family Law Regulations* – ensuring integrity of parentage testing evidence**

28. The *Family Law Regulations 1984* (Cth) ("the FL Regulations") relevant to parentage tests are regs 21A-21M in Part IIA of the FL Regulations. Reg 21A applies Part IIA to a parentage testing procedure required to be carried out under an order under s.69W(1) of the FLA. Reg 21B contains a number of specific definitions including "bodily sample" to include a sample of blood; HLA means "human leucocyte antigen"; and "testing" means the implementation, or any part of the implementation, of a parentage testing procedure.

29. Reg 21C prescribes "parentage testing procedures" to be the following:

    a. red cell antigen blood grouping;
    b. red cell enzyme blood grouping;
    c. HLA tissue typing;
    d. testing for serum markers; and
    e. DNA typing.

30. Reg 21D provides that parentage testing is taken to be carried out in accordance with the FL Regulations if it is carried out in compliance with Division 2 at a laboratory accredited by National Association of Testing Authorities, Australia ("NATA"); in accordance with the standards of practice that entitle the laboratory to be so accredited; and that it is supplemented by a report in the form required by Division 3. Division 3 contains reg 21M which provides that reports are to be in accordance with Form 5 in Schedule 1 to the FL Regulations. Importantly, reg 21M(5) states that a report completed "otherwise than in accordance with this regulation is taken to be of no effect". Therefore where a report is not obtained in a form prescribed by the regulation in Schedule 1 the report does not comply with the FL Regulations, is not a report obtained in accordance with s.69ZB and would not be admissible pursuant to s.69ZC(1) of the FLA.

31. Division 2 of Part IIA of the FL Regulations regulates collection, storage and testing of samples to ensure the integrity of evidence of parentage testing. Reg 21E provides that a person must not take a bodily sample from a donor for the purposes of the parentage testing procedure unless that person is a registered medical practitioner or employed by a hospital pathology practice, parentage testing practice or registered medical practitioner. Reg 21F provides the mechanism by which a donor is properly identified by the use of an affidavit to which is annexed a recent photograph of the donor. The affidavit is in a form prescribed by Form 2 in Schedule 1 to the FL Regulations. The photograph must be of a prescribed size with a full view of the donor's head and donor's shoulders. If a donor is under the age of 18 or is a person suffering from a mental disability, the affidavit may be completed by the person responsible for the long-term care, welfare and development of the child or by a trustee or manager in relation to the mentally disabled person or a person who is responsible for the care, welfare and development of the person with the mental disability.

32. Reg 21G provides that with respect to the collection of blood samples, only a needle or syringe that has not been used for any other purpose; has been sterilised; and is disposable may be used. Reg 21H provides with respect to the collection of DNA samples that the sampler must not take a bodily sample from a donor with a swab unless the swab has not been used for any other purpose and has been sterilised. Reg 21I provides that any sample that is taken from a donor must be sealed in a container that

has not previously been used for any other purpose is labelled with the particulars of the label to include the full name of the donor; the date of birth and sex of the donor; and the date and time at which the sample was taken. A statement must be provided by the sampler pursuant to Form 4 of Schedule 1 to the Regulations which ascribes information required as to the identity of the donor. Packaging and storage requirements are contained in reg 21K which requires that the bodily sample must be stored and transported to a laboratory for testing in a manner that will preserve the integrity of the sample and ensures testing of the sample will produce the same results as would have been obtained if the sample had been tested immediately after collection. The sampler must ensure that the documents sent to the laboratory with the sample included the affidavit completed under reg 21F and the statement under reg 21J.

33. Reg 21L provides timetables for the provision of testing within the time from which the sample is taken. If the procedure is red cell antigen blood grouping, red cell enzyme blood grouping or testing for serum markers, the testing must occur within 6 days after the sample is taken. If the procedure is HLA (human leucocyte antigen) typing, testing must occur within 3 days after the sample is taken. If the procedure is DNA typing, testing must occur within a "reasonable time" after the sample is taken.

34. Reg 21N provides that NATA must prepare for each financial year a list of laboratories that are accredited to carry out parentage testing procedures and for each accredited laboratory a nominated reporter. That list must then be provided to the Attorney-General, the Chief Executive Officer of the Family Court of Australia, the Registrar of the Family Court of Western Australia and the Chief Executive Officer of the Federal Circuit Court.

Judicial interpretations of statutory provisions with respect to parentage testing procedures

Three considerations to guide the court in making a parentage testing order

35. The threshold question under s.69W(1) of the FLA is whether the parentage of a child "is a question in issue in proceedings" under the FLA. This threshold question was considered in the decision of *In the Marriage of Lee and Tse* (2005) 33 Fam LR 167;

[2005] FamCA 77 (Full Court) per Rowlands, Holden and May JJ. Lee and Tse were married in Hong Kong in March 1987 and a child was born in June 1987. The child resided with the wife following the parties' separation in 2001 and the husband paid child support. In September 2003, the Husband was ordered by Mushin J of the Family Court of Australia to pay spousal maintenance of $75 per week. In March 2004, the Husband applied to have those orders discharged and sought orders in relation to parentage testing for himself, the Wife and the child. He claimed that the child had been conceived prior to having sexual relations with the Wife; that the Wife had sexual relations with a work colleague during the marriage; and that the child treated him disrespectfully since separation. These allegations formed the evidentiary bases for his doubt as to parentage. The Wife resisted the application for parentage testing orders; denied the extramarital relationship; and claimed that the child was born prematurely after being conceived at the parties' engagement function in 1986.

36. At first instance, Mushin J declined to hear the application for discharge of spousal maintenance but considered the application for parentage testing. Mushin J refused to make an order for parentage after hearing evidence as to conception and birth of the child. Shortly afterwards, a different judge heard the application concerning discharge of spousal maintenance and on 26 May 2004 the existing order for spousal maintenance was discharged. On appeal, the Full Court noted that with the declinature by Mushin J to hear the application concerning spousal maintenance, the court at that point lacked jurisdiction to make orders with respect to parentage testing as it was not a "question in issue" in proceedings under the Act.

37. The Full Court at [29]-[36] addressed the threshold question of when the parentage of a child is a "question in issue" in proceedings under the FLA. It noted at [29] that to satisfy the threshold question, the applicant must overcome two hurdles. Firstly, parentage must be relevant to the nature of the proceedings in that the proceedings involve a substantive dispute such as child maintenance, custody or access in which the question of parentage is an issue. The parentage testing request cannot exist in isolation. Secondly, there must be evidence which places the parentage of a child in doubt. The basis for placing that parentage in doubt was considered by the Full Court of the Family Court in *Duroux v Martin* (1993) 17 FamLR 130 that there must be "an honest, bona fide and reasonable belief as to the doubt" in parentage. An objective test

for that belief is not to be applied but the court will objectively assess the circumstances giving rise to the applicant's subjective belief.

38. Given the fact that Mushin J had declined to entertain the maintenance application by the Husband, the court therefore lacked the jurisdiction to make an order as the parentage of the child was not "a question in issue" in these particular proceedings. The determination of the Full Court may have differed had the application for parentage testing orders been heard by the subsequent trial judge who discharged the existing order for spousal maintenance. That subsequent trial judge could potentially then deal with the order for alteration of property interests.

39. One aspect of s.69W of the FLA that was touched upon by the Full Court in *Lee and Tse* but was not fully explored was the obligation, if any, to take into account the "best interests of the child" before making a parentage testing order. It was noted by the Full Court at 33 FamLR 175, [48] that in the decision of *Duroux v Martin* the Full Court of the Family Court had expressed the view that in parentage testing applications the best interests of the child are the paramount consideration "where parenting orders are also sought". As the Full Court found in *Lee and Tse* that the court lacked the jurisdiction to make orders under s.69W of the FLA, it was unnecessary to discuss matters concerning the trial judge's exercise of discretion, including whether the best interests of the child is a necessary consideration in making a parentage testing order.

40. The question of whether the best interests of the child is a necessary consideration in making a parentage testing order was addressed by Coleman J in *Tryon v Clutterbuck* (2007) FLC 93-339; [2007] FamCA 580. Coleman J sitting as the Full Court heard an appeal from a Federal Magistrate who had ordered that children of the parties undergo parentage testing. Coleman J concluded that a parentage testing order under s.69W of the FLA is in fact a "parenting order". Coleman J's reasoning was based on the fact that s.64B(1) of the FLA outlines what a "parenting order" is. Section 64B(2)(i) of the FLA provides that a parenting order may deal with any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child. Coleman J went on to state that it is "tolerably clear" that the parentage of a child is an aspect of the welfare of a child. That being so, Coleman J concluded a parentage testing order under s.69W of the FLA is a parenting order. The significance of this conclusion

is that s.60CA of the FLA is enlivened which requires the court in making a "parenting order" to take into account the best interests of the child as a paramount consideration in making such an order. This obligation then invokes s.60CC of the FLA which lists the matters to be taken into account in determining the best interests of the child in an application for parentage testing orders.

41. The decision of Coleman J was the subject of an appeal in *Tyron v Clutterbuck (No 2)* (2009) 42 FamLR 118; [2009] FamCAFC 176 (Full Court) per Finn, Warnick and Strickland JJ. Unfortunately, while the Full Court at [44] per Finn J and at [126] per Warnick and Strickland JJ did not agree with Coleman J's views that a parentage testing order is a "parenting order", it did not decide the issue in the disposition of the appeal. The issue therefore remained in limbo despite the Full Court having an opportunity to decide it.

42. The issue of whether a parentage testing order is a "parenting order" was further addressed by the Full Court of the Family Court in *Brianna v Brianna* (2010) 43 FamLR 309; [2010] FamCAFC 97 (Full Court) per Bryant CJ, Finn and Thackray JJ. In that matter, the husband had been recorded as the biological father of the child on a birth certificate issued in the United States of America. The husband also executed an affidavit in the USA in which he acknowledged he was the biological father and waived his rights to contest parentage in court. In Australia he did not deny these documents or that he had held himself out as the child's biological father. He did, however, assert that he was not the biological father of the child and should be permitted to have parentage testing to rebut any legislative presumptions arising from the documents executed in the USA. It was common ground that he had been assessed to pay child support pursuant to the provisions of the *Child Support (Assessment) Act 1989* (Cth). There was no application before the Court relating to his liability for child support although a consequence of a finding that he was not the natural father of the child was that he would have no obligation to pay child support.

43. The trial judge at first instance made orders pursuant to s.69W of the FLA compelling the husband and the child to undergo parentage testing. On appeal, the wife submitted that the trial judge erred in failing to have regard to the best interests of the child as the paramount consideration when deciding to make a parentage testing order. It was also

submitted on appeal that the trial judge should have applied the laws of the overseas jurisdiction, being the USA, where the husband had previously acknowledged paternity of the child. Bryant CJ delivered a judgment which agreed with that of Finn and Thackray JJ who delivered a separate joint judgment.

44. Bryant CJ held that the discretion to order parentage testing under s.69W of the FLA is unfettered but must be exercised judicially. His Honour noted that the Courts had adopted an approach that a parentage testing order are "parenting orders" and therefore the paramount consideration is that of the best interests of the child. His Honour noted that whether or not the parentage testing order is a "parenting order", when exercising the discretion to make a parentage testing order under s.69W of the FLA the best interests of the child is an essential factor to be considered.

45. Similar reasoning was applied by Finn and Thackray JJ at 43 FamLR 340, [159]-[160] that the issue of whether or not a parentage testing order is a "parenting order" could not be definitively determined because the parties were self-represented and could not present a full argument. Finn and Thackray JJ did accept that when exercising a discretion under s.69W to make a parentage testing order, one of the matters which the court must have regard to in exercising the discretion is the interests of the children in question. Finn and Thackray JJ stated at 43 FamLR 342, [172] that "the interests of the child thus become the determinative, or in other words, paramount consideration".

46. Finn and Thackray JJ concluded at 43 FamLR 343, [180] that the recognition of the child's long-term interests in knowing the truth about parentage meant the parentage testing order should be made. The proposed testing, being DNA testing based on buccal swabs, would be carried out in a "non-invasive" way. Any objection which the child may voice to the test "must be subsidiary to the long-term interests which the law recognises that he has in knowing about his parentage". This statement was made in reliance upon authorities including Lord Hodson in *S v S* [1972] AC 24 which spoke of the interests of justice and the child knowing the truth of parentage. Therefore, the long-term, best interests of the child were better served by the ordering of the parentage tests as sought by the father.

47. Finn and Thackray JJ also confirmed that the second stage of determining whether or not the exercise of the discretion should occur in favour of the applicant for a test was that there must be a reasonable doubt as to the paternity of the child in question and the Court must assess the reasonableness of such doubt. Their Honours confirmed the observations of Butler J in the decision of *In the Marriage of F and R* (1992) 15 FamLR 533 at 538 that the Court would not "order parentage testing merely because it is requested to do so".

48. It would therefore appear that post the 2006 amendments, the intermediate appellate family law courts have adopted the line of reasoning started by Coleman J in *Tryon v Clutterbuck* that in making parentage testing orders under s.69W of the FLA, the court must regard the interests of the child as being paramount. This means the factors listed in s.60CC of the FLA apply.

49. The preceding review of the authorities allows the following three considerations to be applied to the making of an order for parentage testing:

    a. Is the parentage of the child a question in issue in proceedings under the FLA?
    b. Is there a genuine, bona fide and reasonable doubt (or belief) as to parentage?
    c. Is the order in the best interests of the child (including the long term interest of the child to know parentage)?

DNA test obtained without court order

50. The question of what to do with a DNA parentage test obtained without court order under s.69W of the FLA was dealt with in *Ames v Ames* (2009) 42 FamLR 95; FamCA 825 per Dawe J. This matter involved property settlement proceedings in which the husband obtained a DNA test for a child's parentage under the guise of screening the child for genetic diseases. That test showed he was not the father and the test was obtained without the knowledge or consent of the Wife who was the mother. The Husband commenced proceedings in the District Court of South Australia against the Wife for damages alleging allegations of false representation and deceit concerning parentage of the child. The Husband then commenced proceedings in the Federal Magistrate's Court and the proceedings were transferred to the Family Court. The Wife

brought an application for orders that the District Court proceedings be joined with the Family Court proceedings pursuant to the Family Court's accrued jurisdiction. The Husband brought an application for parentage testing orders which the Wife opposed.

51. At issue in the application for the parentage testing orders was whether the Family Court could order parentage testing in property settlement proceedings; whether there was an honest, bona fide and reasonable doubt on the part of the husband as to parentage; whether the report obtained by the husband could be evidence of such doubt; and whether it was in the best interests of the child to order parentage testing. Dawe J ultimately ordered parentage testing was to be conducted but the costs were to be paid by the husband and an injunction was issued restraining the parties from using any information in the report for any purpose other than Family Court proceedings.

52. With respect to the first consideration in making an order under s.69W of the FLA (being whether the parentage testing is relevant to an issue in the proceedings) Dawe J held at 42 FamLR 111, [78]-[80] that parentage may be an issue in proceedings under the FLA in relation to property settlement proceedings. The issue in the proceedings that is the precondition for testing is not merely limited to parenting orders under Part VII of the FLA. As noted by his Honour at 42 Fam LR 111, [78], s.69W of the FLA simply refers to "proceedings under this Act". Property settlement proceedings issues including contributions of the parties, the future needs and obligations of the parties and their financial circumstances will require a determination of the parentage of a child. Expanded reasons for this conclusion were not provided, however it seems that such a conclusion is sustainable when it is borne in mind that s.79 of the FLA refer to a "child of the marriage" as defined by s.4(1) of the FLA. The cognate provision for a de facto relationship is s.90SM of the FLA which refers to a child "of a de facto relationship" as defined by s.90RB of the FLA. Therefore, if a child is not a child of the marriage or of the de facto relationship, then it may be that the parentage testing will be relevant to determining the entitlement to a share of property.

53. With respect to the second consideration in making an order under s.69W of the FLA (being whether there was sufficient evidence to raise a doubt as to the parentage of the child), Dawe J refused to allow admission into evidence of the DNA test on the basis that it was obtained by a deception, that deception being that the Husband told the Wife

he was having the child tested for genetic reasons. The Husband had thereby potentially contravened s.139 of the *Criminal Law Consolidation Act 1935* (SA) which is the criminal offence in South Australia for fraud. This meant the DNA test could be excluded under s.138 of the *Evidence Act 1995* (Cth) which allows a court to admit evidence which has been obtained "improperly or in contravention of an Australian law". The DNA test could not be admitted as evidence raising a genuine, bona fide doubt a as to the parentage of the child.

54. Despite this conclusion excluding the DNA test, Dawe J found the steps which the husband had taken to obtain the test evidenced that the husband did have a bona fide concern. This permitted parentage testing orders to be made. This reasoning was somewhat circular as it seemed to actually condone the husband's behaviour in obtaining the DNA test as this conduct formed the basis for a conclusion a parentage test should be ordered. As such, the husband seemed to have been rewarded for his own deception.

55. The third consideration that Dawe J applied was whether or not it was in the best interests of the child to order the parentage test. His Honour concluded at 42 FamLR 113, [101] that determining who is or who is not a child's biological father concerns the welfare of the child. Therefore an order under s.69W would be a parenting order within the definition of s.64B(2)(i) of the FLA. In reaching this conclusion. Dawe J applied the reasoning of Coleman J in *Tryon v Clutterbuck*. Dawe J noted at 42 FamLR 114, [111] that it was possible to argue that one of the responsibilities of parenthood is to assist the child in knowing the truth about his biological background. His Honour therefore concluded that on the balance of probabilities, and taking into account the best interests of the child, parentage testing was required.

56. The importance of *Ames v Ames* cannot be underestimated. It confirms that parentage testing can be relevant where property proceedings are the sole substantive dispute under the FLA between the parties and that a non court ordered DNA test as to parentage may be inadmissible on the issue of whether a parentage test under s.69W of the FLA should be ordered. The steps taken to obtain that test may, however, be evidence of a genuine, bona fide doubt (or belief) as to parentage.

Inferences drawn if testing order contravened

57. In the decision of *G v H* (1994) 181 CLR 387, the High Court of Australia dealt with the question of what inferences may be drawn by the court "as appear just in the circumstances" where a person has contravened an order for the provision of a parentage test. This inference was pursuant to the former s.66W(5) of the FLA. The entitlement to draw inferences is now contained in s.69Y(2) of the FLA.

58. In *G v H*, the mother brought proceedings against the father, G, seeking orders for maintenance of the child. At first instance, a parentage test was ordered requiring G provide a sample. G declined to undergo the parentage test and claimed that he was not the father as the mother was a prostitute and engaged in sexual intercourse five days of the week with between three and six clients per day. H adduced evidence that when working as a prostitute she took contraceptive measures, including use of a diaphragm and required her clients to use condoms. This evidence was not challenged. H testified that when she was with G, she sometimes took no contraceptive measures and that G never used condoms.

59. The High Court held at 181 CLR 400-401 that where the evidence establishes that a particular person could be the father of a child, the question of actual paternity should be approached free of constraints inherent in the view that a question involved a grave or serious allegation. The majority consisting of Deane, Dawson and Gaudron JJ held at 181 CLR 397 that in the circumstances established by the evidence, the "just" inference to be drawn from G's contravention of the parentage testing order "was that it was more probable than not" that the outcome of the test would be unfavourable to him, which in turn must lead "to the finding that, on the balance of probabilities, he was the father of the child". In reaching this conclusion Deane, Dawson and Gaudron JJ held at 181 CLR 401 that the inferences, if any, to be drawn from a refusal of a person the subject of a parentage test to submit to the order will depend on the circumstances of the particular case. The inferences must be consistent with the evidence and other findings. As a general rule, there will be two inferences that may be drawn where a person contravenes a parentage testing order. The first inference will be as to the state of mind of the person who has contravened the parentage testing order. The second inference will be whether he or she is the parent of the child concerned. With respect

to the first inference, it could be inferred that G had chosen to take the risk of being held to be the father of H's child and thereby liable for maintenance and support rather than submit to a parentage test which would effectively disclose whether or not he was in fact the father. This was not an inference that was in any way inconsistent with the evidence, and there was no injustice involved if such a finding was ultimately made.

60. With respect to the second inference, it was noted that in the ordinary process of legal reasoning, an inference may be drawn contrary to the interests of a party who, although having it within his/her power to provide or give evidence on some issue, declines to do so. The inferences which were permitted under s.66W(5) were "as appear just in the circumstances". The majority noted that the inferences "are not confined to inferences that can or should be drawn as a matter of strict legal reasoning" and they could certainly extend beyond those inferences that may be drawn from other available evidence. They were not, however, permitted to be matters of mere surmise and must be consistent with the other evidence. In all the circumstances the "just" inference to be drawn was that it was more probable than not that the outcome of the court-ordered test would have been unfavourable to G which would lead to a finding that, on the balance of probabilities, he was the father of the child.

61. The judgment of Brennan and McHugh JJ, whilst agreeing with the majority, contained slightly different reasoning at 181 CLR 391 to find that where a question of paternity arises and the evidence discloses that one of two or more men must be the father, but it is uncertain which of the men is the father, a "slight preponderance" of evidence tending to show that a particular man is the father may be sufficient to establish paternity if that man fails without reasonable excuse to comply with a parentage testing order. The just inference to draw from a putative father's failure to comply with a parentage order is that "he knows facts which make it likely that the test would establish his paternity": applying *Re C (No 2)* (1992) 106 FLR 82; 15 FamLR 355.

62. *G v H* has not been contradicted by any later judgments of the High Court of Australia, despite amendments to the FLA. The inferences that may be drawn under s.69Y(2) of the FLA are therefore as follows:

a. the state of mind of the person who contravenes the order is that they have chosen to take the risk of being held to be the parent of the child; and
b. it is more probable than not that the outcome of the parentage test would be unfavourable to the person who refused to comply with the order.

63. The inferences that may be drawn for contravention of a parentage testing order were considered in *Vakros v Letsos* (2012) 47 FamLR 172; [2012] FamCAFC 40 (Full Court) per May, Ainslie-Wallace and Murphy JJ. That matter involved lengthy litigation and an appeal concerning orders and declarations made by a Federal Magistrate about parentage. The respondent, Letsos, asserted that he was the father of the child while the mother, Vakros, denied this and asserted that another man, being her present partner, was the father. At birth, no father had been recorded on the child's birth certificate. Four years after birth, the mother forwarded to the Registry of Births, Deaths and Marriages a statutory declaration asserting the current partner to be the father of the child. As a result, a second birth certificate was issued by the Registry showing the current partner to be the child's father. Letsos asserted that he was the father and sought orders that the mother undergo parentage testing.

64. The Federal Magistrate made orders for parentage testing but Vakros did not undertake the parentage testing. She then failed to attend two separate court dates and orders were made by a Federal Magistrate including a declaration under s.69VA of the FLA that Letsos was the father of the child. The Federal Magistrate found the presumption as to parentage arising from the registration of birth under s.69R of the FLA had been rebutted, particularly considering the circumstances in which the current partner's name was recorded on the birth certificate. Drawing on the evidence of Vakros' non-compliance with the order for parentage testing, the Federal Magistrate drew an inference under s.69Y of the FLA that Letsos was the father. Interim orders were made providing that Letsos spend supervised time with the child at a contact centre.

65. On appeal, Vakros argued that the Federal Magistrate had erred in drawing an inference against her pursuant to s.69Y of the FLA without determining whether a contravention of parentage orders had occurred and without determining whether the inference Letsos was the father was just in the circumstances.

66. In a unanimous decision, the Full Court held that the drawing of inferences under s.69Y is an exercise of judicial fact-finding. The drawing of an inference is based on consideration of the facts and circumstances established by the evidence and part of the consideration process is the determination of whether the inference is a "just" one. The Full Court held at 47 FamLR 184, [73] that there is no reason to bifurcate such an intellectual process. The Full Court confirmed that non-participation in an ordered parentage test is equivalent to a contravention and therefore enables a court to draw such adverse inferences as it sees fit and is just in the circumstances of the case.

Need for an "issue in proceedings under this Act"

67. It should be noted that the impact of parentage testing orders is not limited to matters within jurisdiction of the Commonwealth of Australia. As previously noted, the court may make orders for compliance with international agreements or arrangements under s.69XA of the FLA. The international scope of parentage testing was exemplified in *Secretary of the Attorney-General's Department v Evans* [2010] FamCA 913 per Coates FM. This matter involved an application by the Secretary under s.69XA of the FLA for a parentage testing order to enable an order of a Swedish court that a Mr Norris of Queensland submit to a blood test to be effected by a parallel order of an Australian court. The order of the Swedish court had been obtained by Mr Evans who believed Mr Norris to be his biological father. Reliance was placed by the Secretary on the international conventions *Recognition and Enforcement of Decisions Relating to Maintenance Obligations 1973* and the *Taking of Evidence Abroad in Civil or Commercial Matters 1970*.

68. The Federal Magistrate found at [45] that the authorities had always stressed that that there must be some issue in the FLA proceedings bringing parentage into issue. The Secretary did not adduce any evidence as to the nature of the proceedings in Sweden in which an order had been made. The Federal Magistrate noted that the request made by the Secretary failed to include the nature of the proceedings for which the evidence was required and had not given all necessary information in accordance with Article 3(c) of the *Taking of Evidence Abroad in Civil or Commercial Matters 1970*. Mr Evans was 20 years old at the time of the application and the only issue was determination of paternity. There was no issue of child maintenance. Further, the Secretary's application

did not disclose the purpose of the parentage testing. In short, the Secretary had failed to adduce evidence linking the Swedish proceedings and Swedish court order to a question in issue in proceedings under the FLA. While the purpose of the parentage testing may be for some other reason (such as to know a family medical history), without a tie to the FLA the orders for parentage testing could not be made. As noted by the Federal Magistrate at [66], the FLA cannot be used to determine mere questions of parentage. The mere fact there were civil proceedings in Sweden in which an order for a blood test to determine parentage was made did not warrant parentage testing orders being entered in Australia. To make an order under s.69W of the FLA, parentage of a child must be a question in issue in proceedings under the FLA. The Secretary's application was therefore dismissed.

69. The reasoning in *Secretary of the Attorney-General's Department v Evans* at [66] was echoed (although the decision was not referred to) in *Bima and Anor* [2014] FamCA 1170 per Berman J in refusing an application for parentage testing. In that matter, the first and second applicants (being a husband resident in Australia and wife resident in Indonesia) sought a declaration under s.69VA of the FLA they were parents of a child, R. The applicant wife was not the biological mother as the child R was born of a prior relationship the applicant father had with the biological mother. Originally the Minister for Immigration and Border Protection was a party to the proceedings but was disjoined on application to the Court. At final hearing it emerged that the applicants' true motive in seeking the declaration as to parentage under s.69A of the FLA was to assist the wife to "secure the entry of and the provision or granting of a visa to" the wife to enter the Commonwealth of Australia: at [7]. Further, the Court became satisfied from the husband's submissions that the focus of the application for a declaration as to parentage was "not for the purpose of any application under the Act" (being the FLA) but was brought for purposes "relating to the immigration dispute between the Minister" and the wife: at [9]. It was (somewhat startlingly) submitted for the husband that the purpose of the application was to "secure a declaration that is conclusive evidence of parentage for the purpose of all laws of the Commonwealth": at [9].

70. The Court rejected the application for a declaration under s.69VA of the FLA and held that the section has to be read with s.69V of the FLA, the latter section requiring the "parentage of a child" to be "a question in issue in proceedings under this Act"

(referring to the FLA): at [17]. In other words, the gateway for making a declaration is the parentage of a child must be an issue in proceedings under the FLA. In the current proceedings there was no issue as to matters of parentage and the parentage issue related solely to matters of the wife's ability to gain immigration status within the Commonwealth of Australia: at [22]-[23]. The Court also considered but did not determine the application was an abuse of process, being an application which "put the process of the court in motion" for a purpose which the process of the court was not "intended to serve or when the process is incapable of serving the purpose which it is intended to serve": at [25] citing *Jago v District Court of NSW* [1989] HCA 46; (1989) 168 CLR 23 per Brennan J at 47-48.

71. The salutary lesson of these preceding decisions is that an application for parentage testing orders and declarations cannot be made for a purpose ancillary to the FLA such as mere parentage or obtaining a declaration for the purposes of other laws of the Commonwealth. There must be at a minimum a question as to the parentage of the child in issue in proceedings under the FLA. If the question is not germane to an issue in proceedings, the evidence of parentage is arguably irrelevant under s.55 of the *Evidence Act 1995* (Cth) and an application for a declaration as to parentage may be an abuse of process.

Conclusion

72. A parentage test under s.69W of the FLA cannot be obtained to determine mere question of parentage. Such a test should only be ordered if the following can be established:
    a. parentage is relevant to an issue in proceedings under the FLA;
    b. there is evidence of a genuine, bona fide and reasonable doubt or belief as to parentage; and
    c. it is in the best interests of the child to order the testing including the long-term interest of the child to know his or her parentage.

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