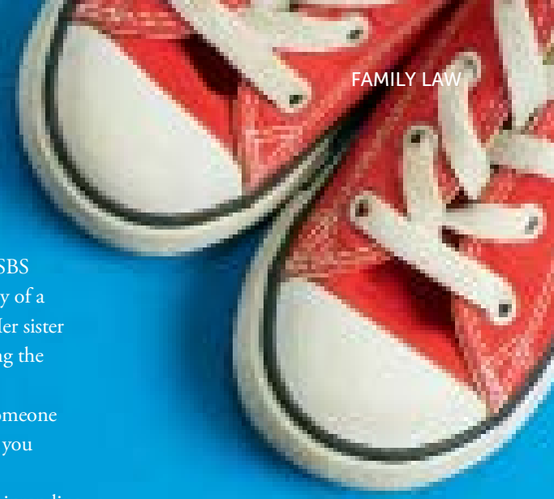

ONE STEP AT A TIME

FLESH AND BLOOD DRAMAS FROM THE FAMILY COURT

From surrogacy to DNA parentage testing and social media uses and abuses, family law is evolving far more slowly than the make-up of modern parenting units. **DENISE CULLEN** reports.

Television sitcoms often best map the changing nature of the nuclear family. When it premiered in 1969, *The Brady Bunch* featured a then boundary-pushing blended family of eight. Fast forward 40 years to *Modern Family*, where themes such as same-sex marriage and international adoption make the second wives and stepfamilies of the former series seem mundane.

The shape of the nuclear family isn't just changing in the US. Census data shows that Australian families are more diverse than ever.

We're getting married later, if at all. We put our plans for kids on ice – literally. We cohabit. We're quicker to call it quits. Sole-parent families are growing in number faster than two-parent families and the proportion of blended and stepfamilies continues to climb.

Popular culture has been quick to identify – and reflect – shifting social mores and technological developments. The law, however, tends to respond more cautiously, says Heather McKinnon, a family lawyer working in Slater + Gordon's Coffs Harbour office.

"Science moves much more rapidly than the law," McKinnon says. "It's often a case of legislation trying to keep up with what's happening in the real world."

Bearing baby

For most people, the desire for a family runs deep but, for a range of reasons, not all couples are able to have their own children.

They can use a surrogate, who carries a baby conceived using sperm or eggs from either intended parent, the surrogate's own eggs or a donor's.

However, surrogacy legislation has struggled to keep pace with developments in reproductive technology. It is complicated and confusing, given that different laws apply in each state and territory.

In NSW, the *Surrogacy Act 2010* (NSW) permits surrogacy so long as the only money paid is to reimburse the surrogate's medical costs. Commercial (for-profit) surrogacy arrangements, and advertising surrogacy services, are prohibited.

In a landmark case in 2012, two men became the first same-sex couple in NSW to be declared the parents of a baby born through a surrogate.

The presiding judge in *MM & KF re FM* [2012] NSWSC 445 said he was satisfied the pregnancy did not arise through an illegal commercial arrangement, and that the birth mother agreed to no longer be recognised on the birth certificate.

Despite such stories, Alfonso Layson, a senior associate with Sarah Bevan Family Lawyers, says altruistic surrogacy remains rare and is usually restricted to family members. For example, a recent SBS *Insight* program screened the story of a woman born without a uterus. Her sister offered to carry her child, fulfilling the woman's dream of motherhood.

"It can be really hard to find someone who is willing to have a child for you without paying," Layson says.

The *Surrogacy Act* requires that intending parties draw up surrogacy agreements. However, because these are not binding, parents or the surrogate can change their minds. "People worry that when push comes to shove they may not be able to have their child," he says.

Layson says international surrogacy enquiries outnumber local ones 10 to one.

Prospective parents who can afford the fees, which can nudge the $200,000 mark, favour Canada, or California in the US. Alternative, cheaper destinations have emerged, but these are less regulated, and difficulties can arise when parents return to Australia with the baby.

The highly publicised case of Thai-born baby Gammy, who was the centre of an international surrogacy dispute in 2014, has highlighted the complexities that can arise.

Cases that don't make the headlines regularly become immigration, rather than family law, issues.

According to the *Surrogacy Matters* report, released last year following a parliamentary inquiry into surrogacy arrangements, the Department of Immigration and Border Protection deals with 250 offshore surrogacy cases each year.

A key recommendation arising from the report was that the law should protect a child's best interests, including their right to know about their origins.

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> MARK STREETER, STREETERLAW

Heather McKinnon, Slater +Gordon

Alfonso Layson, Sarah Bevan Family Lawyers

William Boyce, Boyce Family Law

Mark Streeter, Streeterlaw

Paternity blues

The same yearning to raise one's own flesh and blood can also lead fathers on a quest for certainty, using parentage testing. McKinnon notes that before DNA testing, the number of men who suspected they were raising a child who was not their own fed a booming trade in private detectives seeking to expose wives' infidelities. Now, men can allay their fears with a "peace of mind" DNA test. Though valid, the test does not meet the stringent standards required for admissibility in court.

According to William Boyce of Boyce Family Law, about one in every three or four men who submit a sample to a laboratory for a "peace of mind" test find out they are not the child's biological father.

While this is a staggeringly high figure, Boyce notes that it comes from a biased sample in which the men are already doubting their paternity. "This statistic probably reflects the strength of human instincts when something is amiss," he says.

DNA tests can only determine parentage with a high degree of probability, not absolute certainty.

The Legal Information Access Centre (LIAC) published a case in which DNA testing showed a 98.5 per cent likelihood that the man presumed to be the father was, in fact, the father. Despite the man's continuing and strenuous denial of parentage, he was forced to pay child support. Only years later, after the man's brother admitted to a sexual relationship with the mother, did parentage testing establish with a 99.5 per cent probability that the brother was the child's father.

LIAC figures show that 3,000 parentage tests are conducted in Australia each year. Usually, they are linked to financial obligations such as child support payments.

Writing in the *Australian Journal of Family Law* in 2005, Lisa Young and Stephen Shaw pointed out that under s 143 of the *Child Support (Assessment) Act 1989* (Cth), courts can order the repayment of child support where paternity is disestablished.

Though the courts have made such orders in several cases, they also consider other matters, including property settlement outcomes, and the financial impact on the mother of repaying the child support.

Cases of proven non-paternity – where it has also been shown that the child's mother knowingly misled the supposed father – have led to men taking mothers to civil court actions for "paternity fraud".

For example, in *Magill v Magill* [2005] VSCA 51, a man used the tort of deceit to sue his former wife for damages after DNA testing established that two of the three children he thought he'd fathered were not his, and were instead the children of a family friend.

In 2002, Mr Magill won $70,000 in the Victorian County Court for economic loss in relation to the support of his wife and the two children in question, as well as psychological injuries incurred through his wife's deception. However, three years later, a court overturned that decision on appeal.

Antisocial media

Non-custodial parents can use technology and social media, such as Facebook and Instagram, to stay in touch and involved with their children, and its use is being increasingly included in parenting agreements.

For example, McKinnon notes that if a father and his child both have a copy of the same book, they can read bedtime stories together via Skype.

But parents also need to be aware of their legal obligations relating to social media, warns Streeterlaw's Mark Streeter.

"It's illegal to publish the names or to identify witnesses in family law proceedings, and that includes on social media," he explains.

Parents often turn to social media to vent their anger or frustration in the mistaken belief that such posts are restricted to their inner circle of friends, making them "private".

"That doesn't stop someone reposting or republishing or reliking something, which then gets distributed among a greater network," Streeter says. "Social media allows for a much wider distribution of bad news or evidence of so-called 'crimes' in the sense of relationship offences."

People involved in family law proceedings must be mindful of any detrimental effects their social media activities will have on other parties, including their children, he says.

Communications made via Facebook, Twitter, Instagram and similar forums increasingly are being used as evidence in family law proceedings, so people who make intemperate comments might find they adversely affect their court matters.

For example, in *Gilkes & Lenton* [2008] FMCAfam 775, the Federal Magistrate described an extract that had been tendered from the mother's Myspace page as "derogatory in quite offensive terms of (the father)".

In *Bosco & Sullivan* [2015] FamCA 962, Facebook posts by the father were described as "disturbing, offensive, intolerant (and) horrific". The father had to provide a printout of a year's worth of his posts, and the court issued an injunction restraining him from "abusing, denigrating or otherwise speaking badly of the mother or her family on Facebook".

Sometimes, even legal representatives attract the ire of disgruntled parties.

In *Xuarez v Vitela* [2012] FamCA 574, the court granted an injunction that required the father to remove material from his website that detailed family law proceedings he was involved in, including the names and, in some cases, photographs of people he described as "corrupt" legal professionals. **LSJ**

Ethics

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