Comment
Parentage: Some testing problems

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Introduction

This note reviews a series of three cases dealing with parentage testing orders: *Tryon v Clutterbuck* (2007, Coleman J),[1] *Ames* (2009, Dawe J),[2] and, especially, the Full Court decision in *Brianna* (2010).[3]

The importance of determining parentage has always been recognised. As Fogarty J said in 1993:

> 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 . . .[4]

In earlier times, there were various presumptions about parentage which sometimes applied in ways that had more to do with advancing some social policy or interest (eg, where they suppressed the fact of illegitimate birth) than finding the truth.[5] Naturally, when blood tests came upon the scene the courts were keen to use them. As Denning MR put it 30 years ago: 'In the absence of strong reason to the contrary, a blood test should be made available. The interests of justice so require.'[6]

Medical technology has advanced since the days of blood tests. As Bryant CJ said in *Brianna*:

> The increasing availability of parentage testing and the ease with which it is now possible to obtain tests is notorious. The advances in science from blood tests to the DNA testing now available already indicate the scientific advances which have been made and which continue to be made. The blood tests which themselves could be invasive have now been replaced by the provision of genetic material such as mouth-swabs and hair analysis. This means that there is virtually no physical invasion at all.[7]

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1 *Tryon v Clutterbuck* (2007) 211 FLR 1; (2007) FLC 93-332; [2007] FamCA 580.

2 *Ames v Ames* (2009) 42 Fam LR 95; [2009] FamCA 825; BC200950740.

3 *Brianna v Brianna* [2010] FamCAFC 97; BC201050480 (Bryant CJ, Finn and Thackray JJ, 28 May 2010).

4 *G v H* (1993) 16 Fam LR 525; (1993) 113 FLR 440; (1993) FLC 92-380 at 79,942; this case was discussed in R Chisholm, 'Paternity and Public Interests: In the Marriage of G and H' (1993) 7 *AJFL* 270.

5 *Russell v Russell* [1924] AC 687; (1924) 40 TLR 713; *Watson v Watson* [1954] P 48; *Ah Chuck v Needham* [1931] NZLR 559.

6 *S v McC (formerly S) and M (S intervening)* [1970] 1 All ER 1162 at 1165, quoted by Bryant CJ in *Brianna* [2010] FamCAFC 97; BC201050480 at [22].

7 Ibid, at [28], citing the ALRC's Report, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report 96, 2003.

Because the procedure is now painless and non-invasive, and because the results give virtual certainty, it seems likely that the courts today would find it even easier than in the past to draw inferences from a person's refusal to participate.

Fogarty J once said that parentage is 'now a medical and not a legal issue'.[8] While one can see the point, this is not literally true. Determining parentage for legal purposes involves the application of rules of law and sometimes the making of court decisions and, as these three cases show, the process can still pose difficult problems. The decisions provide considerable guidance as to the current law relating to the making of parentage testing orders. They also raise an intriguing legal issue, namely, whether the parentage testing order is, itself, a 'parenting order' within the meaning of the Act. If it is, of course the child's best interests would be the paramount consideration and the various other provisions about making parenting orders would come into play.

Tryon v Clutterbuck[9]

Mr Clutterbuck brought an application in the Federal Magistrates Court to spend time with the two children (who had been born when the wife was married to Mr Tryon, her husband). He said that he had had a sexual relationship with the wife, and that she had told him that he was the father of the two children. The wife however claimed that her husband, Mr Tryon, was the father.

In October 2006 a Federal Magistrate made a parentage testing order, from which the wife appealed. The substantial ground of appeal, which came before Coleman J, was that an order under s 69W of the Family Law Act 1975 (Cth) was a parenting order, and that the Federal Magistrate had erred in failing to consider ss 60CA, 60CB and 60CC of the Act before making the parentage testing order. Coleman J ultimately upheld the appeal on the grounds of inadequate reasons, and found it unnecessary to determine whether the order was a parenting order. However his Honour discussed the issue, and expressed the view that it was. His discussion of this issue will be considered later in this article.

The case has had an interesting subsequent history. At the rehearing, a different Federal Magistrate again made orders for parentage testing, but dismissed the father's interim application for time with the children. The mother did not comply with the order and, accordingly, in later proceedings Mr Clutterbuck submitted that an inference could be drawn, to the effect that he was the father, and he sought a declaration to that effect. The Federal Magistrate made such a declaration, and again the mother appealed. The Full Court dismissed the appeal.[10] Some points arising from this decision will be discussed at the conclusion of this article.

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8 *G v H* (1993) 16 Fam LR 525; (1993) 113 FLR 440; (1993) FLC 92-380 at 79,942, quoted by Bryant CJ in *Brianna*.

9 *Tryon v Clutterbuck* (2007) 211 FLR 1; (2007) FLC 93-332; [2007] FamCA 580. In *Letsos v Vakros* [2009] FMCAfam 897; BC200907742, Kemp FM followed the dicta in *Tryon* without discussion.

10 *Tryon v Clutterbuck (No 2)* (2009) 42 Fam LR 118; [2009] FamCAFC 176; BC200950837 (Finn, Warnick and Strickland JJ). The case was again before the Full Court in April 2010,

Ames[11]

In *Ames*, the husband applied for a parentage testing procedure in circumstances where there were property proceedings, but no other proceedings, before the Family Court. The question was the paternity of a child, Y, born to the wife while she and the husband were married and living together, and aged 14 at the time of the proceedings.

The circumstances were unusual. The husband had brought proceedings in the District Court seeking damages against the wife for deceit, based on the wife's alleged misrepresentation that Y was the husband's son. The husband had the child DNA tested, without consulting the wife. He obtained the child's cooperation by telling him, untruthfully, that the purpose of the test was to predict what inheritable diseases the child might develop. After the test, the husband told Y that he was not the child's father. Later, the husband filed the application for parenting testing that came before Dawe J.

In the course of a carefully reasoned judgment, Dawe J held, first, that the existing DNA report could not be used in the Family Court proceedings. In obtaining it, the husband had lied to the child, and it was therefore obtained 'improperly' under s 138 of the Evidence Act (and, indeed, an offence may have been committed). The unreliability of the test,[12] and the way in which it had been obtained, led Dawe J to refuse to receive it as evidence of Y's paternity.

Her Honour then applied the provisions of the Act, in particular s 69W, to the husband's application for parentage testing. The main points, in brief, were:

- Y's paternity was 'a question in issue in proceedings under this Act', being relevant to the property proceedings under s 79(4)(g), s 75(2)(c), etc.[13]
- The husband had a doubt about Y's parentage.
- A parentage testing order is a 'parenting order' under s 64B,[14] and thus the provisions relating to the child's best interests apply (especially ss 60CA and 60CC).
- Having regard to the child's interests, the court should make the order, but on condition (s 69X) that the husband was to pay the costs, and the parties were restrained from using the test except for financial proceedings between them in the Family Court.[15]

Mr and Mrs Tryon arguing that they had a right to be legally represented at an interview with a family consultant in relation to the preparation of a report: *Tryon v Clutterbuck* [2010] FamCAFC 80; BC201050296.

11 *Ames v Ames* (2009) 42 Fam LR 95; [2009] FamCA 825; BC200950740.

12 The husband had performed the test at home.

13 Under s 69W, the question of parentage has to be 'a question in issue in proceedings under this Act'.

14 Dawe J agreed with dicta in *Tryon v Clutterbuck* (2007) 211 FLR 1; (2007) FLC 93-332; [2007] FamCA 580; and discussed *Jacks v Samson* (2008) FLC 93-387; 221 FLR 307; [2008] FamCAFC 173; BC200851264.

15 The wife had said that the husband wanted the test to assist him in the District Court proceedings, and Dawe J thought that the history formed a basis for a 'reasonable belief' to that effect: (2009) 42 Fam LR 95; [2009] FamCA 825; BC200950740 at [114].

The third point, that parentage testing order is a 'parenting order', will be considered below.

Brianna[16]

Introduction

This case requires closer attention. The facts in *Brianna* were as follows. The child was aged 10. The parties were married, and the husband was recorded on the birth certificate in the United States as the child's father; he had also executed an affidavit of parentage for a US state, in which he acknowledged he was the biological father of the child, and also waived his right to parentage testing and the right to contest parentage in a court. As a result, there was a rebuttable presumption that he was the father.[17] He had also been assessed as liable to pay child support.

The wife had commenced proceedings in the Family Court of Western Australia seeking orders in relation to the welfare of the child and financial claims both for the child's benefit and her own. The husband had sought a parentage testing order. He claimed that he was not the father: he met the mother only after the child was born, and he had previously had a vasectomy: he had agreed to be recorded as the father to meet US immigration requirements, so the child could settle in Australia. He said that both parties always knew he was not the father. The (unrepresented) mother's arguments were along the lines that the father had given up his rights and could not now deny that he was the child's father. Both parties were unrepresented.

The trial Judge made an order for parentage testing. He found that the husband had established a prima facie case for his claim that he was not the child's biological father. The execution of the US parentage affidavit for the US state did not prevent the court from exercising its jurisdiction to order parentage testing in an appropriate case, although it 'might have consequences for the parties elsewhere'. The trial Judge was satisfied that the husband's evidence disclosed a genuine issue to be determined, and that parentage testing should be ordered. The mother appealed.

In the Full Court, there were two judgments: one by the Chief Justice and one by Finn and Thackray JJ. The common conclusion was that there was an error, in that the trial Judge had not considered the interests of the child, which were, on any interpretation, an important consideration.[18] However the Full Court re-exercised the jurisdiction and reached the same result, so the appeal was dismissed and the parentage testing order confirmed. The wife raised various other appeal grounds, but the Full Court dismissed them all, and none requires comment. The court's approach to the redetermination of the issue, however, is of considerable interest.

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16 *Brianna v Brianna* [2010] FamCAFC 97; BC201050480 (Bryant CJ, Finn and Thackray JJ, 28 May 2010).

17 Sections 69R, 69T.

18 See [2010] FamCAFC 97; BC201050480 at [93] (Bryant CJ), [159]–[160] (Finn and Thackray JJ).

The redetermination by the Full Court

The redetermination of the application for parentage testing orders is dealt with by Finn and Thackray JJ,[19] with whom Bryant CJ agreed.[20]

The first question was whether paternity was an issue that arose in proceedings under the Act. The proceedings had been rather confused. There were parenting proceedings, but it seemed that by the time the parentage testing order was made both parties wanted the same outcome. If so, then it would seem that the child's parentage could hardly have been regarded as an issue that arose in the proceedings. Child support was irrelevant, because there had to be proceedings under the Family Law Act 1975 for s 69W to apply. However there were proceedings for spousal maintenance, and the husband's paternity would have been an issue in those proceedings. So paternity was an issue that arose in proceedings under the Act, and thus s 69W applied.

Next, the judgment considered whether the applicant had a reasonable doubt, and found that he did. Although care should be taken in placing reliance on authorities which pre-date the 2006 amendments,[21] it remained good law that the applicant for such tests must have a reasonable doubt as to the paternity of the child in question; the court would not 'order parentage testing merely because it is requested to do so'.[22]

Next, their Honours agreed with the trial Judge that the husband's prior conduct in making false statements about his paternity did not prevent the court from exercising the jurisdiction under s 69W. The judgment then says:

> The interests of the child thus become the determinative, or in other words, paramount consideration in this case.[23]

This sentence seems to assert that the paramountcy principle applies. But this is curious, because the judgment carefully leaves open the question whether a s 69W order is a parenting order. If the parentage testing order is not a parenting order, how could the paramountcy principle apply? Under the Act as it is now drafted, the 'paramount consideration' principle is expressed to apply to a number of specific matters, which include the making of parenting orders, but do not include s 69W, in relation to which, as the Chief Justice remarked, 'the Act gives no assistance as to how that discretion might be exercised'.[24] In my view it is clear, as the Chief Justice indicated at one point,[25] that if a parentage testing order is not a 'parenting order', the court's discretion to make the order is at large, although it must be exercised judicially, and the child's interests must be treated as a relevant issue.

If so, what are we to make of para [172]? The word 'thus' suggests that something in the previous paragraphs has led to the conclusion expressed in this paragraph. The wife's only substantial points seem to have been (i) that ordering the test would have a negative impact on the child, and (ii) that the

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19 Ibid, at [163]–[183].
20 Ibid, at [108].
21 Ibid, at [161].
22 Ibid, at [169], affirming Butler J in *F and R* (1992) 15 Fam LR 533; 106 FLR 145; (1992) FLC 92-300.
23 Ibid, at [172].
24 Ibid, at [20].
25 Ibid, at [19] and [20].

husband, having asserted that he was the father, could not now ask for a parentage testing order to show he was not. The paragraphs leading up to this paragraph dealt with the husband having a prima facie case and the circumstances of his deceiving conduct not precluding the court from making a parentage testing order. Perhaps what the Full Court meant to say in para [172] was not that the paramount consideration principle applied, but only that since nobody had asserted any other competing interest, the impact on the child was the only matter that needed to be considered.

The impact on the child: The importance of knowing the truth

The judgment then deals with the impact of the order on the child. The substance of the reasoning appears from the following:

> . . . in her affidavit evidence the wife referred to the threat to the child of a loss of identity if the parentage tests are carried out, to the child's unwillingness to participate in any tests, and to the severe emotional and psychological damage that the child has suffered because of these proceedings.
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> . . . these concerns which the wife has expressed regarding the child are serious. . . . if the parentage tests sought by the husband are carried out and if they establish that the husband is not the father of the child, then it is only that fact which will be established. In those circumstances the true paternity of the child will not of course, be established; the only certainty that the child will have will be that the husband is not his father; he will not know who his true father is.
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> However, this unfortunate consideration must be balanced against the possibility that the child may well already be aware that the husband has claimed that he is not his father. Even if the child is not already aware of the husband's claim, a time may come when he will realise that if the husband's account of when he first met the wife is accurate, then the husband cannot possibly be his father. Thus, if there is not already uncertainty in the child's mind about his paternity, then such uncertainty may well arise. Parentage testing at this time will at least establish the certainty of whether or not the husband is his father.[26]

The judgment then says that 'it is important to note that for some decades now the courts in this country and in England have recognised the interest which all children have in knowing their true parentage', citing a number of authorities.[27] The 2007 English decision *Re D (Paternity)* is a striking example: the child was 'adamant to anyone who will listen to him that as [the non-paternal] father is his father, that he wants nothing to do with the idea of the applicant and that he is deeply resistant to scientific testing', but the court ordered the test, saying that the child's identity was something he should know and that it was thus in his best interests 'to know the truth . . . and that in the end truth is easier to live with than doubt or fiction'.[28]

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26 Ibid, at [173]–[175].

27 *S v McC (orse S); W v W* [1972] AC 24; [1970] 3 All ER 107; [1970] 3 WLR 366 (Lord Hodson); *G v H* (1994) 181 CLR 387 at 391 per Brennan and McHugh JJ; 124 ALR 353; BC9404649; *G v H* (1993) 16 Fam LR 525; (1993) 113 FLR 440; (1993) FLC 92-380 at 79,942 per Fogarty J; *Taylor v Burgess* (2002) 29 Fam LR 167; (2002) FLC 93-120; [2002] NSWSC 676; BC200204233 (NSW SC).

28 *Re D (Paternity)* [2007] 2 FLR 26 (Hedley J), discussed by Bryant CJ in *Brianna* [2010] FamCAFC 97; BC201050480 at [23].

Their Honours then expressed the following conclusion:

> This recognition by the law of the child's long term interest in knowing the truth about his parentage, coupled with the likelihood earlier discussed of the child already being aware, or of his becoming aware in the future, of the controversy surrounding his paternity, must outweigh not only the wife's expressed concerns regarding the threat to his loss of identity, but also the emotional and psychological harm which she reports he has suffered.
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> It must also be borne in mind in connection with the matter of harm or distress to the child, that the proposed tests can be carried out in a non-invasive way. Thus, any practical objection he may have to the test can be avoided. Any other objection which he may voice to the test must be subsidiary to the long term interest which the law recognises that he has in knowing about his parentage (or at least, so much as can be known at the present time).[29]

We should not be distracted by the curious way in which the 'possibility' in para [175] had become a 'likelihood' by para [180]. What emerges from the discussion, I think, is that the court is likely to approach these applications with a firm view that normally children's interest in knowing the truth about their paternity will lead to an order being made. This seems very much in keeping with the current trend of authorities internationally as well as in Australia.[30] Indeed on the facts here this is a strong decision: the need for a parentage testing order arose in financial proceedings, and although it seems that the only thing said about the child was the distress that the revelation might cause him, and although a finding of non-paternity would leave the child without any known father, the Full Court determined that the parentage testing order should be made.

Nevertheless, so long as the legislation gives the court a discretionary power each case must be evaluated, and it seems useful to remind ourselves about two earlier cases dealing with a somewhat similar issue, namely, whether the court should require a parent to disclose to a child the truth about the child's paternity.

In *Re C and V* (1983),[31] the parties separated in 1969, about a year after their child was born. Then, when the child was 13 months, the wife travelled from Victoria to the Northern Territory, and remarried. The father did not see anything more of the child. The mother and her husband had misled the child into believing that her husband was in fact the father. In 1973, when the boy was 5, the Supreme Court of Victoria dealt with the father's application that his identity should be disclosed to the child and that he should have access. The judge found that the father was not in any way disqualified from having access to the child, and that the child must eventually learn that the mother's husband was not his true father. He concluded, however, that it would be detrimental to the child to learn the truth at the present time, and the best time for him to be informed would be in about 3 or 5 years, or perhaps when he was an adolescent.

The father renewed his application, to the Family Court of Australia, in late 1981, and it was determined by Lusink J in 1982. Her Honour dismissed his

29 [2010] FamCAFC 97; BC201050480 at [180]–[181].

30 The same theme has transformed adoption law in recent times. See, eg, Adoption Act 2000 (NSW) Ch 8, 'Adoption Information'.

31 (1983) 50 ALR 441; 9 Fam LR 31; (1983) FLC 91-333.

application. She found that the wife's family was loving and close-knit, that the child was emotionally fragile, that the husband desperately wanted to adopt the child, and that it was 'their entrenched belief and hope that the lie they are living will never be exposed'. The father appealed, and the Full Court explored the dilemma involved:

> There is in fact little difference between the experts in identifying the advantages and disadvantages. The first advantage is that he would know the truth and would be told it in a controlled situation with the support of his family. It should, however, be pointed out that this was seen as a benefit only if the discovery of the truth was inevitable. The risk of concealing the truth is that inadvertent discovery may involve even greater potential trauma than if D were told now by his mother. The disadvantage is that D is likely to undergo some degree of trauma, and possibly anger and resentment, however and whenever he is told and that he may cope with this better when he is older.[32]

The Full Court's view was as follows:

> In our view it would have been desirable, indeed almost essential, in this child's interests to tell him the truth years ago. In our view it would also be proper for the mother to take this step very soon, voluntarily, and at a time which seems most appropriate to her. If she were able to do so, however reluctantly, she may well be sparing D from the shock of discovery through other means and she may well be able to ensure that he be spared the worst trauma by the support and care of his family.[33]

The Full Court concluded, however, that it agreed with the trial Judge:

> From the court's point of view, however, the issue is whether the risk of accidental discovery in the immediate future is so high that D should now be told the truth and thereby be subjected to pain and distress which may be greater in a situation where the mother is acting under compulsion. The evidence falls short of establishing this.[34]

In a much more recent case involving a somewhat similar situation, *W v G (No 1)*,[35] Carmody J held that it was in the child's best interests to make an order requiring disclosure. His Honour concluded that overall, the advantages of telling the child in a managed way, perhaps with expert assistance, outweighed the disadvantages for her of being told the truth at this point in her life. Accordingly, he determined that a mandatory injunction would be made requiring the mother to inform the child of her birth history, and arranged for further argument to determine how that should most appropriately be done.

In *Brianna*, by contrast, the Full Court had minimal assistance in determining whether a parentage testing order would benefit the child: the parties were unrepresented, and there seemed little in the way of reliable or expert evidence. It seems a shame that there was no independent lawyer for the child. It seems an ideal case for such an appointment — an important issue, the parties unrepresented, and the court having little assistance in determining either the law or the facts.

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32 Ibid, at ALR 447; Fam LR 36.
33 Ibid.
34 Ibid, at ALR 448; Fam LR 37.
35 *W v G (No 1)* (2004) 35 Fam LR 417; (2005) FLC 93-247; [2004] FamCA 427.

The two cases just discussed indicate, I think, that it should not be assumed that the court will always be limited in the way it was in *Brianna*. Especially, perhaps, since the introduction of 'less adversarial' trials, in such cases it will surely be important for the court to ensure, whether by way of appointing an independent children's lawyer or otherwise, that there is material that will allow it to assess in a careful and informed way the various advantages and disadvantages of each alternative, and also to deal in appropriate detail with consequential matters such as what the child is to be told, and when, and by whom.

What emerges from this decision may perhaps be summarised as follows:

- The Full Court left open the correctness of the view that a parentage testing order is itself a 'parenting order' under the Act.
- The Full Court probably did not mean to say in para [172] that the paramount consideration applies, only that the child's interests was the only relevant matter having regard to the conduct of the case.
- In determining the best interests of the child, the decision suggests that a child's long-term interest in knowing the truth of their parentage will generally prevail over short-term distress and difficulties that might follow the revelation that a man previously taken to be the father is not in fact the father, even if the result is that the child has no known father.

Is a s 69W order a parenting order?

We come, at last, to the question whether a parentage testing order is a parenting order within the meaning of the Act. The reasoning that led Coleman J in *Tryon* to an affirmative answer can be seen below. The court's reasoning which leads it to conclude, however, that the order under s 69 was a parenting order, proceeds as follows.

> Section 64B(1) of the Act, which is headed 'Meaning of parenting order and related terms' outlines what a parenting order is or, perhaps more accurately for present purposes, indicates how that question is decided.
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> Relevant for present purposes then is s 64B(2)(i) which provides:
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> (2) A parenting order may deal with one or more of the following: . . .
>
> (i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.
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> It is tolerably clear that the paternity of a child is an aspect of the welfare of a child. That is to say who is, or is not, a child's biological father as a matter of commonsense, appears to be capable of being an aspect of the welfare of that child. That being so, an order under s 69W would be a parenting order. The significance of that, as the submissions for the appellants make clear, is that s 60CA is enlivened. Section60CA of the Act says:
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> In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.[36]

Coleman J referred to s 60CC and s 65AA, and continued:

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36 (2007) 211 FLR 1; (2007) FLC 93-332; [2007] FamCA 580 at [28]–[30].

> . . . These statutory provisions are persuasive that the s 69W order was a parenting order, and that his Honour was obliged to have regard, to the extent that they were relevant, to the matters referred to in s 60CC.[37]

In *Ames*, Dawe J quoted these comments, treating them, although not binding, as persuasive.[38] She also noted that Henderson FM had treated s 60CC as applicable, indicating that she treated the order as a parenting order.[39] Dawe J said:

> . . . I conclude that the parentage testing order is an order which relates to the court's determination of the parentage of a child and that the order for parentage testing is an order which deals with an aspect of the welfare of a child. I agree with his Honour Justice Coleman that determining who is or who is not a child's biological father is capable of being an aspect of the welfare of that child and that therefore an order under s 69W would be a parenting order within the definition of s 64B(2)(i) . . ..[40]

In the second Full Court appeal in *Tryon*, however, the court was careful not to be taken to endorse Coleman J's view.[41] And in *Brianna*, Finn and Thackray JJ, with the Chief Justice agreeing,[42] were less than enthusiastic about the proposition. They first pointed out that if a parentage testing order is a 'parenting order', then s 60CA must be applied, and the court must under s 61DA apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility. They referred to the argument that the 'catch-all' matter mentioned in s 64B(2)(i)), 'any other aspect of the care, welfare and development of the child or any other aspect of parental responsibility for a child', includes an order for parentage testing, on the basis that such an order relates to an 'aspect' of the 'welfare' of the child, but then identified difficulties with it.

Their Honours said that a difficulty with the argument is that the drafter thought it necessary to provide expressly that the child's welfare must be paramount in s 67ZC, which is later in Div 8 of Pt VII, and '[i]t would appear therefore that the drafter considered that the reference in s 64B(2)(i) to "welfare" was of limited operation'. They made the same point about the way the principle is expressly applied to location and recovery orders in subdiv C of Div 8 of Pt VII.[43] They continued:

> The question therefore arises as to why, when the drafter came to Subdivision E of Division 12 of Part VII ('Parentage Evidence'), no mention was made of the best interests test in the section concerning the power to make a declaration of parentage (s 69VA), nor in the section concerning the power to make orders for parentage testing (s 69W).[44]

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37 Ibid, at [33].
38 (2009) 42 Fam LR 95; [2009] FamCA 825; BC200950740 at [63].
39 Dawe J also discussed *Jacks v Samson* (2008) FLC 93-387; 221 FLR 307; [2008] FamCAFC 173; BC200851264.
40 (2009) 42 Fam LR 95; [2009] FamCA 825; BC200950740 at [101].
41 *Tryon v Clutterbuck (No 2)* (2009) FLC 93-412 at [57] (Finn J) and [139] (Warnick and Strickland JJ).
42 *Brianna* [2010] FamCAFC 97; BC201050480 at [92]. At [89], her Honour had suggested that a passage in *Magill* might give 'further weight' to Coleman J's view.
43 Sections 67S and 67V.
44 *Brianna* [2010] FamCAFC 97; BC201050480 at [157].

Finn and Thackray JJ left it at that, saying that this was not the case in which the question could or should be determined, since the court did not have the benefit of legal argument.[45] As already noted, all appeal judges agreed that it was not necessary to determine the issue in order to decide the appeal.

There are, perhaps, some further comments that might be made about the interesting proposition that a s 69W order is a parenting order. It's useful to put the important legislative words in context. Section 64B(1) relevantly says that a parenting order is 'an order under this Part . . . dealing with a matter mentioned in subsection (2)'. The matters mentioned in subs (2) are (emphasis added):

(a) the person or persons with whom a child is to live;
(b) the time a child is to spend with another person or other persons;
(c) the allocation of parental responsibility for a child;
(d) if 2 or more persons are to share parental responsibility for a child — the form of consultations . . .;
(e) the communication a child is to have with another person or other persons;
(f) maintenance of a child;
(g) the steps to be taken before an application is made to a court for a variation . . .;
(h) the process to be used for resolving disputes . . .;
(i) *any aspect of the care, welfare or development of the child* or any other aspect of parental responsibility for a child.

Does a parentage testing order 'deal with' an 'aspect of the welfare of the child'? Of course the facts of parentage will be relevant to a child's welfare. But so will the parenting ability of those having the child's care, the quality of the local schools, and global warming. The section does not say that a parenting order is an order about something relevant to a child's welfare. The question is whether the order '*deals with*' the child's welfare. I'm not sure that a parentage testing order does. Its point is simply to determine parentage, a question of fact.[46]

For this reason, the various guidelines and principles governing parenting orders don't readily fit the situation where the court is considering whether to make an order to determine a child's parentage. Applying the 'primary' considerations, which often mention parents, requires the court to know the identity of the parents. Similarly, how can the court apply the presumption that it is in the child's best interests for the parents to have equal parental responsibility (s 61DA) when the court is engaged in finding out who the parents are?

There is force, too, in the points made by Finn and Thackray JJ. Section 69W, dealing in detail with orders for carrying out testing procedures, seems to stand separate from the provisions about parenting orders. And historically, orders for blood tests have not been characterised as parenting orders, or orders about 'custody', or 'guardianship'. If the legislature had intended to make a significant change by treating these orders as parenting orders, we might have expected it to say so more explicitly, and we might have

45 Ibid, at [158]–[159].
46 As Dawe J pointed out in *Ames* (2009) 42 Fam LR 95; [2009] FamCA 825; BC200950740 at [105].

expected to find that intention recorded in the legislative history (which we don't).

In fact, the more you think about its location in the Act, the less s 69W looks like a place where you would find parenting orders. You might expect to find a house for parenting orders in the leafy and fashionable Div 6 ('Parenting orders other than child maintenance orders'). But poor s 69W, I'm afraid, is located quite a way out of town, in the rather low-rent area of Div 12 ('Proceedings and jurisdiction'). It has to make do with some rather peculiar neighbours, too — those presumptuous residents, ss 69P to 69U, and, even further out of town, the extremely peculiar and unlikeable s 69ZH, the legislative neighbour from hell, who shouts at you in words you can't understand.[47]

Although for these reasons I suggest that a parentage testing order is not a 'parenting order' under s 64B, the question remains wonderfully debateable. But is it important? In all the cases, it was agreed that on any view the child's interests are relevant, and in none of the cases, so far as I can see, did anyone suggest any competing consideration. We have yet to see a case in which anyone argues that the court should give serious consideration to something other than the interests of the child, which will surely always be treated as of enormous importance.

Nevertheless, there is something to be said for the view that the legislature should put it beyond doubt. The real policy question, of course, is not whether it is to be called a 'parenting order', but whether the paramount consideration principle should apply. Resolving that issue raises the question whether there could ever be considerations competing with those of the child and, if there are, whether we can confidently say that they should always give way to the child's interests.

Conclusions

It might be helpful to review the main points.

There is power under the Family Law Act 1975 to make an order for parentage testing if a child's parentage is a question in issue in proceedings under the Act: s 69W(1). It is clear from the authorities that there must be a reasonable doubt about parentage.

A person who refuses to take a test is not liable to a penalty, but 'the court may draw such inferences from the contravention as appear just in the circumstances': s 69Y(2). In relation to a child, the consent of the parent or guardian is required, but, similarly, the court may draw inferences from a refusal or failure to consent: s 69Z.

Section 69Y provides, in substance, that the court can draw inferences from a contravention of a parentage testing order. It is worth noting that a person contravenes the order by intentionally failing to comply with it or making no reasonable attempt to comply with it.[48] If the person has a reasonable excuse, although that would be a defence to proceedings arising from the

47 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 31 Fam LR 339; (2004) FLC 93-174; [2004] HCA 20; BC200402148 at [2] per Gleeson CJ and McHugh J: 'What is clear to the drafter is not necessarily clear to the reader'.

48 Section 70NAC.

contravention, there has still been a 'contravention' from which the court is entitled to draw inferences.[49]

What inferences? It is wrong to think that the question is simply whether the court should draw the inference that a particular person is the father. The inferences to be drawn might be much more specific. For example, the court might draw an inference that the person who refused to take the test might believe that a particular person was the father; or, perhaps, knew certain facts which might cast light on the question. The correct approach, it seems, is for the court to consider carefully what inferences can be drawn from the contravention and, having regard to those inferences as well as all the other relevant evidence, make a finding fact about parentage.[50] Of course it will be relevant for the court also to take into account any applicable presumptions about parentage.

On any view, the making of a parentage testing order under s 69W is discretionary, and the impact of the order on the child is obviously relevant; indeed, the cases indicate, of enormous significance. If it is a s 64B 'parenting order', as some have thought, it is governed by the paramount consideration principle and associated provisions. If it is not, the discretion is open, but must be exercised judicially. Whatever the analysis, the authorities, especially *Brianna*, strongly emphasise the importance of children knowing the truth about their origins, although the determination of each case requires an assessment of the impact of the order, especially on the child. As the Chief Justice pointed out, '[t]here may ultimately come a time when the legislation permits parentage testing as a matter of right'.[51] But while it doesn't, determining whether to make a parentage testing order will remain a task that requires the courts to make a detailed examination of the facts, and especially the impact of an order on the child, in each case. Two of the cases discussed earlier — *Re C and V* and *W v G*[52] — provide particularly valuable glimpses of the range of sensitive issues that can arise.

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49 This emerges clearly from the Full Court's discussion in *Tryon v Clutterbuck (No 2)* (2009) FLC 93-412.

50 See *Tryon v Clutterbuck (No 2)* (2009) FLC 93-412 at [96]–[97]; and the discussion of *G v H* (1994) 181 CLR 387; 124 ALR 353; [1994] HCA 48; BC9404649 at [98]. In that case, the High Court said that the correct inference, on the facts, was 'that it was more probable than not that the outcome of the court-ordered test would be unfavourable to G. And given the accuracy of the test, that must lead to the finding that, on the probabilities, he was the father of the child': ibid at CLR 402.

51 [2010] FamCAFC 97; BC201050480 at [29].

52 *Re C and V* (1983) 50 ALR 441; 9 Fam LR 31; (1983) FLC 91-333 and *W v G (No 1)* (2004) 35 Fam LR 417; (2005) FLC 93-247; [2004] FamCA 427.