

# ***RE PATRICK* AND THE RIGHTS AND RESPONSIBILITIES OF SPERM DONOR FATHERS IN AUSTRALIAN FAMILY LAW**

JAMES McCONVILL\* AND EITHNE MILLS\*\*

## I INTRODUCTION

We are in an era of rapid scientific development in the manner in which a child can be created. Society is increasingly accepting of using technology to make babies. ... The most important debate is not about how we create babies but protecting their rights. At the very least, as a community we must be able to define clearly a child's parents, father, mother and family.<sup>1</sup>

The matter of *Re Patrick*<sup>2</sup> was the first case in Australia, and one of the first cases in the world, to deal with the issue of whether a sperm donor has a right of contact with the child under family law. Although the sperm donor father was granted access to the child on the basis of the child's best interests, Guest J of the Family Court of Australia also held that the sperm donor was not a 'parent' under the *Family Law Act 1975* (Cth) ('*Family Law Act*').<sup>3</sup>

Despite the enormous significance of *Re Patrick* from both a legal and social perspective, there has been little commentary on the case up to this point in time.<sup>4</sup> This is perhaps due to a very tragic set of events which followed Guest J's order. The mother of Patrick did not handle at all well the decision by Guest J that the sperm donor was the 'father' of Patrick and that the father was to have four-hour fortnightly contact visits with Patrick, which would increase gradually as Patrick got older. It is understood that the mother had had psychiatric treatment since the court case to try and deal with the father's involvement in Patrick's life (according to press reports, the father was enjoying a healthy relationship with Patrick).<sup>5</sup> However, the treatment did not have

---

\* Lawyer, Allens Arthur Robinson, Melbourne; PhD (Law) Candidate, Deakin University. This article was written independently of Allens Arthur Robinson, and the views expressed in this article do not necessarily reflect the views of Allens Arthur Robinson.

\*\* Lecturer, School of Law, Deakin University.

<sup>1</sup> J Campbell, 'Hatching, Unmatching and Parental Responsibility' (2002) 10 *Australian Health Law Bulletin* 101.

<sup>2</sup> See *Re Patrick* (2002) 28 Fam LR 579.

<sup>3</sup> Justice Guest's reasoning is explained below.

<sup>4</sup> At the time of writing, the only significant academic discussion of *Re Patrick* is by F Kelly, 'Redefining Parenthood: Gay and Lesbian Families in the Family Court' (2002) 16 *Australian Journal of Family Law* 17 (accessed via Lexis).

<sup>5</sup> See J Szego, 'Battle for Boy Ends in Double Tragedy', *The Age* (Melbourne), 3 August 2002, 1.

the desired effect, and in August 2002 the mother took her own life and the life of little Patrick (then two years old).

Whilst the authors were understandably shocked and deeply upset by the mother's action, we resolved that it was still appropriate to comment on the case and to support the decision of Guest J in *Re Patrick* that the sperm donor father be allowed access to the child. The authors also believe that, consistent with the best interests of a child, a known sperm donor should be regarded as a 'parent', and accordingly the article contains proposed amendments to Australia's *Family Law Act* which would achieve this.

The authors will make the argument that if the *Family Law Act* is to expressly recognise that a sperm donor is to have rights in relation to the child, then the sperm donor should also have responsibilities in relation to the child consistent with what is in the best interests of the child.

## II CHILDREN'S RIGHTS IN AUSTRALIAN FAMILY LAW

Read in the abstract, the objects and principles of Part VII of the *Family Law Act* (titled 'Children') are clear and unambiguous. The objective of the provisions is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties concerning the care, welfare and development of their children.

It is an accepted principle of Australian public law that international legal rules (increasingly being in the form of formal treaties) have no direct effect under domestic law until implemented through legislative action (the so-called 'transformation' theory).<sup>6</sup> Accordingly, Part VII of the *Family Law Act* was drafted with the aim of incorporating the rules and principles contained in the 1989 UN Convention on the Rights of the Child (the 'UN Convention').<sup>7</sup> The UN Convention, ratified by Australia in December 1990, recognises a broad range of children's rights. The rights of the child do not depend on the status of the parents of that child; as equity and justice demands, they are rights accorded to children *per se*.

Article 3(1) of the UN Convention stipulates that in actions concerning children, the best interests of the child is the paramount consideration. Article 7 indicates that, as far as possible, the child has the right to know and be cared for by his or her parents. Article 9(3) indicates that children of separated parents have a right to maintain personal relations and direct contact with both parents on a regular basis except where it is contrary to their best interests.

---

<sup>6</sup> See *Nulyarimma v Thompson* (1999) 165 ALR 621; *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. This is compared to the traditional 'incorporation' theory that rules of international law become automatically incorporated into domestic common law. It has been suggested that the 'incorporation' theory may still reflect the relationship between rules of customary international law and domestic law: See T Blackshield and G Williams, *Australian Constitutional Law & Theory: Commentary & Materials* (Federation Press, 3<sup>rd</sup> ed, 2002) 762-3.

<sup>7</sup> Though it should be noted that in *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676, the Full Court of the Family Court said that, while it is clear that Part VII of the *Family Law Act 1975* (Cth) adopts the terms and principles of the UN Convention of the Rights of the Child, the Convention had yet to be incorporated wholesale into domestic law, and is not specifically referred to in the *Family Law Act 1975* (Cth).

Articles 18 and 19, respectively, require state recognition of the principle that both parents share responsibility for the development of their child and, further, the state must take appropriate legal, administrative, social and educative measures to protect children from all forms of violence and abuse.

As the Full Court held in *B and B: Family Law Reform Act 1995* ('*B and B*'),<sup>8</sup> the reforms made by the *Family Law Reform Act 1995* (Cth) to the Children provisions contained in Part VII represent a major restatement of the law rather than simply semantics.<sup>9</sup> Indicative of this is the lack of proprietary language in the reform act, which emphasises the concept of parental responsibility for a child's care, welfare and development. By introducing the concept of parental responsibility, Parliament was seeking to remove proprietorial notions surrounding the parent/child relationship, consistent with the terminology and philosophy of the Convention.<sup>10</sup> The influence of the Convention is particularly evident in the statement of objectives in s 60B of Part VII of the *Family Law Act*.<sup>11</sup>

In *B and B*, a case which involved the question of the extent to which children are able to enforce the rights enumerated in s 60B, the prevailing message from the Full Court was that in matters under Part VII, the 'essential inquiry' is the best interests of the child. This is clear from s 65E which states that when considering parenting orders, the Court must regard the best interests of the child as the paramount consideration.

Section 60B(2) also indicates that the principles it enumerates are subject to this consideration. The Full Court in *B and B* indicated that the best interests of the child are to be determined in light of the relevant guiding factors in s 68F(2),<sup>12</sup> and the objects

---

<sup>8</sup> (1997) 21 Fam LR 676.

<sup>9</sup> See E Mills, *Butterworths Tutorial Series: Family Law* (Butterworths, 2001) 86.

<sup>10</sup> See above n 1, 101-2. Campbell provides a good overview of the changes introduced to the *Family Law Act* in 1996, and discusses how the emphasis is now on parental responsibility rather than parental rights and the rights of the child rather than possession or ownership of children.

<sup>11</sup> Section 60B states:

- (1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- (2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:
  - (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
  - (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
  - (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
  - (d) parents should agree about the future parenting of their children.

<sup>12</sup> Section 68F states:

- (1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).
- (2) The court must consider:
  - (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
  - (b) the nature of the relationship of the child with each of the child's parents and with other persons;

and principles set out in s 60B, with the weight to be given to each consideration being determined by the particular facts of the case. This finding was affirmed in *Marriage of R*.<sup>13</sup>

The concept of parental responsibility may be found in s 61C(1) of the *Family Law Act*, which stipulates that each parent of a child under 18 years has parental responsibility for that child. Section 61B defines parental responsibility to mean ‘all the duties, powers, responsibilities and authority which, by law, parents have in relation to children’. The term takes its origins from the *Children Act 1989* (UK) and, subject to court orders, it is ongoing despite changes to, or the termination of, the marital relationship. Whatever the marital status of the parties, parents are encouraged to make agreements in relation to matters concerning their children, rather than seeking a judicial response.

### III THE CASE OF *RE PATRICK*

#### A *The Factual Background*

The authors consider it important to provide a full discussion of the facts involved in *Re Patrick* to provide the reader with a complete picture of the very sad set of events which Guest J was confronted with and required to piece together to achieve some sort of resolution.

- 
- (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
    - (i) either of his or her parents; or
    - (ii) any other child, or other person, with whom he or she has been living;
  - (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
  - (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
  - (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
  - (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
    - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
    - (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
  - (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
    - (i) any family violence involving the child or a member of the child's family;
    - (j) any family violence order that applies to the child or a member of the child's family;
  - (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
  - (l) any other fact or circumstance that the court thinks is relevant.
- (3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).
- (4) In paragraph (2)(f):

*Aboriginal peoples* means the peoples of the Aboriginal race of Australia.

*Torres Strait Islanders* means the descendants of the indigenous inhabitants of the Torres Strait Islands.

<sup>13</sup> (1998) 23 Fam LR 456.

The proceedings in *Re Patrick* involved a homosexual sperm donor ('the father'), a lesbian couple and a 2 year old boy. In January 1998, the father entered into an agreement with the mother and her partner ('the co-parent') to provide genetic material for the purpose of artificially inseminating the mother. Although the terms of that agreement were bitterly contested at the hearing, it was plain to the court that the pregnancy of the mother followed many months of cooperation between the parties. In early January of 1999, the mother and the co-parent informed the father of the pregnancy. The earlier cooperation leading to the pregnancy was lost, and the relationship between the parties became one of animosity, so much so that the arrangements for the birth of Patrick (born on 11 September 1999) were kept secret from the father. Upon learning of the birth, however, the father instituted proceedings *inter alia* for contact with Patrick. On 2 June 2000, final orders for contact between the father and child were made by consent between the parties. These orders proved unacceptable to the mother and co-parent, with the result that when the matter came before Guest J, the positions of the parties were polarised. On 8 May 2001, the mother and co-parent filed an application with the Family Court pleading that the orders made on 2 June 2000 be discharged. The relevant orders made that day by Registrar Harold were as follows:

2. That the child Patrick born on 11 September 1999 reside with the mother and the co-parent.
3. That the mother and the co-parent have joint responsibility for decisions concerning the long term and day to day care, welfare and development of the child.
4. That the mother and the co-parent keep the father advised of any major health and education issues concerning the child.
5. That the father have contact with the child as follows:
  - (a) Each third Sunday from 8.30am to 10.30am or such other day or times as may be agreed commencing 25 June 2000.
  - (b) Such other contact as may be agreed.
  - (c) At the residence of LD or JB or such other venue as may be agreed.
  - (d) That upon the mother and the co-parent providing to the father 21 days' notice in writing of their intention to and dates of travel, contact for one period shall be suspended on one occasion in the year 2000.
  - (e) With the person nominated by the mother and the co-parent to be available to the child.
6. That each party keep the others advised of their residential address and contact telephone number.
7. That if contact is unable to take place pursuant to 5(a) then contact shall take place on the following Sunday or at such other date or time as may be agreed.
8. That pursuant to Section 65L these parenting orders be supervised until 2001 by such counsellor as nominated by the Manager of Mediation to give any party to these orders such assistance as is reasonably requested by that party in relation to compliance with, and the carrying out of the parenting order.

On that occasion, the court noted that the contact orders detailed above were to remain in place until Patrick reached two years of age, and thereafter to be reviewed as Patrick matured. The court also noted that unless the father sought otherwise, the mother and co-parent were not to accompany Patrick during contact visits. It was further noted that the father agreed that the mother and co-parent have joint responsibility for decisions concerning the long-term and day-to-day care, welfare and development of Patrick. On 17 May 2001, the father sought orders at variance with those orders sought by the co-parent. The father sought final orders for contact with Patrick as follows:

1. That as from 11 September 2001, Order 5 of the orders of 2 June 2000 be discharged and that father have contact with the child as follows:
  - (a) from 10am to 1pm on 16 September and 30 September;
  - (b) from 10am to 3pm on 14 October, 28 October and 11 November;
  - (c) from 10am to 5pm on 25 November and each alternate Sunday thereafter until the child is three years of age;
  - (d) that the father have overnight contact with the child from Saturday 5pm to Sunday 5pm on five occasions before the child is three years of age such contact to coincide with the contact weekend in paragraph (1)(c) hereof;
  - (e) from 10am Saturday to 5pm each alternate weekend commencing when the child is three years of age;
  - (f) such further or other contact as agreed between the parties.

By the time the matter came before Guest J, the position of the mother and co-parent had changed to such a degree that Patrick could see his father for a period of no more than 3 hours twice per year unless the mother and co-parent agreed otherwise. The history leading up to the conception of Patrick is indicative of the quite complex arrangements which may have to be made by a lesbian mother desiring parenthood. Although the father and mother of Patrick first met socially in 1989, it was not until ten years later that the parties discussed seriously the likelihood of parenting a child.

On 5 January 1998, the mother invited the father to her home for the purpose of interviewing him as a prospective donor. On the 12 January 1998, the father made known his willingness to be a donor of genetic material to the mother. To this end, the father very soon after attended a sexual health centre in order to undergo tests for any sexually transmitted disease in anticipation of attempting to conceive a child with the mother. At the end of January 1998, a meeting was held in order to allow all of the parties to discuss the hoped for pregnancy and the role of the respective parties.

The following day the first attempt at conception took place. Somewhere between 26 and 36 attempts followed between 31 January 1998 and 16 December 1998. During the lapse of time between January and December 1998, it was obvious that the parties felt some disquiet at the failure to conceive. On 20 March 1998, the father had his semen analysed at the Mercy Hospital in Melbourne at the request of the mother due to their failure, despite artificial insemination, to achieve pregnancy. Attempts were discontinued for two months owing to the father's absence in order to compete in the Gay Games held in Holland. Upon his return, the parties discussed the continuation of the process of artificial insemination, and agreed that it should continue. In January 1999, the mother's pregnancy was confirmed to the father. This news was celebrated privately and publicly. It would appear from the evidence that celebration turned to dissension. On 8 March 1999, the father attended the home of the mother and co-parent in order to discuss the progress of the pregnancy and the care of the expected baby. It was then that the mother told the father of her wish to deliver the child without the presence of the father.

Within days of the meeting, the co-parent telephoned the father with news of the mother's acceptance into a birthing centre. Very soon afterwards, the father in a telephone conversation with the mother and co-parent, asked that they change their minds and allow him to be present at the birth. Although it is not apparent from the facts of the case by whom mediation was instigated, it is a fact that on 14 April 1999 the parties attempted to reach an agreement regarding proposed care arrangements for the

prospective child with the aid of mediator Michael Madden. The mother and co-parent had drafted an agreement for the occasion. No collective agreement was reached. On 21 April 1999 a further mediation session was held with Michael Madden. Again, no concrete agreement emerged. A third meeting was arranged for 7 May 1999. The mother and co-parent, however, cancelled. From that time, the evidence suggests that the mother and co-parent prevented the father from any further involvement with the birth.

Sometime later the father instructed a solicitor to seek details of the pregnancy and forthcoming birth from the solicitor of the mother and co-parent. No information in that regard was forthcoming. Instead, the former solicitor for the mother and co-parent advised that they no longer held instructions to act. They further advised that they had no details of the hospital in which the birth was to take place or of the date in which the mother was expected to deliver the baby.

Sometime after the birth of Patrick on 11 September 1999, the father learned of the baby's arrival from a mutual friend of the father and mother. Despite the father now being aware of the birth, he was still unaware of the mother and co-parent's whereabouts. It would appear from the facts of the case that through the services of a private investigator, the father was given an address at which the mother, co-parent and Patrick resided. Subsequently, the father made an application to the Family Court in which he sought *inter alia* the following outcome:

- that the mother and father have joint responsibility for making decisions concerning the long term care, welfare and development of Patrick;
- that the child reside with the mother, and
- that the father have contact with Patrick:
  - on two occasions each week for two to three hours until the child was nine months old;
  - thereafter on two occasions each week for five hours; and
  - on two occasions each week to include overnight after Patrick was two years of age.<sup>14</sup>

The mother responded by asking the Family Court for an outright dismissal of the father's application or, as an alternative, final orders as followings:

- that Patrick live with the mother and co-parent who shall retain joint responsibility for his long term care, welfare and development;
- that the mother and co-parent be responsible for Patrick's day to day care, welfare and development; and
- that the father have supervised contact with Patrick twice yearly as agreed between the parties.

The Court adjourned the applications until 23 November 1999. On that date, the co-parent applied for leave to intervene in the proceedings. Orders were made by consent that leave be granted to intervene, and to respond to the father's application on or before the 6 December 1999. The matter was then adjourned to the Registrar's Duty List to be held 14 December 1999. In addition, all parties were ordered to attend counselling in

---

<sup>14</sup> *Re Patrick* (2002) 28 Fam LR 579.

accordance with s 62F(2) of the *Family Law Act* on 6 December 1999 and subsequent dates as directed.<sup>15</sup>

On 6 December 1999, the parties attended separate appointments with a confidential counsellor. This achieved little by way of agreement. Three days later, the co-parent also filed a response to the father's application of the 18 October 1999 in which she sought an order that the father's application be dismissed. In addition, she sought an order that the mother and she have joint responsibility for the long-term and day-to-day care, welfare and development of Patrick. She sought further orders that Patrick continue to live with the mother and herself and that the father's contact with Patrick be otherwise reserved.

On 14 December 1999, all parties agreed to adjourn the matter to 10 February 2000. In the intervening time, Patrick, at the age of 14 weeks, had his first contact with his father. He saw his father again on 14 January 2000. The matter next came before the court on 10 February 2000. On that date, orders were made appointing a child representative for Patrick. The matter was then adjourned to 31 March 2000. Consent orders, however, were made allowing the father to see Patrick on several occasions. These orders *inter alia* provided: that the father have contact with Patrick on 5 March 2000, and 25 March 2000, between 10.30am and 12.00 noon (or on such other dates that may be agreed between the parties).

In addition, the parties consented to a welfare report to be prepared by Mr Vincent Papaleo to be presented to the Court. On 31 March 2000, the matter was further adjourned to 2 June 2000. It was also ordered that the father have contact with Patrick between 10.30am and 12 noon on three occasions, 16 April 2000, 5 May 2000 and 27 May 2000. The proposed contact for 16 April 2000 was cancelled by the mother and co-parent. The father did, however, see Patrick on the other two occasions ordered. So on 2 June 2000, final orders were made by consent. The 2 June 2000 final orders have been reproduced earlier in this description of the facts. It would appear from the facts that in terms of the father's contact with Patrick, the orders were successful until 31 December 2000, when the mother and co-parent cancelled the next scheduled date of contact. This meant that the father did not see Patrick between 10 December 2000 and 21 January 2001.

On 26 October 2000, the mother and co-parent wrote to the father detailing concerns regarding Patrick's interaction with his father and close relatives. Guest J reproduced the communication in his judgment. It is again reproduced here in order to emphasise issues of contention between the parties.

...

It has come to our attention that during contacts you are introducing your family members to Patrick using familial terms like 'your grandmother', 'your aunt' and 'your cousin'.

---

<sup>15</sup> Section 62F(2) of the *Family Law Act* provides:

(2) The court may, at any stage of the proceedings, make an order directing the parties to the proceedings to attend a conference with a family and child counsellor or welfare officer:

- (a) to discuss the care, welfare and development of the child; and
- (b) if there are differences between the parties in relation to matters affecting the care, welfare and development of the child—to try to resolve those differences.



Presumably you are also referring to yourself, or being referred to by your guests, as Patrick's 'dad'. This method of introducing your family, and labelling his relationship to them is likely to cause Patrick confusion and distress in the future as it is in direct contradiction to the reality of how Patrick experiences his family and the way in which we will be speaking of you and your family.

It is clearly our responsibility as Patrick's lesbian parents and the people who have long term and day to day care for Patrick, to ensure that Patrick feels positive about and understands his alternative family structure and his method of conception, and to guide Patrick through the associated complex emotional, ethical and social issues. It is our responsibility to ensure that the people Patrick has contact with respect him, his family and the decisions we make as his parents. These people include you and the people you bring to contacts.

[Later]

Patrick has contact with lots of people who aren't in his direct family or extended family but who are never-the-less significant. This includes the contact he has with you and your family. Patrick will know that you and your relatives have a biological relationship to him because he will know that you are his donor. We are happy to refer to you as the father in Patrick's presence, but absolutely do not accept or support you referring to yourself, or encouraging Patrick to call you dad, father or any other such title. Nor do we accept or support familial terms like grandmother/grandson, aunt/nephew or cousin to be used in Patrick's presence in reference to your relatives.

[Later]

Patrick lives in a cultural and community setting in which his family as we define it is acknowledged and affirmed:- by us, his extended family, our friends, his playgroup and the broader gay-friendly members of our society. He often hears the word donor and already knows many children in similar situations who have varying levels of contact with their donors. Patrick will grow up knowing the difference between a donor and a father. The discrimination against lesbian families is considerable and the decisions we are making in regard to how to support Patrick in this regard are not made on a whim but rather through extensive personal experience and research:- books, articles, conferences, support groups, professional advice and anecdotes. *Patrick is part of a socially disadvantaged minority group, and thus has special needs ...*

We believe that you can choose to make Patrick's life easier by supporting us in the decisions we make as Patrick's parents, and that you can use contacts as a time in which to establish a relationship with Patrick which is not based so much on pre-conceived roles such as 'father' and 'son' but on a more individual basis. ...

Patrick will eventually be old enough to understand the issues that surround his family, his conception and the broader matrix of his biological origins. Until he is old enough not to be confused or overwhelmed by these issues we, as his parents, will be making those decisions for and with him. If we are ever going to be able to speak amicably to Patrick about you and your family, we need to feel that you are granting the same respect that you would offer any other intact, valid and complete family. We are proud of our family and would certainly prefer to be in a position where we could encourage Patrick to be proud of his connection to you.

... (emphasis added)

On 6 December 2000, the father replied in terms which Guest J described as 'conciliatory, sensitive and understanding'.<sup>16</sup> The father stated the following:

Thank you for your letter of 26 October. It was great to see Patrick last time on 26 November, he is really looking well and happy. Thank-you once again for making the visits possible and please pass on my thanks to LD for her kindness in giving up her time and making her house available. I look forward to these visits with Patrick and he is a credit to you both. He is growing up so fast now and I notice quite distinct changes every time I see him. While this has been a terribly difficult time for us all I tell myself that the most important thing is that Patrick is healthy and happy. I hope that things can improve between us.

I have taken on board, and accept your concerns about how my relationship with Patrick can be best explained to him in the future. In the agreement between us signed in June this year I did sign over to you both, residence, day to day and long term care and decision making for Patrick. This was agreed to by me at that time for the following reasons:

- That I believed it was in Patrick's best interests;
- To show my willingness to support you both and your position as Patrick's primary care givers;
- To try to improve the situation between myself and you both;
- To avoid further damaging and costly litigation.

In no way do I wish to undermine your relationship and I haven't sought to do this in the past. I do however remain father to Patrick and have not given up any of the responsibilities or rights associated with fatherhood. It was agreed from the beginning that I would be a dad/father to our child and it was never agreed by me that I might be seen simply as an uninvolved donor.

Further I am concerned at the confusion Patrick might experience if I am described to him other than as his father. I believe it is important that Patrick should know that he does indeed have a father and one who he has seen regularly and continues to see regularly. It is undesirable for Patrick to grow up believing that there is something missing in his life, his father, when that is clearly not the case at all. It is far better for Patrick to know that he has a father who loves him very much and who he sees on a regular basis. This may not be what you both want and it may not be what I want but I believe that it is in Patrick's best interests.

In June this year I was challenged by Vincent Papaleo's report to the court to accept you both as Patrick's parents. I have tried my best to do so and as I said earlier Patrick is clearly a credit to you both. You too were challenged by the same report to accept that it is in Patrick's best interests for him to bond with his father and to have an ongoing relationship with his father. I would ask that you consider this. ...

On 7 December 2000, the mothers and co-parent wrote to the father stating that, upon his return from contact with the father, Patrick was unusually 'tired and vulnerable'. On 21 January 2001, the father resumed contact with Patrick. In March of that year, all parties attended confidential counselling, but no agreement was reached. Indeed, the mother and co-parent imposed conditions upon the father's contact with Patrick which the father found to be unreasonable. These conditions are detailed in the following affidavit lodged with the court on 30 May 2001, in which the mother and co-parent

---

<sup>16</sup> *Re Patrick* (2002) 28 Fam LR 579, 587.

recollect terms of an agreement for contact made in March 2001. It provided as follows (reference to 'LD' is to a friend of the mother and co-parent):

- (i) The co-parent was to be present during the contact.
- (ii) LD was to be 'available to Patrick' as we had defined her role in our 6 December letter to the father.
- (iii) That he treat LD with more respect re: her role at contacts and the fact that it is her house.
- (iv) That the father did not have any parenting responsibilities or rights, despite his claims, hopes and attitude. the co-parent and I held these responsibilities.
- (v) That separation anxiety and stress related to contacts were real and serious issues for Patrick and Patrick's family.
- (vi) No photos were to be taken at the contact on 4 March 2001. The father was extremely resistant to this agreement.
- ....
- (viii) The father to stay within fence line of LD's property in accordance with the orders. We were specifically instructed that the footpath and the nature strip were outside of the fence line.
- (ix) No familial terms to be used in regards to the father and his family members' relationship to Patrick.
- (x) No questions to the co-parent re: Patrick's life outside of contacts unless specifically related to Patrick's care during the contact.
- (xi) All of LD's property is available during contacts, within reason, under the terms of the order.
- (xii) The father finds out more info re: child development in a way that does not increase his sense that he is or should be a parent.
- (xiii) Attempt to 'normalise' experience for Patrick to reduce his stress and anxiety.
- (xiv) That we all consider a referral for ongoing counselling due to the complexity of the situation.
- (xv) That if the father did not change his attitude then chances of a positive relationship with Patrick were minimal.
- (xvi) That Patrick needed a shorter contact time or a less stimulated environment in contacts. And that the constant focus on Patrick by the father and his guests, and the amount of unfamiliar toys, books, music, rugs, clothing, drinking cup, tape recorder etc. that he was bringing to contacts was unnecessary and contributing to Patrick and our stress.
- (xvii) That the father takes responsibility for packing up and leaving on time.
- (xviii) That the father establish a 'goodbye' ritual in last 1/2 hour of contact so as to avoid further confusion, stress and over-tiredness for Patrick.
- (xix) That the father could bring his water bottle for Patrick's usage, but that he was simply to bring it out then make no further reference to it during the contact. He was to refrain from using the water bottle in competition with that provided by the co-parent and I. That it was not his role to provide for Patrick.
- (xx) That the father could bring his rugs for his own personal usage, but was to ensure that they were clean and did not smell of his body-odour.
- (xxi) That the father could bring a couple of toys with him, and that he was to make more use of the toys, books etc that the co-parent and I provided. That he was again to refrain from engaging in competitive behaviour re: his toys books etc vs. those provided by us.
- (xxii) That the father was to refrain from any competitive behaviour re: seeking Patrick's attention when Patrick was relating to the co-parent.
- (xxiii) That all parties reduce the level of attention on Patrick so as to normalise the experience for him and reduce stress, tiredness, confusion etc.

- (xxiv) That the father could take one photo only, if Patrick gave his consent for the contact periods on 25 March and 29 April 2001.
- (xxv) That the father brings no guests to the contacts on 25 March and 29 April 2001, so as to assess the effect on Patrick and us.
- (xxvi) That the father write down the agreements as he appeared to remember them differently to everyone else in the room and that he not assume room to move in agreements.

These conditions caused the father's solicitors to write to the mother and co-parent in what appears to be clarification and response to the restrictions. The letter stated:

1. That Patrick is scared when they or their friends try to take a photo. Our client has agreed to take one photo only during his contact visits. It is agreed that our client is to bring the camera out and leave it for ten minutes or so and then ask Patrick if he can take the photo and respond accordingly.
2. That LD finds it offensive that our client spreads his rug on the floor at contact as it constitutes a hazard as Patrick may trip on the rug. Our client has agreed that he will not spread the rug on the floor for Patrick. He will use the rug for his own benefit if necessary.
3. Our client has been permitted to use LD's tape player to play music but he is not permitted to bring his own tape player as this constitutes 'too much input' for Patrick.
4. Our client has been bringing a whole bag full of toys to contact. This is apparently too much input for Patrick and our client is permitted to bring one or two toys only.
5. There has been an agreement that our client will begin the 'goodbye ritual' by packing up his things before the end of the contact visit and being ready to leave rather than LD signalling the end of the contact visit by announcing that there are just a few minutes left, Patrick being passed to her and whisked away to the back of the house whilst our client packs up and prepares to leave.
6. Our client is permitted to provide his drink cup for Patrick (his Christmas present) to fill it for him and offer it to him, but is not to compete with anything which LD might offer him.
7. Our client is to ensure that Patrick remains strictly within the fence line and is not to walk on the footpath or the nature strip. The contact visit is to be restricted to the boundaries of LD's property.

In the following months, the relationship between the parties deteriorated to such a degree that contact between the father and Patrick was not permitted from 25 March 2001 until 11 July 2001. During that time, several matters occurred which Guest J considered significant. For example, the mother and co-parent failed to attend a counselling appointment on 1 May 2001. On the day after, the solicitor for the mother and co-parent informed the father's solicitor that the mother and co-parent considered that further contact between the father and his son was not in Patrick's best interest and therefore they intended to apply for a discharge of the contact order made on 2 June 2000. Subsequently, the mother and co-parent filed an application out of the Federal Magistrates' Court of Australia seeking inter alia that the contact orders made on 2 June 2000 be discharged. Any further contact with Patrick by the father was refused by them. On 17 May 2001, the father responded to the application seeking orders in the following terms:

1. That as from 11 September 2001, Order 5 of the orders of 2 June 2000 be discharged and that father have contact with the child as follows:
  - (a) from 10am to 1pm on 16 September and 30 September;
  - (b) from 10am to 3pm on 14 October, 28 October and 11 November;

- (c) from 10am to 5pm on 25 November and each alternate Sunday thereafter until the child is three years of age;
- (d) that the father have overnight contact with the child from Saturday 5pm to Sunday 5pm on five occasions before the child is three years of age such contact to coincide with the contact weekend in paragraph (1)(c) hereof;
- (e) from 10am Saturday to 5pm each alternate weekend commencing when the child is three years of age;
- (f) such further or other contact as agreed between the parties.

On 19 June 2001, the parties agreed to the reappointment of the child representative, Dr Kovacs. Subsequently, orders were made by Federal Magistrate Phipps on 11 July 2001 directing the parties to see Dr Robert Adler in order that he prepare a welfare report. In addition, Federal Magistrate Phipps ordered that contact ordered pursuant to paragraph 5 of the 2 June 2000 order be resumed on 15 July 2001, allowing the father two hours contact with Patrick. On 10 August 2001, Federal Magistrate Phipps made orders transferring the proceedings from the Federal Magistrates' Court to the Family Court of Australia.

In October 2001, Dr Adler submitted a report very much in line with the wishes of the mother and co-parent. In paragraph 3 of his report, it was his opinion that the father be allowed contact with Patrick at least twice a year for a period of no more than 3 hours on each occasion, unless more frequent and longer contact be agreed upon by the mother and co-parent. In paragraph 7 of his report, Dr Adler recommended that when Patrick reached a suitable age, he should have a say with regard to contact with his father. The mother and co-parent instructed their solicitor to write to the father's solicitors proposing settlement in the matter in the terms of Dr Adler's recommendation. Some days later, the proposal for settlement was rejected by the father's solicitors. The end of 2001 brought little relief, with the mother and co-parent unilaterally cancelling the father's contact with Patrick on two occasions. The matter came before Guest J on 21 January 2002.

### *B The Orders in Re Patrick*

Justice Guest granted the father's application of 17<sup>th</sup> May 2001 and made the following orders:

- (1) That paragraph 5 of the Orders of 2 June 2000 be discharged.
- (2) That the father have contact with Patrick as follows:
  - 2.1 As and from the date of this order until 11 September 2002:
    - 2.1.1 each alternate Sunday for a period of four hours at times to be agreed between the parties and failing agreement from 10am to 2pm commencing on Sunday 7 April 2002;
    - 2.1.2 in the event that Father's Day falls on a non-contact weekend, from 10am to 2pm on Father's Day; and
    - 2.1.3 as may otherwise be agreed between the parties from time to time.
  - 2.2 As and from 11 September 2002 until 11 September 2003 as follows:
    - 2.2.1 each alternate Sunday for a period of eight hours at times to be agreed between the parties, and failing agreement from 9am to 5pm;
    - 2.2.2 in the event that Father's Day falls on a non-contact weekend from 9am to 5pm on Father's Day;
    - 2.2.3 as may otherwise be agreed between the parties from time to time.

- 2.3 As and from 11 September 2003 until 11 January 2004 in each four week cycle as follows:
  - 2.3.1 in week one on Sunday from 9am to 5pm;
  - 2.3.2 in week three from 9am Saturday to 9am Sunday such contact to continue for a period of two months and thereafter such contact to conclude at 12 noon on Sunday.
- 2.4 As and from 11 January 2004 to 11 September 2004 in each four week cycle as follows:
  - 2.4.1 in week one on Sunday from 9am to 5pm;
  - 2.4.2 in week three from 9am Saturday to 3pm Sunday;
  - 2.4.3 in the event that Father's Day falls on a non-contact weekend from 9am to 5pm on Father's Day;
  - 2.4.4 as may otherwise be agreed between the parties from time to time.
- 2.5 As and from 11 September 2004 as follows:
  - 2.5.1 each alternate weekend from the conclusion of school / creche on Friday to the commencement of school / creche on Monday, or in the event that the child is not attending school or creche, from 3.30pm Friday to 8.30am Monday;
  - 2.5.2 one half of all school holiday periods at times to be agreed between the parties and failing agreement for the second half of all school holiday periods;
  - 2.5.3 in the event that Father's Day falls on a non-contact weekend from 9am to 5pm on Father's Day;
  - 2.5.4 in the event that Mother's Day falls on a contact weekend, such contact be suspended at 9am on Mother's Day;
  - 2.5.5 on the child's birthday and the father's birthday for a period of two hours at times to be agreed between the parties and failing agreement from 4pm to 6pm on the said birthdays;
  - 2.5.6 as may otherwise be agreed between the parties from time to time.
- (3) That for the purposes of contact, the father do collect the child from and return the child to the home of the mother and the co-parent.
- (4) That paragraph 3 of the orders made on 2 June 2000 do include the following:
 

'... AND THAT the father have responsibility for decisions concerning the child's immediate care, welfare and development whilst the child is having contact with him'.
- (5) That pursuant to s 65DA(2) of the Family Law Act 1975 (as amended), the particulars of the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders are set out in Annexure A and these particulars are included in these orders.
- (6) That the appointment of the child representative be discharged from this day
- (7) That pursuant to Order 38 rule 25 of the Family Law Rules this matter reasonably required the attendance of Counsel.

### C *The Reasoning of Guest J in Re Patrick*

It is useful at this point to examine the basis upon which judgment was reached by Guest J in *Re Patrick*. Of particular significance in *Re Patrick* was the provisions of the UN Convention on the Rights of the Child. It follows from the decision that the welfare of the child is the paramount consideration in a decision made relating to children in Australia. In other words, it is the best interests of the child which is to form the linchpin in any major decision of a court exercising family law jurisdiction. Guest J emphasised the point as follows:

In deciding an issue such as this, s 65E of the Act requires me to regard the best interests of Patrick as the paramount consideration. Accordingly, it is a consideration of these best

interests that form the cornerstone of my judgment, and remains its final determinant. ... In determining that which is in Patrick's best interests, there are a number of matters which I must consider. They are set out in s 68F(2) of the Act, to which I will return later in this judgment. Subject to matters I will later discuss, I discharge my task in these proceedings having regard to the objects and principles set out in s 60B of the Act, which is in the following terms:

- (1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- (2) The principles underlying these objects are that, except when it is or would be contrary to the child's best interests:
  - (a) children have a right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
  - (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
  - (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
  - (d) parents should agree about the future parenting of their children.'

...

It is important to consider what the Full Court said in *B and B: Family Law Reform Act 1975* (supra) at par 9.54 when dealing with s.60B of the Act. The court made it clear that the section is a significant part in the exercise as it represented a deliberate statement by the legislature of the object and principles which I am to apply in proceedings under Part VII of the Act. However, the section is subject to s.65E of the Act. The Full Court pointed out that s.60B did not purport to define or limit the full scope of what is ordinarily encompassed by the concept of best interests and went on to say:

'The object contained in subs (1) can be regarded as an optimum outcome but is unlikely to be of great value in the adjudication of individual cases. The principles contained in subs (2) are more specific but not exhaustive and their importance will vary from case to case. They provide guidance to the court's consideration of the matters in s.68F(2) and to the overall requirement of s.65E. The matters in s.68F(2) are to be considered in the context of the matters in s.60B which are relevant in that case. But s.65E defines the essential issue.' See also *Paskandy v Paskandy* (1999) FLC 92-878 at par 35.<sup>17</sup>

His Honour went on to say that it was incumbent upon him in dealing with s 60B of the Act, to be mindful of the relationship with s 65E of the Act. His Honour referred to the judgment of the Full Court of the Family Court of Australia in *B v B*:

The object contained in sub-s 1 of s 60B can be regarded as an optimum outcome, but is unlikely to be of great value in the adjudication of individual cases. The principles contained in sub-s 2 are more specific, but not exhaustive and their importance will vary from case to case. They provide guidance to the court's consideration of the matters in 68F(2) and to the overall requirement of s 65E. The matters in s 68F(2) are to be considered in the context of the matters in s 60B which are relevant in that case. But s 65E defines the essential issue.<sup>18</sup>

<sup>17</sup> *Re Patrick* (2002) 28 Fam LR 579, 589-590.

<sup>18</sup> *Ibid* [40].

Another important issue addressed by Guest J was the position in Australia in relation to the definition of ‘parent’. Whether a person is a parent in Australia under the *Family Law Act* is not necessarily dependant on a biological or genetic connection. The position is governed by s 60H of the *Family Law Act*. In the case of the father of Patrick there was, of course, a biological connection. Patrick was born as a result of an ‘artificial conception procedure’ as defined in s 60D of the *Family Law Act*, in that the conception occurred by artificial insemination.

The relevant legislation in Australia (the *Family Law Act*, the *Child Support (Assessment) Act 1989* (Cth) and the relevant infertility treatment and the status of children legislation of the states and territories) make it abundantly clear that the provision of sperm and a resulting birth may make the donor a father but not a parent. The uniformity of approach is deliberate. In July 1980, the Standing Committee of Commonwealth and State Attorneys-General determined that uniform legislation on the status of children born as a result of artificial insemination by donor treatments should be enacted in all Australian jurisdictions. In short, the legislation is designed to provide that a sperm donor in Australia would incur no liability, nor retain any rights with regard to a child born as a result of a donation of sperm.<sup>19</sup>

Guest J in the part of his judgment in *Re Patrick* dealing with who is a parent under the *Family Law Act*, looked to the *dicta* of Fogarty J in *B v J* and in particular his Honour’s opinion that:

There is no corresponding provision in the *Family Law Act* which would exclude a biological parent from otherwise being regarded as a parent. That is to say, that it is not clear that the provisions of s 60H do not enlarge, rather than restrict, the categories of persons who are regarded as the child’s parents. In the case of the *Child Support (Assessment Act) 1989* (Cth), it is the words ‘means’ which make it clear that the provision is exhaustive. Prima facie, s 60H is not exclusive, so there would need to be a specific provision to exclude people who would otherwise be parents. Relevantly here, that means the donor of genetic material.<sup>20</sup>

According to Guest J, it follows that under the analysis of Fogarty J, a sperm donor who was not liable under the *Child Support (Assessment Act) 1989* (Cth), may still be a parent under the *Family Law Act*, because of the non-exhaustive definition in s 60H of that Act. Guest J agreed with a commentary by Danny Sandor<sup>21</sup> that to conclude that a person may not be a parent under relevant State and Territory law, but yet be a parent under the *Family Law Act*, would give rise to complications, not the least of these being that unknown sperm donors could be saddled with significant responsibilities and rights neither sought nor expected. His Honour agreed with Sandor’s argument that the provisions of the *Family Law Act* should be in step with State and Territory presumptions, leaving the sperm donor known or unknown, outside the meaning of ‘parent’. According to the present authors, while this conclusion has validity for many participants in donor insemination arrangements, it has little or no relevance in situations of same-sex families where a known donor father is seeking a parental status

<sup>19</sup> See above n 4, [65]-[66].

<sup>20</sup> See *Re B v J* (1996) FLC 92-716, 83,620.

<sup>21</sup> D Sandor, ‘Children Born From Sperm Donation: Financial Support and other Responsibilities in the Context of Discrimination’ (1997) 4 *Australian Journal of Human Rights* 175.



definition of parenthood which owes more to a heterosexual model than it does to a clinical donation of sperm from an unknown donor.

In the matter of the father in *Re Patrick*, his Honour was compelled to reach the conclusion that the father was not a parent. In reaching this conclusion, his Honour drew attention to s 60H(3) of the *Family Law Act* which provides as follows:

- (3) If:
- (a) a child is born to a woman as a result of the carrying out of an artificial insemination procedure;
  - (b) under a prescribed law of a Commonwealth, or of a State or Territory, the child is a child of a man;
- whether or not the child is biologically the child of a man, the child is his child for the purposes of this Act.

In short, s 60H(3) falls into line with State or Territory legislation in defining the status of parenthood under the *Family Law Act*. Accordingly, the biological father of Patrick could be a 'parent' under the *Family Law Act* only if there was legislation in Victoria conferring such status on him. In Victoria, the relevant provision is s 10F of the *Status of Children Act 1974* (Vic). This section in effect provides that the donor of sperm in circumstances where there is no *de jure* or *de facto* marriage, has no rights and incurs no liabilities in relation to a child born as a result of artificial insemination.

The favourable outcome for the father of Patrick was premised not on parental status, but merely on his status as '*... any other person concerned*' with Patrick's welfare under s 65C(c) of the *Family Law Act*.<sup>22</sup> This is highlighted in the following statement by Guest J:

As matters presently stand the father's position is this. Patrick has the right of contact '*... with other people significant to (his) care, welfare and development.*' See s 60B(2)(b) of the Act. As a person who is '*... concerned with the care, welfare and development of the child*', the father may apply for a parenting order pursuant to the provisions of s 65 of the Act. In that event, the child's best interests are of paramount consideration (s 65E of the Act) and the considerations pursuant to s 68F(2) apply. On that basis the father, whilst not a 'parent' can have certain parental responsibilities conferred on him within section 61D(1) of the Act.<sup>23</sup>

It is now six years since Fogarty J remarked in *B v J* that:

It is a reality of life children are born as a result of a variety of artificial conception procedures, out of non-traditional circumstances, and into non-traditional families. Legislation which deals with the personal and financial responsibility for such children should be clear and exhaustive and should recognise the reality of the situations.<sup>24</sup>

<sup>22</sup> Section 65C of the *Family Law Act* provides:  
A parenting order in relation to a child may be applied for by:

- (a) either or both of the child's parents; or
- (b) the child; or
- (ba) a grandparent of the child; or
- (c) any other person concerned with the care, welfare or development of the child.

<sup>23</sup> *Re Patrick* (2002) 28 Fam LR 579, 647.

<sup>24</sup> *B v J* (1996) FLC 92-716, 83,621.

In referring to the comments of Fogarty J, Guest J drew attention to the fact that little or nothing had changed since the judgment of *B v J*. His Honour stated:

Over five years have passed since his Honour expressed his view and, as these proceedings so starkly highlight, there has been no appreciable progress in this area. During the course of the proceedings, the issue of how to best address the various identified problems was discussed by counsel from time to time at my invitation by reason of my growing concerns.<sup>25</sup>

His Honour was clearly mindful of the legislative complexities in giving voice to the recommendations of Fogarty J. His Honour said:

Whilst one could envisage labyrinthine drafting problems alone, nonetheless, in my view legislation could be considered to recognise the reality in our community of our non-traditional circumstances evidenced in these proceedings and long ago identified by Fogarty J.<sup>26</sup>

In clarifying the basis for the definition of parent in section 60H of the *Family Law Act*, his Honour stated:

The current provision was designed to maintain consistency between the federal law and the status of children legislation of the states within the Commonwealth. It was also designed to ensure that the opposite sex partner of a woman undergoing artificial insemination treatment is considered a parent of any child conceived through such a procedure, and to protect donors from parenting responsibilities and financial burdens they did not agree to when making available their genetic material.<sup>27</sup>

His Honour went on to make reference to the fact that the model of artificial insemination procedures under Commonwealth and State law fall very much into the traditional heterosexual model, and made the point that ‘given the diversity of gay and lesbian families and the varying role donors play in the lives of children conceived using their donated sperm, the legislature needs to reassess s 60H of the Act and to consider the ramifications of its application in cases such as *Re Patrick*’.<sup>28</sup>

In the present authors' opinion, in light of the stated objectives and aims of the UN Convention and of Part VII of the *Family Law Act*, it makes no sense and cannot in the normal course of events be in the best interests of the child, to be part of an agreement whereby one of the parents of that child is relegated to mere genetic material. In relation to Part VII of the *Family Law Act* it is not possible to make an agreement which ousts the authority of the Family Court of Australia. Guest J drew attention to this when he stated:

An agreement absolving a father from the obligation to pay maintenance for a child would not be enforceable directly or by way of estoppel. Nor would an agreement absolving the father from any other aspect of parental responsibility. Equally, a written agreement which provided for a donor to have frequent contact with a child could not prevail over a finding by the court, in a given case, that contact was not in the best interests of the particular child. Whilst agreements might be valuable in avoiding, pre-

---

<sup>25</sup> *Re Patrick* (2002) 28 Fam LR 579, 647.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid 580.

empting or resolving inter-personal disputes between the individuals in donor insemination arrangements, it is the considerations in s 65E<sup>29</sup> and s 68F(2)<sup>30</sup> of the Act rather than the terms of any agreement which will dictate the outcomes for the child.<sup>31</sup>

In light of these observations by Guest J in *Re Patrick* regarding the impact of Part VII on the rights and responsibilities of sperm donor fathers, the authors have spent some time considering whether reforms to Part VII could be implemented to improve the position of sperm donor fathers whilst continuing to uphold the best interests of the child as the paramount principle.

#### IV PROPOSED AMENDMENTS TO AUSTRALIA'S *FAMILY LAW ACT*

The present authors believe that one part of the decision in *Re Patrick*, that the known sperm donor was not a parent for the purposes of Part VII of the *Family Law Act* is unfavourable, given that it means that sperm donor fathers are treated merely as any other person 'significant to the care, welfare and development of the child' for the purpose of the Act: s 60B(2)(b).<sup>32</sup> This does not reflect the reality of factual scenarios such as that in *Re Patrick* where the father is known and has a genuine interest in the care, welfare and development of the child, and also undermines the role of the sperm donor father in the life of the child.

It is our contention, consistent with the dictum of Guest J in *Re Patrick*,<sup>33</sup> that a sperm donor father who has a genuine and proven interest in the care, welfare and development of his child should be considered a 'parent' of the child. Not only does this mean that the father is entitled to the rights associated with being a parent under Part VII, but it also means that the father must exercise parental responsibilities, including child maintenance.<sup>34</sup>

After reading the decision of Guest J in *Re Patrick*, the present authors contemplated whether the problem which arose in *Re Patrick* as to whether the sperm donor father was a 'parent' for the purposes of the *Family Law Act* could be resolved by simply removing the barrier which stood in Guest J's way of classifying the sperm donor father a 'parent' for the purposes of the Act: s 60H(3). The problem, however, with such a simple amendment would be that all sperm donor fathers would then come to be regarded as a 'parent' – meaning both sperm donors known to the mother, and sperm donors who provided their genetic material anonymously to a sperm bank.<sup>35</sup> The authors

<sup>29</sup> Refer to part II above of this article.

<sup>30</sup> Ibid.

<sup>31</sup> *Re Patrick* (2002) 28 Fam LR 579, 648.

<sup>32</sup> See also s 65C of the *Family Law Act*, in which a sperm donor father, as a person who is '... concerned with the care, welfare and development of the child', may apply for a parenting order. This is discussed by Guest J in *Re Patrick* (2002) 28 Fam LR 579, 647.

<sup>33</sup> See *Re Patrick* (2002) 28 Fam LR 579, 648: '...consideration should be given to review the definition of 'parent' in s 60H of the Act to take into account that there are varying arrangements between donors and prospective mothers, and that donors such as the father in these proceedings may not only consider themselves a "parent", but may also be considered by the recipient of the genetic material to be a parent.'

<sup>34</sup> See *B v J* (1996) FLC 92-716 where the Family Court of Australia held that a sperm donor father was not liable for child maintenance under the *Child Support (Assessment) Act 1989* (Cth).

<sup>35</sup> Kelly, above n 4, argues that other problems with amending s 60H to make the donor father a 'parent' include that it may result in the creation of a relationship between the donor and child that

believe that it would be oppressive, and contrary to the best interests of the child, to extend parental rights and responsibilities to these anonymous sperm donors. It would also undoubtedly deter a significant number of males from donating sperm to assist women who are wanting to conceive through artificial insemination. In a recent article on the decision in *Re Patrick*, Fiona Kelly also stressed the need to distinguish between known sperm donors and anonymous sperm donors in any proposed legislative amendments to address the position of sperm donors fathers, stating:

It was obviously not Guest J's intention that all sperm donors be given the status of 'parent' . . . . If the legislature were to agree with Guest J's view that individuals in the position of the donor father should be considered 'parents' under s 60H, it would be necessary to make some legislative distinction between men like the donor father and other sperm donors.<sup>36</sup>

Accordingly, the authors have resolved that the most desirable amendment to the *Family Law Act* would be to model a new provision on s 11 of the *Children (Scotland) Act*, which relevantly provides:

- 11.** (1) In the relevant circumstances in proceedings in the Court of Session or sheriff court, whether those proceedings are or are not independent of any other action, an order may be made under this subsection in relation to—
- (a) parental responsibilities;
  - (b) parental rights;
  - (c) guardianship; or
- ...
- (2) The court may make such order under subsection (1) above as it thinks fit; and without prejudice to the generality of that subsection may in particular so make any of the following orders—
- (a) an order depriving a person of some or all of his parental responsibilities or parental rights in relation to a child;
  - (b) an order—
    - (i) imposing upon a person (provided he is at least sixteen years of age or is a parent of the child) such responsibilities; and
    - (ii) giving that person such rights;
  - (c) an order regulating the arrangements as to—
    - (i) with whom; or
    - (ii) if with different persons alternately or periodically, with whom during what periods,
 a child under the age of sixteen years is to live (any such order being known as a 'residence order' );
- ...
- (3) The relevant circumstances mentioned in subsection (1) above are—
- (a) that application for an order under that subsection is made by a person who—
    - (i) not having, and never having had, parental responsibilities or parental rights in relation to the child, claims an interest;
    - (ii) has parental responsibilities or parental rights in relation to the child;
- ...

---

is not the reality of a child's life (see [51]), and would undermine the independence and boundaries of the 'homo-nuclear family unit' (see [66]).

<sup>36</sup> See above n 4, [55].

- (b) that although no such application has been made, the court (even if it declines to make any other order) considers it should make such an order.

In effect, s 11 allows the court to make such order as it thinks fit in relation to parental responsibilities or parental rights, and this order may be imposed in the absence of an application by the parent or where the father actively seeks an order from the court.<sup>37</sup>

The authors' proposed new provision would be Part VIIA of the *Family Law Act*. While the new Part VIIA would be different from s 11 as Australia's Act talks about the rights of the child rather than parental rights and responsibilities, the general operation of the provision would be the same: sperm donor fathers who have a genuine interest in the care, welfare and development of the child would be able to apply to the Court for an order that they are a parent of the child for the purposes of the Act. Like s 11 of the *Children (Scotland) Act*, the best interests of the child would be the Court's paramount consideration when determining whether or not to grant an order under Part VIIA. To overcome the problem of singling out sperm donors, the provision would refer to 'biological fathers' rather 'sperm donors'. The new Part VIIA would read:

A      *Part VIIA- Biological fathers*

70R-

- (a) If the biological father of a child is not the parent of the child for the purposes of the Act due to a provision in Part VII above, the biological father can apply to the Court for an order that they are the parent of the child for the purposes of the Act.
- (b) The Court cannot make an order under (a) unless it considers the making of the order to be better for the child's welfare than not making an order.

The present authors' believe that our proposed Part VIIA of the *Family Law Act* responds to the comments of Guest J in *Re Patrick* in an appropriate and balanced manner. As an order cannot be made until the Court has assessed all the relevant facts (including the willingness and ability of the biological father to be involved in the child's care, welfare and development, and the attitude of the child towards the biological father) and considered that the making of the order will be better for the child's welfare than not making an order (in accordance with proposed s 70R(b) of the Act), the new provision will ensure that raising the status of a sperm donor father to that of 'parent' will only occur if this is clearly in the best interests of the child. A known sperm donor genuinely interested and involved in the child's life may want to be a 'parent' and therefore apply for an order under new Part VIIA, whereas an unknown sperm donor would be extremely unlikely to apply for an order under Part VIIA and even if they did, the application would certainly fail once the best interests of the child are taken into consideration.

In that sense, the consideration of the interests of the child would be an important protection. It would ensure that even though the *Family Law Act* would be amended to recognise the rights of sperm donor fathers who are outside what is considered to be the 'traditional' understanding of what a 'parent' is, the rights of the child would remain the

<sup>37</sup> See the recent Scottish decision of *In the Matter of Child A*, decided in the Glasgow Sheriff's Court, in which s 11 is discussed in detail. This case is available on-line via the Scottish Law Courts website: <<http://www.scotcourts.gov.uk/index1.asp>>

primary focus. This would be achieved not only by incorporating a test to ensure that an order is not granted unless the child's welfare is improved, but also through the biological father acquiring parental responsibilities once considered to be a parent pursuant to a Part VIIA order.

## V CONCLUSION

The case of *Re Patrick* highlights that the principle of the best interests of the child applies in all cases involving children's rights, without any exception. The principle cannot be compromised or ignored simply due to one biological parent of a child believing that a complete family unit can be achieved without the involvement of the other biological parent. The important point to come out of *Re Patrick* is that lesbian mothers who become pregnant with sperm provided by a known male donor are wrong to assume that they are justified in excluding him from assisting with the care, welfare and development of the child on the basis that he is a 'mere donor'.

The development of the law in this way is not about undermining the status of lesbian relationships, but rather reinforces the depth and universality of the best interests of the child principle, and demonstrates that it will generally be in a child's best interests to have regular contact with as many people as possible that have a genuine interest in the child's welfare.

It therefore becomes important that an educational program be established to support lesbian women contemplating parenthood by making available to them information about the rights and responsibilities that sperm donors could potentially have in relation to the child. It is vital that all lesbian women considering a pregnancy to be achieved through donated sperm have available to them information about the law relating to the status of sperm donors in Australian family law. This way, lesbian women are less likely to become pregnant using the sperm of a known donor unless these women accept that the sperm donor father may become involved in a child's life to the extent to which this is in the child's best interests.