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TITLE: [*1] Articles: Redefining Parenthood: Gay and Lesbian Families in the Family Court — the Case of *Re Patrick*

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ABSTRACT: The Family Court decision of ***Re Patrick***, n2 *in which a gay man who acted as a sperm donor to a lesbian couple was awarded contact with the 2 year old child conceived via his donation, raises fundamental issues about the meaning of family, legal parenthood, and the regulation of the gay and lesbian community. The case challenged the Court to move beyond heterosexual and gendered models of family, and to recognise the diverse family forms created by same-sex couples. This article critically analyses the judgment,* **[*2]** *focusing on whether a sperm donor in circumstances similar to those found in* ***Re Patrick*** *should be considered a 'parent' under the Family Law Act, and whether such donors should be liable for child support.*

n2 *Re Patrick (An Application Concerning Contact)* (2002) 28 Fam LR 579; FLC 93-096 (Hereafter, *Re Patrick*).

TEXT: Introduction

Recognition of same-sex relationships and same-sex family units is understandably a central focus of gay and lesbian politics. n3 'The family' has long been considered, both legally and socially, the fundamental unit of society. n4 Although the legislative boundaries of the family have recently been expanded through gay and lesbian relationship recognition legislation in most states, n5 same-sex family units that include children remain largely unrecognised and unprotected. *Re Patrick* is the first case of its kind in Australia and is a significant statement of how the Family Court views lesbian families with children and the sperm donors that make these families possible. **[*3]**

n3 Jenni Millbank argues that the inclusion of gay and lesbian families within the definition of 'family' is a logical goal for a community that 'is stigmatised . . . precisely because of their intimate relationships': see J Millbank, 'Which, then, would be the "husband" and which the "wife"?': Some Introductory Thoughts on Contesting "The Family" in Court' (1996) 3 *Murdoch University Electronic Journal of Law*, para 2 (www.murdoch.edu.au/elaw/).

n4 See, for example, s 43(b) of the Family Law Act which states that the Family Court shall, in the exercise of its jurisdiction, have regard to 'the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of

dependent children'.

n5 The following legislation has extended relationships recognition in certain areas of the law to same–sex couples: Domestic Relationships Act 1994 (ACT); Statute Law Amendment (Relationships) Act 2001 (Vic); Property (Relationships) Legislation Amendment Act 1999 (NSW); Property Law Amendment Act 1999 (Qld); Acts Amendment (Lesbian and Gay Law Reform) Act 2001 (WA).

[*4]

Re Patrick raises many complex issues and it would be impossible to deal with them all. This article will focus predominantly on two issues: (1) whether the sperm donor/father *should*, as Guest J argued, be a 'parent' under the Family Law Act; and (2) whether he should be liable for child support.

A note on language

Before considering the judgment as a whole, it is necessary to briefly address the importance of nomenclature in the case. As feminists have argued for decades, the power to name, to construct the language with which society describes, is the power to shape the dominant discourse. n6 The choice of language can include and exclude, acknowledge and make invisible. Given the unusual nature of the relationships in this case, questions of identity and definition were particularly significant and arguably at the centre of the dispute. The names given to each of the parties on the first day of the trial was an early statement as to how they would be viewed and how their roles would be understood. Would the man who donated sperm be called a 'donor'? A 'father'? A 'parent'? Could he be a 'father' but not a 'parent', or a 'parent' but not a 'father'? Is it possible to distinguish **[*5]** between the two? And what of the mother's partner? Was she a 'mother' too? Was she a 'parent'? Were Patrick and the two women together 'a family'? These questions were both the issue to be determined and the procedural starting point. The choices made would inevitably shape the rest of the case.

n6 See, eg, D Spender, *Man Made Language*, 3rd ed, Pandora, London, 1992 pp 163–90; D Cameron (ed), *The Feminist Critique of Language* Routledge, London, 1998. For a discussion of this issue in the legal context see: L Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886.

Obviously the three parties did not fit easily into the categories usually applied in the Family Court — mother/wife, father/husband. However, Guest J decided from the outset that the parties would be known as 'the mother', 'the co–parent', and 'the father'. The decision to refer to the mother's partner as the 'co–parent' is commendable, particularly given the invisibility **[*6]** of such women in previous decisions of the Family Court. n7 The term 'co–parent' is an accurate description of the role played by the mother's partner. It reflects the day to day lived reality of the family, and the fact that she was granted joint responsibility for the day to day and long term care, welfare and development of Patrick under a Family Court consent order. The acknowledgment within the term co–parent that she is a 'parent' to Patrick (though not in law), is also a significant statement about the status of psychological parents in the Family Court. The choice cannot be seen as anything but a victory for non–biological lesbian parents.

n7 In the past the Family Court has largely ignored lesbian partners, and has rarely recognised the non–biological mother's role as a social parent. For example, lesbian partners have been referred to by the Court as 'friends' (*In the Marriage of Schmidt* (1979) 5 Fam LR 421, 428; FLC 90–985) or 'companions' (*Jarman v Lloyd* (1982) 8 Fam LR 878, 884), and lesbian relationships have been termed 'associations' (*In the Marriage of Spry* (1977) 3 Fam LR 11,330, 11,333). More recently in *W v G* (1996) 20 Fam LR 49, Hodgson J of the NSW Supreme Court acknowledged that the non–biological mother had agreed with the mother to 'act . . . as a parent to the child' and, in part, found child support liability on that basis, but gave little indication that the co–parent's parenthood extended beyond her liability for financial support. This non–recognition or mis–recognition of lesbian relationships through language negates the lesbian experience and contributes to the invisibility of non–biological mothers.

[*7]

The title to be given to the sperm donor/father is slightly more controversial given that the essence of his case was that he was a father seeking contact with his son, while the mother and co–parent saw him as a sperm donor and nothing more. The choice of nomenclature for the sperm donor/father also raised complex questions about the nature of parenthood, and

fatherhood in particular. In the current culture of the Family Court being a 'father' is of considerable significance. Thus the choice between calling the sperm donor/father a 'father' or a 'donor' could not avoid being a statement as to how the individual, and his relationship to the child, would be understood. n8

n8 In an American case between two lesbian mothers and a sperm donor a similar dilemma about language arose. Interestingly, the majority, who found in favour of the sperm donor/father, referred to him as 'the father', while the minority referred to him as the 'petitioner sperm donor' or the 'biological progenitor': *Thomas S v Robin Y*, 618 NYS 2nd 356 (1994).

[*8]

When writing this article I struggled with the issue of how to refer to the sperm donor/father. I was uncomfortable with the idea that biological parenthood automatically equated to fatherhood. Social science research has suggested that parenthood is a psychological relationship that should be understood from the perspective of the child, and that while biology is important psychological or social attachments are of at least equal, if not more, significance. n9 This was the view taken by both expert witnesses in the case. n10 I also questioned whether the sperm donor in this case would have been referred to as 'the father' if he had donated to a heterosexual couple. Was he given the status of 'father' simply because of the view that a child 'needs' a father, and no one else was filling this inherently gendered role? After all, Patrick had two parents who were more than adequately meeting his needs. Why did he need a third parent, a 'father'? Or was the difficulty in this case that he did not have a *male* parent? Alternatively, the sperm donor/father may have been given the status of 'father' because it was the original intention of all three parties that he play such a role in **[*9]** the child's life. But this was one of the central issues to be determined in the case, so to have attributed a status on the assumption that all parties had so agreed would seem to have pre-empted the factual findings.

n9 The concept of psychological parenting was first developed by J Goldstein, A Freud and A Solnit, *Beyond the Best Interests of the Child*, Free Press, New York, 1973. This volume has since been updated: J Goldstein, A Solnit, S Goldstein and A Freud, *The Best Interests of the Child: The Least Detrimental Alternative*, Free Press, New York, 1996. For a discussion of the importance of recognising psychological/social parents in the context of step-families see: R Edwards, V Gillies and J McCarthy, 'Biological Parents and Social Families: Legal Discourses and Everyday Understandings of the Position of Step-parents' (1999) 13 *International Journal of Law Policy and the Family* 78.

n10 *Re Patrick*, above n 1 at Fam LR 625 (Adler), 631 (Papaleo); FLC 88,906-7 (Adler), 88,912 (Papaleo).

Based on **[*10]** the expert evidence, the literature on psychological parenting, and the fact that it was always intended that Patrick live in a lesbian household and have what can only be regarded as a non-traditional relationship with his biological father, I concluded that the male individual in this case fell somewhere between 'father' and 'donor'. He was not a mere sperm donor, as it was eventually found that it had been the intention of all the parties that he play some role in the child's life, but neither was he a 'father' as we commonly understand the term. It was clearly intended that this child be born into a lesbian household in which he would always reside, and that the two women would be his parents and primary caregivers. Calling the sperm donor 'the father' imputed a heterosexual family structure on to the women and Patrick when this was neither their lived reality nor their intention. If the term 'father' could be used in a fluid sense then it may have been appropriate, but I do not believe that given the highly gendered environment of the Family Court and recent debates about same-sex parenting, we have yet moved to a place where fatherhood can be understood in this less traditional **[*11]** form. Ideally, I would hope that we could move to a position where fatherhood (and motherhood) could take many forms, and the gay and lesbian community is certainly challenging society to reach this point.

This conclusion still left me with the problem of what to call the sperm donor/father. Ultimately I settled on 'donor father'. This terminology is designed to encapsulate the fact that he is a biological father by way of sperm donation — a category of 'father' commonly found in the gay and lesbian community — but that his role in the child's life was not intended to be that of a traditional father, but of something else, a third way created by a community that does not necessarily fit into or comply with traditional gender roles or parenting structures. Departing from the language used by the court is obviously a significant statement, but this decision was made in an effort to reflect the reality of Patrick and not of an inherently heterosexual and heterosexist language system.

The facts

The facts in this case were bitterly contested and the majority of the judgment is spent unravelling the competing claims. This article will outline the main facts but, because of the length **[*12]** of the judgment, it does not attempt to cover all of the factual issues. Due to the vastly differing stories told by the parties, issues of credibility were an important issue for determination. After hearing all of the evidence Guest J accepted the donor father's evidence over that of the mother and co–parent. This finding was significant to the eventual outcome.

The mother and donor father met in 1989 and over the next 9 years saw each other as social acquaintances. In October 1997 the mother placed an advertisement in a gay and lesbian newspaper seeking a 'sperm donor/co–parent'. The advertisement read: 'Attractive, creative intelligent gay woman seeks sperm donor/co–parent. Gay man/couple preferred. Level of involvement negotiable. GSOH (good sense of humour) essential.'

The mother interviewed two prospective donors in response to the advertisement, but ultimately she contacted the donor father. The mother and donor father met on 5 January 1998 when the mother asked him if he would be interested in becoming a known sperm donor. The two parties discussed the role the donor father would play if the arrangement went ahead. According to the donor father's evidence, the mother told **[*13]** him she had always had him in mind as a sperm donor. It was also his evidence that he told her he wanted to be known as the child's parent and to see the child one or two days a week and that she agreed to this. The mother's evidence was that she:

. . . did not ask him if he were interested in being a father to my child, but rather whether he would be interested in being a known sperm donor . . . I said that the co–parent and I wanted to have children, and that I was interviewing donors. I deny that the applicant said to me that he wanted to be known as the child's parent, but rather state that he told me he wanted to be known to the child. The donor indicated to me that he did not wish to be an anonymous donor. I acknowledge that and asked him what level of contact he desired. He responded he would like weekly contact, and I responded that could certainly not happen to begin with, and would ultimately be at the co–parent and my discretion. He asked if his role was to be as a 'co–parent', and I indicated this was not possible. I said, the only person I wanted to co–parent with was the co–parent. I deny that we made any agreement for the applicant to have regular contact with the child **[*14]** at this interview . . . n11

n11 *Re Patrick*, above n 1 at Fam LR 606; FLC 88,891.

Justice Guest accepted the donor father's evidence that he had always made it clear that he desired involvement in the care of any child for 1 or 2 days a week and that he would be known as the father. He also accepted the evidence of the donor father that he had always wanted to be a parent. His Honour concluded that had the situation been as deposed to by the mother the donor father would not have proceeded beyond their first meeting.

On 30 January 1998 all three parties met to further discuss their plans. The donor father's evidence was that the parties discussed who was to be present at the birth, immunisation, schooling, whether his name would appear on the birth certificate, and the mother's fears about not wanting to be financially dependent on him. He said that he again made it clear that he wanted to see the prospective child 2 days a week and to take on the role of an actively involved father. He gave evidence that the **[*15]** mother agreed to this. He further deposed that it was agreed that they would have a three–way partnership where each of them was an equal partner to the agreement and had equal parenting responsibility. In contrast, the mother's evidence of this meeting was that the parties reached the following agreement:

(a) the co–parent and I were the child/rens parents;

(b) his role was as a known donor, who would hopefully have some contact with the child/children at our discretion;

(c) the child/ren would not reside with him;

(d) he would not pay maintenance;

(e) his name would not be on the birth certificate and we (the mother and co–parent) would name the child/ren;

(f) as the first birth mother it was my decision as to who would be at the birth and he would have no ante–natal role;

(g) he would not have long term or day to day decision making responsibilities;

. . . n12

n12 *Re Patrick*, above n 1 at Fam LR 608; FLC 88,893.

Again, Guest J accepted the donor father's version of events. The first insemination session took place **[*16]** on 31 January 1998 and inseminations continued several times each month for 11 months.

After accepting the evidence of the donor father as to the pre–birth agreement, Guest J stated that any agreement reached between the parties did not confer binding parental rights on the mother and co–parent, or define the status of the donor father. He stated:

The issue of the discussions that took place on 5 January and 31 January 1998, while not binding, is relevant in assisting me to understand the intention of the parties at the time and also has ramifications extending to credit issues. n13

n13 *Re Patrick*, above n 1 at Fam LR 612; FLC 88,896.

On 3 January 1999 it was confirmed that the mother was pregnant. On 28 February 1999 all three parties attended a function at the home of a mutual friend. At that function the donor father announced that he and the mother were having a baby. It was his evidence that he thought at the time that that was 'not the right thing to say', and that he did not intend any disrespect to the **[*17]** co–parent.

The parties met again on 8 March 1999 and it was at this meeting that their 'once amicable and agreeable relationship became progressively embittered'. n14 At the meeting it was revealed by the mother that she did not want the donor father to be present at the birth. He protested and the three unsuccessfully sought to resolve the issue through mediation. At the first mediation session in April 1999 the donor father was handed a proposed agreement by the mother and co–parent which provided for all contact to be entirely at their discretion. The donor father's evidence, which the court accepted, was that this did not reflect the earlier discussions of the parties and he refused to sign it.

n14 *Re Patrick*, above n 1 at Fam LR 584; FLC 88,873.

Following the mediation sessions the mother and co–parent went into hiding and concealed the birthing arrangements from the donor father. The donor father learnt of Patrick's birth on 11 September 1999 from a friend and upon hearing this news filed an application in **[*18]** the Family Court seeking, inter alia, that he and the mother have joint responsibility for Patrick, that Patrick reside with the mother, and that the donor father have contact. The co–parent was not mentioned in the donor father's application. The mother opposed the application seeking orders that Patrick live with the mother and co–parent, that they retain joint responsibility for his day to day and long term care, welfare and development, and that the donor father have supervised contact with Patrick twice yearly. On 23 November 1999 an application was filed by the co–parent for leave to intervene in the proceedings and on that day orders were made by consent that leave be granted.

In December 1999 the donor father had his first contact with Patrick, who was then aged 14 weeks. Further contact visits took place between December 1999 and April 2000 pursuant to consent orders. During this time the parties also attended upon Vincent Papaleo, a psychologist, for the purpose of preparation of a report to be presented to the Court.

On 2 June 2000 final orders were made by consent. The orders stated, inter alia, that the mother and co–parent have residence of Patrick and joint responsibility **[*19]** for his long term and day to day care, welfare and development, and that the donor father have contact every third Sunday for 2 hours at the home of a friend of the mother and co–parent. The orders were to remain in place until Patrick attained the age of 2 years, after which they would be reviewed.

Following these orders the donor father had contact with Patrick on a regular basis. However, the relationship between the parties further deteriorated. On 26 October 2000 the mother and co–parent wrote a letter to the donor father and requested that he not refer to himself as Patrick's 'dad' during contact and that he not refer to his family members as Patrick's 'relatives'. The letter also stated:

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 . . . *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 **[*20]** 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 . . .* (emphasis in judgment) n15

n15 *Re Patrick*, above n 1 at Fam LR 587; FLC 88,875–6.

The donor father responded to this letter stating that he did not wish to undermine the mother and co–parent's relationship but that, 'I do however remain father to Patrick and have not given up any of the responsibilities or rights associated with fatherhood'. n16

Following several months of correspondence between the parties, in which the mother and co–parent sought to severely restrict the donor father's movements and behaviour during contact, the mother and co–parent unilaterally ceased contact and filed an application in the Court seeking that the contact orders of 2 June 2000 be discharged.

n16 *Re Patrick*, above n 1 at Fam LR 587; FLC 88,876.

[*21]

On 11 July it was ordered that contact resume and that the parties attend upon Dr Robert Adler for the purposes of a welfare report. On 23 October 2001 Dr Adler delivered his report in which he recommended that:

3. The father be allowed contact with Patrick at least twice a year for a period of no more than 3 hours on each occasion or at a greater frequency and duration if agreed by the mother and the co–parent.

7. As Patrick gets older his wishes regarding contact with the father should be respected and his frequency of contact varied accordingly. n17

n17 *Re Patrick*, above n 1 at Fam LR 589; FLC 88,878.

The mother and co–parent sought resolution of the dispute in the terms of Dr Adler's recommendations. The donor father rejected the offer. The dispute came before Guest J in the Family Court in January 2002.

The decision

The decision of Guest J addressed two separate questions. First, whether contact was in Patrick's best interests, and second whether the donor father was a 'parent' under s 60H of the Family **[*22]** Law Act.

Guest J ultimately held that it was in Patrick's best interests to have contact with the donor father on a regular and increasing basis. His decision was complex and lengthy and much of the reasoning will be dealt with in the discussion below. In summary however, Guest J held that he was satisfied that Patrick is 'familiar with his father, comfortable in his presence and gains considerable reward and benefit from their mutual interaction'. n18 He cited with approval Papaleo's view that 'psychological relatedness and not biological relatedness was the primary consideration when determining the welfare of children', n19 but also agreed with Papaleo's unequivocal belief that regardless of '. . . ideological considerations' for any of the parties involved, 'it was important for Patrick to know who fathered him'. n20

n18 *Re Patrick*, above n 1 at Fam LR 638; FLC 88,917.

n19 *Re Patrick*, above n 1 at Fam LR 632; FCR 88,912.

n20 *Re Patrick*, above n 1 at Fam LR 632; FCR 88,912.

Guest J ultimately ordered **[*23]** that Patrick have fortnightly contact with the donor father for 4 hours, increasing to 8 hours by September 2002, and then to overnight and eventually weekend contact by the time Patrick is 4 years old. While the contact ordered is less than that which would be granted to a typical father in the Family Court, it is still considerable.

In making his decision about contact Guest J gave considerable weight to the agreement between the parties. While he stated that the agreement was not binding on him and was only 'relevant in assisting [him] to understand the intentions of the parties at the time', n21 his decision to award contact rested heavily on his finding that the donor father had donated his genetic material 'upon an understanding that he was to have a role in the life of any prospective child'. n22 The weight Guest J gave to the agreement between the parties is significant, though it should be noted that Guest J's factual findings in relation to the agreement essentially involved the donor father 'contracting in' rather than 'contracting out' of parenting. n23

n21 *Re Patrick*, above n 1 at Fam LR 612; FCR 88,896.

n22 *Re Patrick*, above n 1 at Fam LR 640; FCR 88,918.

n23 While the donor father sought to 'contract in' to parenting responsibility, he had actually 'contracted out' of financial responsibility for Patrick via an agreement with the mother that he not pay child support. Given Fogarty J's comments in *B v J* [1996] FLC 92,716 about this issue it is somewhat surprising that it did not receive any attention in the judgment.

[*24]

Historically, Australian courts have refused to permit parents to contract about parenting on the basis that it is contrary to public policy. n24 In particular, the courts are concerned that permitting parents to contract out of their parental responsibilities will leave children without financial support, and may result in reliance on the public purse. n25 For example, in *B v J* Fogarty J made it clear that a parent cannot contract out of paying child support:

n24 See, eg, *B v J*, above n 22 at 83,618–9. In contrast to the Australian position, the courts in America have been much more willing to uphold contracts about parenting (at least in part), usually via the equitable principle of estoppel. See, eg, *Leckie v Voorhies* 875 P 2d 521 (Or App 1994); *Straub v Todd* 626 N E 2d 848 (1994); *Purificati v Paricos* 545 NY S 2d 837 (A D 2 Dept 1989). For a discussion of the American cases see D Kovacs, 'The AID Child and the Alternative Family: Who Pays? (or Mater Semper Certa Est — That's easy for you to say!)' (1997) 11 *Australian Journal of Family Law* 141 at 155–60; N Polikoff, 'The Deliberate Construction of Families Without Fathers: Is it an Option for Lesbian and Heterosexual Mothers' (1996) 36 *Santa Clara Law Review* 375 at 387–90.

n25 For example, see Fogarty J's comments in *B v J* that: 'The financial support of children is a matter of great public interest. The community as a whole would be adversely affected if a person were permitted to waive a "right" to seek support from a child's parent' (at 83,618).

[*25]

The financial support of children is a matter of great public interest . . . Longstanding authority in Australia and overseas has made it clear that such is the nature of responsibility in this area that parents may not contract out of that responsibility. In addition, it needs to be emphasised that not only has the community a substantial interest in this area but the right to child support is the right of the child which may not be waived or contracted out by that child's parents, both of whom have the responsibility for that child. n26

n26 *B v J*, above n 22 at 83,618–9.

Gay and lesbian families challenge many of the assumptions upon which these policy arguments are based. The reasoning of Fogarty J is predicated on a two-parent, heterosexual model of parenting. It does not acknowledge the possible (albeit non-legal) responsibilities of a non-biological co-parent or the diminished role of a biological father who serves as a known sperm donor. Instead it treats responsibility as a function of biology, which **[*26]** is largely in conflict with the model of family created by same-sex couples.

To bring a child into the world via known sperm donation necessarily involves an agreement between the parties involved. For this reason, the vast majority of children born to lesbian parents are the subject of some sort of 'contract' between the mother, the donor, and usually a co-parent. While Guest J was careful to state that the agreement between the parties in *Re Patrick* was not binding on him, the weight which he placed upon it suggests a tentative willingness to recognise the importance of such agreements to decision making about gay and lesbian families. Given the paramountcy of the best interests principle agreements about children will never be binding on the court, but by giving some force to the agreement in *Re Patrick* Guest J sought to acknowledge and affirm the model of family created by the three parties (as he found it to be). This is an important step forward for gay and lesbian parenting.

The second issue Guest J was required to resolve was the more technical question of whether the donor father is a 'parent' under the Family Law Act. In many ways this issue had already been determined **[*27]** in the decision of *B v J*, where it was held that the definition of 'parent' in s 60H of the Family Law Act did not include a sperm donor (and thus a sperm donor was not liable to pay child support). n27

> n27 Child support liability for children born via artificial insemination is dealt with by s 5 of the Child Support (Assessment) Act 1989 (Cth), which refers the Court to the definition of 'parent' in s 60H of the Family Law Act. For a discussion of the decision in *B v J* see: D Kovacs, above n 23 at 149; 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.

The relevant subsection of s 60H states:

> (3) If:
>
> (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
>
> (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;

then, whether or not the child is biologically a child of the man, **[*28]** the child is his child for the purposes of this Act. n28

> n28 Family Law Act 1975 (Cth) s 60H(3).

The effect of this subsection is that where, under a prescribed law of a State or Territory the child is a child of a man, the child is also to be regarded as his child under the Family Law Act. There are no such prescribed laws in any State or Territory. n29 Since no prescribed laws exist, Fogarty J held that the sperm donor in *B v J* was not a 'parent' for the purposes of the Child Support (Assessment) Act.

However, Fogarty J suggested in dicta in *B v J* that it did not necessarily follow that because a sperm donor is not a parent under the Assessment Act he is also not a parent under the Family Law Act. n30 It was Fogarty J's view that the definition of 'parent' in s 60H of the Family Law Act, when not restricted by the Assessment Act, may not be exhaustive, and thus sperm donors may qualify as 'parents'.

> n29 Family Law Regulations 1984 (Cth) Sch 6 & 7.

n30 *B v J*, above n 22 at 83,620.

[*29]

Relying on the explicit wording of s 60H and its state and territory equivalents, as well as the arguments of Sandor and Kovacs, Guest J rejected this view, finding it would be a 'curious result given that all states and territories have laws which presume that a sperm donor is not a parent unless he is the legal or de facto husband of the recipient'. n31 Further, such a result would have serious and unintended implications for sperm donors who would suddenly find that they have responsibility for any number of children born via their donations. Guest J thus concluded that the donor father is not a 'parent' under the Act. However, he did not believe this was a satisfactory position:

n31 Sandor, above n 26, 178, quoted in *Re Patrick*, above n 1 at Fam LR 645; FLC 88,922.

Given the father's active involvement in Patrick's conception and his ongoing efforts to build a relationship with his son, it is a strange result that he is not Patrick's 'parent'. n32

n32 *Re Patrick*, above n 1 at Fam LR 645; FLC 88,923.

[*30]

The question of whether the donor father should be a 'parent' under the Act is considered below.

The issues

It should be made clear from the outset that *Re Patrick* represents a significant step forward for gay and lesbian families in Australia. It exists in stark contrast to earlier jurisprudence on lesbian parenting in the Family Court. Positive statements about lesbians and gay men are few and far between in Australian law, making the decision in *Re Patrick* a significant moment in our legal history. *Re Patrick* is the first decision in Australia to give appropriate recognition to a non-biological lesbian co-parent, to what Guest J calls the 'homo-nuclear family', n33 and to the ability of gay and lesbian parents to raise healthy and happy children. It also makes important recommendations in relation to increasing access for lesbian women to state regulated assisted reproduction services, and the counselling facilities that accompany these services. While these gains may seem long overdue, it is interesting to note that a case with almost identical facts, *Child A*, heard in Scotland at around the same time as *Re Patrick*, did none of these things and actually **[*31]** implied that being raised in a same-sex household equated with being raised in a home where there was domestic violence, drinking, gambling, and physical or sexual abuse. n34 The decision in *Re Patrick* is all the more significant given that decisions such as *Child A* can still be made in 2002.

n33 This phrase has been criticised by feminists and queer theorists on the basis that it prioritises the traditional, couple-based nuclear model of family over others, and encourages lesbian women to conform to a conservative heterosexual and heterosexist model. Valorising the 'homo-nuclear family' also necessarily results in the exclusion of other intimate relationships such as non-cohabiting couples and non-monogamous relationships. For a discussion of this issue see: D Herman, 'Are We Family? Lesbian Rights and Women's Liberation' (1990) 28 *Osgoode Hall Law Journal* 789; S Boyd, 'Expanding the "Family" in Family Law: Recent Ontario Proposals on Same Sex Relationships' (1994) *Canadian Journal of Women and the Law* 545; K Arnup and S Boyd, 'Familial Disputes? Sperm Donors, Lesbian Mothers and Legal Parenthood' in D Herman and C Stychin (eds) *Legal Inversions: Lesbians, Gay Men, and the Politics of Law*, Philadelphia, Temple University Press, 1995. Debate over what form relationship recognition should take is an ongoing issue in the gay and lesbian community. For discussion of this issue see: Lesbian and Gay Legal Rights Service, *The Bride Wore Pink*, Gay and Lesbian Rights Lobby, Sydney, 1994; *Reducing Discrimination Against Same Sex Couples — Discussion Paper*, Victorian Attorney-General's Advisory Committee on Gay, Lesbian and Transgender Issues, July 2000.

n34 *Child A* (unreported judgment, 6 March 2002, Glasgow, Sheriff Duncan).

[*32]

At times this article is critical of certain aspects of the decision in *Re Patrick*, and certainly challenges the reader to consider the implications of some of the findings. In particular, it addresses the problems raised by the recommendation that some sperm donors be given the status of 'parent', and considers whether such a proposal seeks to impose a heterosexual model on to a same-sex family unit. While the article is sometimes critical it is not, however, intended to detract in any way from the courageous step forward that *Re Patrick* represents.

While *Re Patrick* is predominantly a case about same-sex parenting, as Arnup and Boyd argue 'parenting for lesbians and gays occurs in a highly gendered context'. n35 Historically, lesbian women and gay men have fought as a united front in the battle for recognition of their relationships and their families. However, with the increasing incidence of lesbian couples having children using the sperm donations of gay men, it is inevitable that some of the future battles about 'family' will be found within the community. Unfortunately, it will be impossible to remove such disputes from the highly gendered atmosphere that currently **[*33]** pervades family law in Australia and overseas. n36 The recent reassertion of fathers' rights, n37 as well as the ongoing attacks on single motherhood and single women and lesbians who seek access to assisted reproductive services, n38 form the backdrop to this dispute. An indication of how families such as Patrick's are sometimes viewed is evidenced by the opinion of Prime Minister John Howard who, over the past 2 years has stated frequently that, 'the fundamental right of a child within our society is to have the reasonable expectation, other things being equal, of the care and affection of both a mother and a father'. Thus while *Re Patrick* is very much a decision about same-sex parenting and the recognition of gay and lesbian families, the gendered context in which it was decided cannot be dismissed.

n35 Arnup and Boyd, above n 32 at 79.

n36 Australia is not alone in experiencing what some are calling 'gender wars' within family law. For the Canadian perspective see: M Laing, 'For the Sake of the Children: Preventing Reckless New Laws' (1999) 16 *Canadian Journal of Family Law* 229; N Bala, 'A Report from Canada's "Gender War Zone": Reforming the Child Related Provisions of the Divorce Act' (1999) *Canadian Journal of Family Law* 163.

n37 For a discussion of the impact of fathers' rights groups on Australian family law see: M Kaye and J Tolmie, 'Fathers' Rights Groups in Australia and Their Engagement With Issues in Family Law' (1998) 12 *Australian Journal of Family Law* 1; M Kaye and J Tolmie, 'Discoursing Dads: The Rhetorical Devices of Fathers' Rights Groups' (1998) 22 *Melbourne University Law Review* 62.

n38 See, eg, the recent decision of *Re McBain; Ex parte Australian Catholic Bishops Conference; Re McBain; Ex parte Attorney-General* [2002] HCA 16 (18 April 2002). For a discussion of the original Federal Court decision see: K Walker, 'Equal access to assisted reproductive services: the effect of *McBain v Victoria*' (2000) 25 *Alternative Law Journal* 288. For a discussion of the position prior to *McBain* see: J Millbank, 'Every Sperm is Sacred?' (1997) 22 *Alternative Law Journal* 126.

[*34]

(a) Sperm donors and legal parenthood

While the issue of whether the donor father is a 'parent' under the Act is irrelevant to the issue of contact — the Family Law Act permits 'any person concerned with the care, welfare or development of a child' to seek a parenting order n39 — it is significant to the larger picture. Being a 'parent' under the Act carries with it substantial social and financial rights and responsibilities. It also signifies a status in law as well as in society that we see as exclusive and important.

n39 Family Law Act 1975 (Cth) s 65C(c).

After determining that the language of s 60H meant that the donor father is not a 'parent' under the Act, Guest J indicated that this was an unsatisfactory position:

I have found that the father holds a genuine and profound paternal love for Patrick and has, notwithstanding the negative definitions sought to be ascribed by the mother and the co-parent, much to offer the child in achieving the milestones of his development over forthcoming years. It is in **[*35]** these particular circumstances difficult to understand

that he is excluded, for the purposes of the Act, from being properly known as a 'parent' of Patrick, but merely to have jurisdictional status in the Family Court as '. . . any other person concerned' with Patrick's welfare (s 65C(c) of the Act), or as was submitted on the part of the applicants, to have an avuncular role in the child's life.

To be Patrick's biological father in the circumstances found by me and yet denied by bare statutory definition appropriate nomenclature as one of his 'parents' in my view sits awkwardly with the provisions of an Act which regulates family law in this country. It falls seamlessly from the expert evidence of both Dr Adler and Mr Papaleo that the mother and her committed lesbian partner in their homo–nuclear relationship are the child's 'parents', but that a similar and appropriate recognition is not accorded to the biological father. n40

n40 *Re Patrick*, above n 1 at Fam LR 647; FLC 88,924.

The situation of the donor father **[*36]** does 'sit awkwardly' with the Family Law Act, but as his Honour goes on to say, s 60H was drafted 'with a heterosexual model in mind'. n41 There was never any expectation that sperm donors would want to be involved in the lives of children conceived via their donations, and there was certainly no expectation that the heterosexual parents of a child born via artificial insemination would encourage any *parental* involvement on the part of a sperm donor in the child's life. Where Guest J's reasoning is problematic is where he states that it is incongruous that the mother and co–parent are the child's 'parents', but that the donor father is not granted similar recognition. While the expert evidence put the co–parent in the category of a 'social parent', the Family Law Act gives her no recognition at all. She has parenting orders in her favour, but only by virtue of being a 'person concerned with the care, welfare or development of the child', the same provision under which the donor father is eventually awarded contact. n42 The co–parent and the donor father in fact find themselves in exactly the same position, the donor father because he is deemed a mere sperm donor by the Act, and **[*37]** the co–parent because she has no biological link to the child to which she, in conjunction with the mother, is the primary caregiver. Thus any criticism of the legislative status of the donor father needs to be accompanied by similar concern for the position of the co–parent who, until she sought to intervene in the proceedings, was not even a party to the dispute.

This discussion raises two separate issues. First, whether individuals in the situation of the donor father should be 'parents' under the Family Law Act and second, if they are parents how should this status be recognised?

n41 *Re Patrick*, above n 1 at Fam LR 652; FLC 88,928.

n42 Family Law Act 1975 (Cth) s 65C(c).

(i) Should the donor father be a 'parent' under the Act?

Before addressing the issue of whether the donor father should be a 'parent' under the Act, it is necessary to consider why Guest J thought it appropriate to draw a distinction between the donor father in this case and other sperm donors. In some sense the decision is not surprising. **[*38]** It is difficult to imagine the court lamenting the unrecognised status of a sperm donor to a heterosexual couple when the result would be that the child has two fathers and that the biological father could exercise, in conjunction with the biological mother and non–biological father, parental responsibility over a child living within an intact heterosexual family unit. The very intention of s 60H and the state and territory equivalents was to *protect* the heterosexual family unit by treating the child as the child of the husband. So why were the family unit and the non–biological parent in *Re Patrick* not afforded the same protection?

In his expert evidence, Papaleo grappled with this question, eventually concluding that the nature of this family was significantly different from the norm, and that this needed to be taken into account when deciding how the different relationships should be recognised:

. . . Mr Papaleo stated his position as Patrick having two parents and a father and which was a distinction he made throughout his evidence. When it was put to him by [the mother's counsel] that the orders sought by the father would intrude upon the homo–nuclear family '. . . because **[*39]** that leads him to having not two parents, but three parents' Mr Papaleo said:

'Does it, or does it convey to him that he has two parents and a father who is not a parent because there is a different —

they exist in a very different model. They are a different model anyway and — we are having to make the rules on our feet as we go. There is no reason for me to think that Patrick's development will do anything but progress extremely well in the care of his parents. Professor Adler has described him as a very strongly and securely attached child. My observations of him, in the company of his father on the video tape, suggests that unequivocally. Why is it that we can't incorporate in these rules parents and a father, the father who doesn't have the same sort of involvement, and I think that there are other models of this . . .'

He agreed that the father's role could be seen as '. . . one down' from that of the mother and the co–parent. He acknowledged that the father was seeking significantly less contact than a '. . . parent' may seek and significantly, had entrusted important decisions about Patrick's day to day life and existence to the mother and co–parent. Mr Papaleo described **[*40]** him as a father who did not have the same sort of involvement as the mother and the co–parent and went on to explain:

'. . . I think we have to re–invent the fatherly relationship to this situation. It is clearly not the kind of fatherly relationship I have with my child but it is different. It is more than a stranger, less than a parent, it is different to a grandparent, it is more important than a grandparent, it is different to an uncle. It falls somewhere in between. *Hopefully it is a loving, caring, regular, familiar, male adult figure in his life* who also happens to be his biological parent.' (emphasis in original) n43

n43 *Re Patrick*, above n 1 at Fam LR 634; FLC 88,913–4.

While Guest J found Papaleo's evidence to be 'persuasive and insightful', n44 he did not ultimately accept Papaleo's opinion that Patrick has 'two parents and a father'. Instead he argued that this construction was 'caught in time', and that with the effluxion of time 'matters will materially change'. n45 This is quite a significant **[*41]** departure, as it seems to suggest that as Patrick gets older and matures he will come to see his family as being made up not of 'two parents and a father', but of three parents. This finding gives the donor father a status beyond what Papaleo understood him to have. It is thus not surprising that Guest J concluded that the donor father *should* be a 'parent' under the Act.

In considering this issue it is interesting to compare the decision in *Re Patrick* with another case with similar facts. The New York trial court decision of *Thomas S v Robin Y*, gives some insight into how children in same–sex households may see their reality, and how it might differ from the reality the Courts may subscribe to them. The decision in *Thomas S* dealt with a gay sperm donor (Thomas S) who sought an order of filiation and visitation which, at trial, was successfully defeated by the biological mother, Robin Y, and the child's co–parent, Sandra S. How Ry, the child at the centre of the case, identified her parents and sibling laid much of the groundwork for Kaufman J's decision that Thomas S should fail in his action.

n44 *Re Patrick*, above n 1 at Fam LR 636; FLC 88,915.

n45 *Re Patrick*, above n 1 at Fam LR 641; FLC 88,919.

[*42]

In *Thomas S* the two women, Robin Y and Sandra S, decided in 1979 that they wanted to have children. In an agreement between the two women and a gay man, Jack Kolb, Sandra S conceived a child via artificial insemination. In reaching the agreement, Kolb verbally agreed that the two women would raise the child as co–parents, that he would have no parental rights or obligations, and that he would make himself known to the child at a future date selected by the mothers. The child, Cade, was born in 1980. Soon after Cade's birth a second sperm donor, Thomas S, was found and he agreed to the same conditions that the mothers had established with Kolb. The second child, Ry, was born in 1981. Although the mothers and their two daughters lived in the same area as Thomas S for most of the first year of Ry's life they had little contact with him. They moved away from the area in 1982 and until 1985 had virtually no contact with Thomas S.

In early 1985, Cade began asking about her biological origins. The mothers contacted both sperm donors to arrange for the children to meet 'the men who helped make them'. The mothers made it clear that they still expected the donors to respect the agreement **[*43]** they had made, and also requested that the men treat the sisters equally. Thomas S agreed to

both requests.

The first contact with Thomas S went smoothly and over the next few years the two mothers and their daughters visited Thomas S several times a year, and occasionally vacationed together. In 1991, Thomas S sought to reinstate his parental rights over Ry and also sought visitation with Ry without her co–mothers being present so that she could be introduced to his family. At this point the women severed all contact with Thomas S.

At trial the court heard the testimony of Dr Schneider, a psychiatrist, who with their consent had conducted lengthy evaluations of all parties. Dr Schneider recommended against an order of paternity and visitation. The judgment of Kaufman J summarises Dr Schneider's evidence in what is a telling account of the reality of Ry, the child at the centre of the dispute:

Ry, Dr Schneider said, considers Sandra R and Robin Y to be her parents and Cade to be her full sister. *She understands the underlying biological relationships, but they are not the reality of her life. The reality of her life is having two mothers, Robin Y and Sandra R, working together* **[*44]** *to raise her and her sister. Ry does not now and has never viewed Thomas S as a functional third parent*. To Ry, a parent is a person who a child depends on to care for her needs. To Ry, Thomas S has never been a parent since he never took care of her on a daily basis.

Ry, Dr Schneider said, views Robin Y and Sandra R as having a relationship with each other that should be given respect. She knows that she, Cade and her mothers comprise an unusual and unconventional family. She knows that some outside her family have often shown intolerance and insensitivity toward her family. Notwithstanding this intolerance, Ry's own view of her family is that of a warm, loving, supportive environment.

Ry, he said, views this court proceeding as an attack on and threat to her positive image of herself and her family. Her sense of family security is threatened. [For Ry, a declaration of paternity would be a statement that she, Young, and Steel constitute one family unit and Cade, Russo, and Kolb form another. This juxtaposition of relationships frightens her]. . . . Ry does not want to visit Thomas S. [for various reasons, Dr Schneider believes. She is angry at him for undermining the security **[*45]** she felt in her concept of family. She feels betrayed because she and her family had counted on him as a supporter of their unconventional family unit. She feels he is acting out of a selfish desire to get what he wants, without appreciating how hurtful his actions have been to her and her family.] n46

n46 *Thomas S v Robin Y*, 599 N Y S 2d 377, 380 (Fam Ct 1993).

Dr Schneider did not believe that Ry had been 'brainwashed' into expressing these views, though Kaufman J recognised that Ry's views were obviously shaped by those of her mothers. n47 Drawing in part on the evidence of Dr Schneider, Kaufman J held that Thomas S should be estopped from a declaration of paternity, despite his biological and social relationship with the child. It was his view that although Thomas S had a relationship with Ry that was closer than her relationship with many family friends, that did not mean that she viewed him as a 'parental figure'. Kaufman J also relied on the fact that Thomas S had shown no interest at the outset in exercising **[*46]** parental rights, had not paid child support, had not attempted to establish paternity earlier, had not seen Ry for the first 3 years of her life and had not supported the 'functional family relationships' of Robin Y, Sandra S and their children, to estop him from claiming paternity. Finally, Kaufman J held that a declaration of paternity would not be in Ry's best interests because:

[A] declaration of paternity would be a statement that her family is other than what she knows it to be and needs it to be. To Ry, Thomas S is an outsider attacking her family, refusing to give it respect, and seeking to force her to spend time with him and his biological relatives, who are all complete strangers to her, for his own selfish reasons. n48

n47 *Thomas S v Robin Y*, above n 45.

n48 *Thomas S v Robin Y*, above n 45.

The decision of Kaufman J was overturned by the Appeal Court which viewed the family not as Robin, Sandra, Ry and Cade, as Kaufman J had, but as Thomas, Robin and Ry, a family no different from that which **[*47]** exists when parents divorce. The Appeal Court held that paternity statutes define parenthood by biology alone. Thus as Ry's biological father Thomas S was entitled to an order of filiation.

Obviously the facts in *Thomas S* are different to those in *Re Patrick* where the donor father sought involvement in Patrick's life from the time of his birth. The difference in age between the children is also significant. However, the decision in *Thomas S* at first instance is still of assistance. The relevance of the case to a discussion of *Re Patrick* is not that Thomas S failed at first instance where the donor father succeeded, but that it gives some insight into the reality of the children being raised in these families. Ry's sense of her family was of having two mothers and a sister. In her mind Thomas S's actions threatened her family security and giving him the status of 'parent' would have undermined her concept of family. In spite of biology and heterosexual society, Ry did not see her family in these terms. For Ry, family and parenthood were much more about functional parenthood and her lived reality. Although she had spent time with Thomas S and had developed a relationship **[*48]** with him, as have Patrick and the donor father, she did not see Thomas S as a 'parent'. It would be easy to dismiss the views of a 10 year old, but considering that the Court has little knowledge of the perspectives and experiences of children being raised in same–sex families it would irresponsible to do so. In addition, given the growing global prominence of children's rights, n49 and in particular a child's right to express a view about decisions that affect them, n50 courts should be reluctant to disregard a child's perception of their familial bonds.

> n49 For a discussion of the growing importance of children's rights in family law see: J Eekelaar, 'The Importance of Thinking that Children Have Rights' in P Alston, S Parker and J Seymour (eds), *Children, Rights and the Law,* Oxford University Press, 1992.
>
> n50 Section 68F(2)(a) of the Family Law Act requires that the Court consider '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'. This is loosely based on Art 12 of the Convention on the Rights of the Child which states:
>
> 12(1) State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in manner consistent with the procedural rules of national law.

[*49]

Obviously Patrick is not old enough to articulate his views, but interestingly the views expressed by the mother and co–parent, and dismissed by the court, closely resemble those articulated by Ry. Guest J outlined the mother's evidence as this:

> [Counsel for the father] asked the mother what harm could come to her relationship with the co–parent if contact were to be ordered by the court as sought by the father. She explained that the family would '. . . no longer exist' . . . She said that if an order was made for the father to have contact with Patrick, the court would in fact be ordering '. . . the destruction of' her family. n51
>
> n51 *Re Patrick*, above n 1 at Fam LR 598; FLC 88,884.

In an earlier affidavit the mother had deposed:

[T]he co–parent and I are certainly not coping with what we continue to see as an intrusion on our family life. The reality, as we see it, is that the father as (sic) a sperm donor who enabled me to conceive but that we are Patrick's parents. n52

n52 *Re Patrick*, above n 1 at Fam LR 617; FLC 88,900.

[*50]

The co–parent articulated similar views, at one point stating that what the donor father was asking for was a 'total reality shift' for Patrick. n53 Guest J rejected the evidence of both of the mothers, noting in particular, 'The fact that the applicants see the father as an intrusion in their family life is a matter for them. The reality is, he is not.' n54 Guest J also found that the mother's view that court ordered contact would 'destroy' her family was 'fanciful'. n55

These conflicting views as to the 'reality' of a situation are difficult to resolve. Arguably the court's views as to the parties' 'reality' and the child's best interests are inextricably linked to a heterosexual, and often patriarchal model. On the other hand, how should the court respond to a 10 year old who says that forcing her to have contact with her biological father is a statement of biology but not of the reality of her life, and that his wish to see her undermines *her* concept of family? If Patrick were old enough to articulate similar views what would the court have decided?

n53 *Re Patrick*, above n 1 at Fam LR 600; FLC 88,886.

n54 *Re Patrick*, above n 1 at Fam LR 618; FLC 88,900.

n55 *Re Patrick*, above n 1 at Fam LR 597; FLC 88,884.

[*51]

These issues are raised not to suggest that one view is the correct one, but simply to highlight the difficulty of relying in these cases on principles firmly grounded in a heterosexual context. Put simply, amending s 60H so that the donor father is a 'parent' may result in the creation of a relationship that is not the reality of a child's life.

A second problem posed by the prospect of reforming s 60H to make *this* donor father a 'parent' is that gay and lesbian families come in many diverse forms. As Guest J points out:

[Gay and lesbian families] cannot be characterised as a homogenous group. Children conceived via artificial donor insemination may have only two mothers, others such as Patrick, may have two mothers and a father, and others, may have two mothers and two fathers. In a rare number of cases a child may have only two fathers. Within each of these family forms itself there may be variations in the level of involvement of the father or fathers in the child's life. Accordingly, whilst a child may have two mothers and a father, this does not mean that the father plays a traditional 'fatherly' role. n56

n56 *Re Patrick*, above n 1 at Fam LR 651–2; FLC 88,927–8.

[*52]

Not only is there diversity in family forms, there is also diversity in the arrangements made by lesbian couples and their sperm donors. In his decision, Guest J cites a survey of 84 women attending the Sydney Lesbian Parents Conference in 2000, which found that a vast array of arrangements and relationships existed within these families. n57 Sixty–six per cent of the respondents with children conceived via donor insemination reported that the donor had no parenting responsibilities or decision–making role, while 12% reported that they shared parental responsibilities with the donor. In relation to contact between the child and the donor, 31% had no contact, 33% had 'some' contact, 22% had regular contact, and 13% had 'extensive' contact, with the donor relating to the child as a non–resident parent. n58 These statistics paint a picture of gay and lesbian parenting that cannot be easily summarised. What is evident though is that the donor father in *Re Patrick* is in a minority as a donor who has been granted what can only be considered 'extensive' contact in the context.

It is thus evident that before implementing reform based on this case, these facts, and these parties, it **[*53]** is important to recognise the diversity of gay and lesbian parenting arrangements. With the statistics quoted above as a backdrop, it is difficult to endorse strict legislative rules. To legislate for sperm donor parenthood when so few donors and lesbian couples enter into arrangements with that intention is likely to create additional conflict, both for the women and their donors. There is the possibility that in the clamour to protect the donor father in *Re Patrick* the legislature and the court may create rules contrary to the arrangements made by the vast majority of lesbian mothers and their donors. Reform that seeks to 'find fathers' for children born into lesbian families is contrary to all of the evidence that children raised in same–sex households develop in the same way as those raised in heterosexual homes. n59 Any reform that does arise out of *Re Patrick* must offer the 'homo–nuclear family' the same protection and respect as the current legislation offers the heterosexual nuclear family. It must resist seeing it as a family missing a father. As Nancy Polikoff argues, children being raised in gay and lesbian families 'need to be assured that the reality of their **[*54]** family structure will not be destroyed by subsequent imposition of definitions of parenthood that do not comport with their experience'. n60

n57 *Re Patrick*, above n 1 at Fam LR 651–2; FLC 88,927–8. Report of the Sydney Lesbian Parenting Conference, Sydney (2000) cited in J Millbank, *Meet the Parents: A Review of the Research on Lesbian and Gay Families*, prepared for the Gay and Lesbian Rights Lobby (NSW), January 2002.

n58 Studies in the US, UK and Canada have elicited similar results: see G Dunne, 'Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship' (2000) 14 *Gender and Society* 11; Gartrell, Hamilton, Banks, Mosbacher, Reed, Sparks and Bishop, 'The National Lesbian Family Survey Study 1: Interviews with Prospective Mothers' (1996) 66 *American Journal of Orthopsychiatry* 272; Gartrell, Banks, Hamilton, Reed, Bishop and Rodas, 'The National Lesbian Family Survey Study 2: Interviews with Mothers of Toddlers' (1999) 69 *American Journal of Orthopsychiatry* 272; Gartrell, Banks, Reed, Hamilton, Rodas and Deck, 'The National Lesbian Family Survey Study 3: Interviews with Mothers of Five Year Olds' (2000) 70 *American Journal of Orthopsychiatry* 272; C Patterson, 'Family Lives of Children Born to Lesbian Mothers' in Patterson and D'Augelli, *Lesbian, Gay and Bisexual Identities in Families*, Oxford University Press, 1998; F Nelson, *Lesbian Motherhood: An Exploration of Canadian Lesbian Families*, University of Toronto Press, 1996.

n59 See, eg, C Patterson, 'Family Relationships of Lesbians and Gay Men' (2000) 62 *Journal of Marriage and the Family* 1052; M Allen and N Burrell, 'Comparing the Impact of Homosexual and Heterosexual Parents of Children: Meta–Analysis of Existing Research' (1996) 32 *Journal of Homosexuality* 19; F Tasker and S Golombok, 'Children Raised by Lesbian Mothers: The Empirical Evidence' (1991) *Family Law* 184; C Patterson, 'Children of Lesbian and Gay Parents' (1992) 63 *Child Development* 1025; R Chan, B Raboy and C Patterson, 'Psychosocial Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers' (1998) 69 *Child Development* 443; S Golombok, F Tasker and C Murray, 'Children Raised in Fatherless Families from Infancy: Family Relationships and the Socio–emotional Development of Children of Lesbian and Single Heterosexual Mothers' (1997) 38 *Journal of Child Psychology, and Psychiatry and Allied Disciplines* 783.

n60 Polikoff, above n 23.

[*55]

(ii) If the donor father is a 'parent' how should this be recognised?

If the donor father were to be given the status of 'parent' under the Act it would be, as Guest J and Dorothy Kovacs point out, an 'alarming' situation for most participants in donor insemination arrangements. n61 Sperm donors throughout the country would find that they suddenly have financial responsibility for children conceived using their sperm and that these children have a right to know and be cared for by them. n62 It was obviously not Guest J's intention that *all* sperm donors be given the status of 'parent'. His dissatisfaction with s 60H was that it precluded *this* father, who wanted a relationship with the child, and who had exercised contact and actively sought to increase this contact.

n61 *Re Patrick*, above n 1 at Fam LR 648; FLC 88,923. See also Kovacs, above n 23 at 154.

n62 Family Law Act 1975 (Cth) s 60B; Child Support (Assessment) Act 1989 (Cth) s 5.

If the legislature were to agree with Guest J's view that individuals **[*56]** 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. It is difficult to know how that might be done. Guest J appears to argue that the donor father should be a 'parent' under the Act based on the following:

> He was the donor of his genetic material upon an understanding (as I have found) that he was to have a role in the life of any prospective child. He has at all times following Patrick's birth intelligently demonstrated by both sacrifice and concession a sensitive tolerance of a secondary role to that of the mother and co–parent. I am quite satisfied that he has never relinquished nor wavered in his desire to be part of Patrick's life. He has actively, solicitously and patiently contributed to his conception. He has persevered, despite the imposition of the many unreasonable conditions to which I have earlier referred, in his contact with Patrick and collaterally maintained '. . . *a strong and unrelenting wish*' to be part of his life. He has demonstrated an ability to foster a positive and loving relationship with Patrick. n63

n63 *Re Patrick*, above n 1 at Fam LR 640; FLC 88,918.

[*57]

This is strong evidence of the donor father's desire and diligence, but is not easily translated into a legislative rule, particularly when that rule would be designed to ensure that donors to heterosexual couples are not caught by the same provision. The practical difficulties of distinguishing between sperm donors highlights the possibility that the underlying reason for the distinction is the court's desire to find a 'father' for a lesbian family unit.

An alternative to reforming s 60H would be to leave the legislation as is and instead use the best interests principle and parenting orders, as Guest J did, to accord to individuals, when appropriate, the rights and responsibilities of parenthood. This option would allow for a degree of flexibility that might best acknowledge the diverse nature of gay and lesbian families. It would permit the Court to evaluate evidence about the relationship between the donor and the child, the donor's involvement in the child's life, and his intentions both prior to the conception and following the birth. It would also allow the Court to hear, in cases where the child is old enough, evidence of the child's understanding of the relationship. **[*58]** In essence, decisions would be made in the same way as Guest J made the decision in *Re Patrick*, and there would be no need for the strict application of a rule. The obvious problem with this proposal is that it leaves both sperm donors and co–parents without legislative protection. Of equal concern is the issue of whether the best interests principle can be extracted from the heterosexual environment in which it has developed.

The best interests principle is inherently indeterminate, and despite the guidance of the s 68F(2) factors it has the potential to reflect biases and presumptions based on particular notions of family. n64 As Southin J of the British Columbia Court of Appeal put it, when making best interests determinations 'judges are tied by the invisible threads of their own convictions'. n65 The interpretation of the best interests principle has developed within a highly contested environment in which women's organisations and father's rights groups have battled over the issue of what role fathers should take in the lives of their children post–separation. n66 The debates are inextricably linked with arguments about domestic violence, relocation and child support. They **[*59]** are also premised on a heterosexual model where once intimate partners have separated and/or divorced. While cases do come before the court in which the parents have never lived together and where the father has never lived with the child, few would involve heterosexual individuals who conceived a child via non–intimate contact on the premise that the child would *never* live in the same home as the father. n67

n64 For a discussion of the indeterminacy of the best interests principle see: R Mnookin, 'Child–custody adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226; M Fineman, 'Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision–Making' (1988) 101 *Harvard Law Review* 727; J Elster, *Solomonic Judgments*, Cambridge, Cambridge University Press, 1989.

n65 *Rockwell v Rockwell*, (1998) 43 RFL (4th) 450 (BCCA), 460.

n66 For some indication of the battles that have taken place see: M Kaye and J Tolmie, 'Fathers' Rights Groups in Australia and Their Engagement With Issues in Family Law' (1998) 12 *Australian Journal of Family Law* 1; H Rhoades, R Graycar and M Harrison, *The Family Law Reform Act 1995: the First Three Years*, University of Sydney and Family Court of Australia, December 2000; S Armstrong, '"We Told You So . . ." Women's Legal

Groups and the Family Law Reform Act 1995' (2001) 15 *Australian Journal of Family Law* 129.

n67 The exception to this is single women who conceive children via artificial insemination or IVF. While single women are permitted access to assisted reproductive services in some states there have been no Family Court disputes regarding children born in such circumstances.

[*60]

The parties in this case exist in stark contrast to the typical family in the Family Court. The biological parents have never been in an intimate relationship and their child was not conceived via sexual intercourse. It was never intended that the child do anything but reside with the mother and co–parent, and it was always intended that the child be raised in a female same–sex household that by its very nature did not include a 'father'. While the best interests principle is intended to be an independent assessment of the child's best interests, when the child it was historically designed to protect was presumed to be born into a heterosexual relationship it is difficult to distance the principle from heterosexual models and norms. While I would like to think that the principle could rise above such an attack, when the Act includes definitions of parenthood premised on a heterosexual marriage/de facto relationship, and s 60B refers to a child's right to know 'both their parents' which, although not gender specific is clearly premised on a two parent model, I have grave doubts as to its versatility.

In *Re Patrick* the application of the best interests principle resulted in a decision **[*61]** in favour of contact. The fact that Patrick had experienced numerous contact visits with the donor father and had developed a relationship of attachment with him seems to support this finding. Guest J's conclusions as to the nature of the agreement between the parties also supported a finding in favour of the donor father. The contact awarded was, however, quite significant and essentially imposed on Patrick a 'separated parent' family model. Arguably this model does not adequately reflect the fact that Patrick was born into an intact nuclear family, and has the potential to undermine the stability of the family unit created. It was the argument of the mother and co–parent that six contact visits per year were adequate for Patrick, n68 and that any more would 'destroy' their family. Their proposal may seem like very little contact in comparison with the 'typical' Family Court contact order of every second weekend and half of school holidays, but it reflects the primacy of the mother and co–parent as Patrick's parents and reflects the level of contact prevalent in the majority of gay and lesbian families. In my view, the Court must avoid the temptation to see a lesbian couple as 'missing' **[*62]** a father. Children like Patrick are entitled to have their families affirmed by the courts and the courts must be careful not to use the best interests principle to impose a gendered model of family on to a same–sex family unit.

n68 This was based on Dr Adler's recommendation.

(b) Sperm donors and child support

While the issue of child support was not explicitly dealt with in *Re Patrick*, the case necessarily raises the question of sperm donor liability. *Re Patrick* upheld the decision of Fogarty J in *B v J*, in which it was found that a sperm donor is not liable to pay child support under the Assessment Act. n69 The position in Australian law after *Re Patrick* is that a sperm donor to a lesbian couple may obtain some of the rights of a parent, including fortnightly contact, but bears no financial responsibility. Somewhat surprisingly this situation received no attention in the judgment.

n69 *B v J*, above n 22.

[*63]

Though the issue of child support was not discussed by Guest J, his belief that the donor father should be a 'parent' under s 60H necessarily has child support implications. Because child support liability in cases of artificial insemination is tied to the definition of 'parent' in s 60H, amending the section to include individuals such as the donor father would also make them liable for child support. In my view, such a result has negative implications for the homo–nuclear family. Obviously there are significant economic and social reasons for biological parents having financial responsibility for their children, but many of them do not apply to gay and lesbian families. Biology is of less importance in same–sex families where one of the child's parents is, by definition, not a biological parent, and a biological parent may have no role at all. Given these circumstances, a child support scheme based on biological parenthood alone would negate the role played by, and the responsibilities of, a non–biological co–parent, and arguably imposes a gendered family structure on a same–sex

family unit.

In my view, child support liability in gay and lesbian families should be based on a social **[*64]** parenting model that reflects the child's actual family structure rather than biological ties. This was the approach taken in the NSW Supreme Court decision of *W v G*, n70 though the degree to which the court was trying to 'find' someone to pay as opposed to recognising a same–sex family unit is debatable. n71 In *W v G* a lesbian co–parent, who had co–parented two children with the biological mother for 8 years was found to be liable for lump sum child support, though she was not a 'parent' under s 60H, based on the principles of promissory estoppel. n72 While it would have been preferable for the women in *W v G* to fall within the child support scheme and thus not have to rely on equitable principles to achieve what heterosexual parents achieve by contacting the Child Support Agency, the recognition given by the Court to the inter–dependence of their same–sex family unit and their joint responsibility for their children was significant, and should not be undermined by an application of principles based on biological parenthood alone.

n70 (1996) 20 Fam LR 48. For a discussion of *W v G* see J Millbank, 'An Implied Promise to Parent: Lesbian Families, Litigation and *W v G* (1996) 20 Fam LR 49' (1996) 10 *Australian Journal of Family Law* 112.

n71 Jenni Millbank argued in relation to *W v G* that 'at present it seems that the law is ready to "find" a lesbian co–mother part of a family in order to pay the bills, but not for any other purpose': Millbank, above n 68 at 123–4.

n72 Though as Sandor argues, reliance on estoppel makes the decision in *W v G* much more about 'the law of enforceable promise, developed in relation to economic loss', than about 'the socio–legal recognition of lesbian and gay families': D Sandor, 'Paying for the Promise of Co–Parenting: A Case of Child Maintenance in Disguise?' (1996) 43 *Family Matters* 24 at 26.

[*65]

Not surprisingly the mother and co–parent in *Re Patrick*, like the mother in *B v J*, did not want the donor father to pay child support. The parties did have some discussions about the donor father purchasing shoes and putting some money towards Patrick's education, n73 but the mother made it clear from the outset (and this evidence was not disputed by the donor father) that she did not want him to pay 'maintenance'. The position of the mother and co–parent was that the payment of child support indicated interdependence between the mother and the donor father, and imputed to him a status in their family that they did not perceive him to have. Child support contribution on his part may also have been perceived as a negation of any contributions made by the co–parent.

n73 *Re Patrick*, above n 1 at Fam LR 608; FLC 88,893.

If the donor father were to be a 'parent' under s 60H, as Guest J proposes, his subsequent liability for child support would arguably impose a heterosexual and biological model of parenting on **[*66]** same–sex families. The research data suggests that most lesbian couples do not intend for their sperm donor to play the role of 'parent' in their child's life. To introduce child support liability in these situations would undermine the independence and boundaries of the homo–nuclear family unit.

Conclusion

Re Patrick offers the legislature and society an opportunity to address the many complex issues arising out of donor insemination arrangements within the gay and lesbian community. However, for the debate to have any practical significance it cannot be conducted within a purely biological or heterosexual framework. As Kaufman J put it so eloquently in *Thomas S*, 'Ry understands the underlying biological relationships, but they are not the reality of her life'. n74

n74 *Thomas S v Robin Y*, above n 45.

Postscript

On 1 August 2002 the case of *Re Patrick* ended tragically when the mother and child were found dead in the family home. It was later determined that the mother had killed the child and then committed **[*67]** suicide. Patrick was aged

2 years and 10 months at the time of his death.