Casenotes

Re Patrick : (An Application Concerning Contact) [2002] FamCA 193[1]

1. Introduction

Re Patrick was a judgment handed down by the Honourable Justice Guest in the Family Court of Australia on 5 April 2002, after a hearing which lasted for nine days. The case involved competing applications concerning contact arrangements for Patrick, a two year-old boy. The proceedings were instituted by Patrick's mother and her lesbian partner/co-parent. They jointly filed a Form 3 Application on 8 May 2001, that certain consent orders regarding contact arrangements be discharged. The applicants sought more limited contact between Patrick and his father (the respondent),[2] and were agreeable to such contact taking place twice per year. The respondent, a homosexual sperm donor who had entered into an artificial insemination agreement with the mother, filed a Form 3A Response on 17 May 2001, in which he sought increased contact with Patrick. Guest J, in determining the issue, was required to bear in mind, amongst other considerations, s 65E of the *Family Law Act* 1975 (Cth)[3] which provides:

In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

As his Honour commented,[4] the proceedings had "brought into stark relief the complexities surrounding donor insemination and its relationship with family law".

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1 ("Re Patrick").

2 Justice Guest refers to the respondent throughout the judgment as `the father'. However, given that the respondent's fatherhood status is one of the centrally contested issues in the case, this case note will refer to him as `the respondent'.

3 ("the Act").

4 At ¶ 1.

2. The Facts

The mother placed a personal advertisement in a Melbourne gay and lesbian newspaper in October 1997, seeking a "sperm donor / co-parent". The respondent, whom she knew socially, confirmed his willingness to be a donor on 12 January 1998. The respondent was then tested for sexually transmitted diseases, and met the applicants at a restaurant on 30 January 1998 to discuss the proposed pregnancy and parenting arrangements. The next day, the parties commenced the artificial insemination procedure, which was separately conducted approximately thirty times until 16 December 1998. In March, the respondent underwent semen analysis at the mother's request, and in May, he attended the couples' housewarming. As Guest J observed,[5] at this point, the relationship of the parties was quite cordial.

The couple informed the respondent of the mother's pregnancy in early January 1999, and the parties dined in celebration. Unfortunately, as Guest J related,[6] "with the effluxion of time their once amicable and agreeable relationship became progressively embittered". While discussing the pregnancy and care of their prospective child in March, the mother informed the respondent that she did not want him present at the birth. The respondent later requested that the couple reconsider this decision, and the parties attended mediation sessions in April, at which no agreement could be reached. The applicants then cancelled a scheduled third session, unilaterally deciding to exclude the respondent from any further birthing arrangements and effectively going into hiding. The respondent engaged a solicitor, in order to ascertain the whereabouts of the couple, and to check upon the progress of the pregnancy, but his enquiries failed.

Patrick was born on 11 September. A friend later informed the respondent of the birth. The respondent filed a Form 7 Application for Final Orders on 18 October, seeking: joint responsibility with the mother for making decisions concerning the long term care, welfare and development of Patrick; and, weekly contact which would include twice weekly overnight contact after Patrick was two years of age. The mother filed a Form 7A Response seeking: that the respondent's application be dismissed; that she and the co-parent retain responsibility for Patrick's long term and day to day care, welfare and development; and that the respondent have supervised contact with Patrick twice yearly. The applications were adjourned, and orders were made by consent on 23 November that leave be granted for the co-parent to intervene in the proceedings. The parties were ordered to attend counselling pursuant to s 62F(2) of the Act, but they failed to achieve a resolution. The respondent had his first contact with Patrick at the Family Court on 16 December, pursuant to orders made by consent.

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[5] At ¶ 12.
[6] At ¶ 15.

After further adjournments and contact periods, final orders were made by consent on 2 June 2000 by Registrar Harold, giving joint responsibility for decisions concerning the long term and day to day care, welfare and development of Patrick to the mother and co-parent, and four hour contacts to the respondent every third Sunday. These contact arrangements were to remain in place until Patrick was two years old, when they would be reviewed with a view to increasing as appropriate.

In October, the applicants wrote to the respondent, asserting: that they *"absolutely* [did] *not accept or support"* the respondent referring to himself and his family in familial terms in the presence of Patrick; that Patrick will *"grow up knowing the difference between a donor and a father"*; and, that the respondent should use contact times 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"*. The respondent replied, explaining that he consented to the June 2000 orders 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.*
- [Later] *In no way do I wish to undermine your relationship and I haven't sought to do so in the past. I do however remain father to Patrick and I 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.*

The applicants wrote again to the respondent in December, expressing concerns and complaints over how the contact sessions were conducted. The respondent in turn objected to conditions placed upon him during contact, which he found unreasonable, and communicated this to the couple. The applicants unilaterally cancelled contact. The respondent was refused contact from 25 March 2001 until Federal Magistrate Phipps made orders on 11 July 2001. The applicants filed an application seeking to discharge the June 2000 contact orders, considering such contact not to be in Patrick's best interests.

The respondent filed a Form 3A Response seeking increasing contact in fortnightly periods, culminating in overnight contact. Federal Magistrate Phipps reinstated the June 2000 contact arrangements and transferred the proceedings to the Family Court of Australia. As proceedings commenced before Guest J, he observed[7] that the parties were now "painfully polarised in their respective positions".

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[7] At ¶ 2.

3. The Issue to be decided, and the Law

The issue for determination before Guest J was, in light of the evidence before him, what contact arrangements between Patrick and his father would be in the child's best interests. Guest J explained[8] that his duty, in deciding parenting orders, required him to consider the best interests of Patrick as the paramount consideration, pursuant to s 65E of the Act. His Honour made reference to *B and B: Family Law Reform Act 1995* (1997) FLC 92-755[9] where it was said:[10]

> In our view, the essential inquiry is clear. The best interests of the particular children in the particular circumstances of that case remain the paramount consideration. A court which is determining issues under Part VII of the type to which we have referred, starts from that essential premise and it remains the final determinant.

In the determination of a child's best interests, a judge is required to consider the matters set out in s 68F(2) of the Act, and the object and principles of Part VII of the Act, which are outlined in s 60B. Section 60B of the Act provides:

(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.

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8 At ¶ 38.
9 ("*B and B*").
10 At ¶ 9.51.

Guest J made reference[11] to what the Full Court of the Family Court said in *B and B* regarding the operation of s 60B. There it was held[12] that s 60B represents a deliberate statement by the legislature of the object and principles to be applied in proceedings under Part VII, but that the section is subject to s 65E, and, as Guest J put it, does not "purport to define or limit the full scope of what is ordinarily encompassed by the concept of best interests".[13] The Full Court said[14] that 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".

Guest J commented[15] that in the course of making his findings in the case, he did not intend to insult or belittle the parties, but rather:

> it is hoped that the findings I make in this judgment will be considered carefully by them, used positively to benefit Patrick and for the parties to better understand an objective consideration of those matters that I consider suitable to accord his best interests in the complex, unusual and discrete circumstances of these proceedings.

4. The Evidence

Guest J explained[16] that in coming to his decision he would be relying on a Statement of Facts in Issue which the parties had agreed upon, affidavits, and oral evidence delivered in court.

Issues of Credibility

Firstly, his Honour examined issues of credibility between the parties, a highly significant factor in the proceedings due to the "antithetical"[17] nature of the parties' affidavits. Guest J declared[18] that he was unimpressed with the evidence of the mother, finding her to be non-responsive, uncompromising, righteous, and unnecessarily denigrating of the respondent without justification. His Honour said[19] that the mother, in a number of instances, was "plainly resistant to making appropriate concessions, seeking to advance her cause and in so doing, demean the father". She was found to be less than frank, consciously omitting evidence, and in

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11 At ¶ 40.
12 At ¶ 9.54.
13 At ¶ 40.
14 At ¶ 9.54.
15 At ¶ 41.
16 At ¶ 43.
17 At ¶ 44.
18 At ¶ 47-48.
19 At ¶ 50.

effect, tailoring evidence.[20] Guest J commented,[21] "The impression I had on a number of occasions during the course of the mother's evidence was that she would reconstruct events and conversations to best suit her own case and, at times, regardless of the truth".

In comparison, his Honour found[22] the evidence of the co-parent to be earnest, fairer and more reliable, albeit "utilising opportunities to promote and emphasise their case". The co-parent accepted the respondent's claim for contact as genuine, but vaguely expressed her irrational and groundless (in Guest J's opinion[23]) fear that the respondent wanted more than contact with Patrick (*ie.* long term and day to day responsibility). His Honour[24] found the evidence of the respondent to be in "sharp contrast" to that of the mother and co-parent, observing him to be calm, reasoned, consistent, credible, and persuasive. The respondent was "not controlled by dogma [and] did not search for hidden motives".[25] Guest J declared[26] that where the evidence of the respondent conflicted with that of the mother and co-parent, he preferred the evidence of the respondent.

The Attitude of the Parties

Guest J observed that "blanketed" within her relationship with the co-parent, the mother "saw no room for the father to have a paternal role",[27] and cited Dr Simon Stafraci's psychiatric evaluation of the mother which concluded that *"it is highly likely that she will present to Patrick a negative view of his biological father"*.[28] In the course of her oral evidence, the mother "spelled out with icy clarity that Patrick had no knowledge of there being 'a father' in his life", and approved the respondent acting in a role with some contact, but not as a parent.[29] She viewed the respondent's contact as being:[30] intrusive; conducted by the respondent in bad faith; intended to destroy her family; potentially destructive of her family; unnecessary for Patrick; and, at conflict with the couple's own parenting of Patrick. Guest J rejected this evidence, and commented:[31]

> From what I have both heard and read, it is doubtless true that children can be happily raised within a homo-nuclear family, but the difference here is that

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[20] At ¶ 53-58.
[21] At ¶ 58.
[22] At ¶ 60.
[23] At ¶ 62-63.
[24] At ¶ 64.
[25] At ¶ 64.
[26] At ¶ 66.
[27] At ¶ 67.
[28] At ¶ 69.
[29] At ¶ 72.
[30] At ¶ 75-77.
[31] At ¶ 78.

> the father desires and has always desired to play an active and fatherly role in the life of his son.

The co-parent's attitude was found to be more reasonable, presenting a milder version of the mother's position.[32] She did not believe a father/son relationship was in Patrick's best interests, as the damage to Patrick of a *"total reality shift"* would outweigh the benefit gained.[33] The co-parent felt marginalised by the respondent, and indicated that she would be partly satisfied if the court determined that the respondent was not a *"parent"*, but rather, an *"interested party"*.[34]

His Honour accepted that the respondent's attitude in relation to parenting, and to the mother and co-parent, was credible, sensitive, and humble. Further, it was accepted[35] that the respondent:

> had always wanted to be part of Patrick's life, and that despite the difficulties in his relationship with the mother and the co-parent that he would do all things necessary to make them feel comfortable with any contact arrangements and would support their role as primary care givers to the child...the father has approached all issues with an open mind to compromise and has borne without dissent what may be termed harsh and onerous demands placed upon him by the mother and co-parent.

The respondent acknowledged that he wanted to be recognised as a father, *"as* [Patrick's] *dad"*.[36]

The Alleged Agreement

As Guest J explained,[37] the "parties each gave evidence concerning discussions...that gave rise to their respective understanding of the role they were to play in the life of their prospective child". Guest J accepted the respondent's evidence that the mother was agreeable to his wishes to be known as the child's parent, and to be involved on a regular basis in the upbringing of the child.[38] Guest J did not accept[39] the mother's denial of this alleged agreement, believing that the respondent would not have proceeded beyond their initial discussion had the mother's position been as she contended. The respondent gave evidence that in a later meeting, "it was agreed they would have a three-way partnership where each of

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[32] At ¶ 88.
[33] At ¶ 90.
[34] At ¶ 92-93.
[35] At ¶ 100-101.
[36] At ¶ 103.
[37] At ¶ 106.
[38] At ¶ 110.
[39] At ¶ 111-114.

them was an equal partner to the arrangement and had equal parenting responsibility".[40] The mother's quite different recollection of this meeting was not accepted by Guest J.

His Honour further accepted the evidence of Ms G[41], who had attended a support group meeting for prospective single lesbian parents in February 1998, at which the mother:

> openly discussed her recent insemination with the father...referred to him as a long term friend with whom she had much in common...described the father as having an active role in the life of their prospective child, that would develop a friendship with the child and provide child care.

Guest J explained that such a parenting agreement does not confer binding parental rights and that "the terms of any such agreement could never prevail over determinations by the Court".[42] Rather, consideration of s 65E and s 68F(2) "dictate Patrick's outcome", while the discussions concerning the agreement assist with an understanding of the intentions of the parties and credit issues.[43] Guest J emphasised:[44]

> These proceedings underpin the need for parties undergoing this procedure to consider a written agreement describing the rights and obligations of each of them which can assist in avoiding, pre-empting and resolving interpersonal disputes.

The Issue of Stress associated with Contact

The mother had deposed that contact (and Patrick's reactions to it) "placed enormous stress upon [the family members] individually, upon their relationship and upon their family unit",[45] but Guest J found[46] no reliable evidence that Patrick had exhibited stress regarding contact, and held that "the problem clearly and squarely lays [*sic*] at the feet of the applicants, but more particularly that of the mother". His Honour was satisfied:[47]

- that the father has a sensitive and genuine regard for the views of the mother and co-parent;
- that he takes their sensitivities into account;

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[40] At ¶ 118.
[41] At ¶ 126.
[42] At ¶ 138.
[43] At ¶ 139.
[44] At ¶ 140.
[45] At ¶ 157.
[46] At ¶ 158.
[47] At ¶ 158.

- that their views are respected by him and not disregarded, and
- that rather than hinder, he has actively promoted and encouraged in a genuine and honourable manner the role of the mother and co-parent.

The mother further deposed that her own stress affected her ability to support Patrick, but Guest J, on the evidence, had "no doubt it can be handled with associated and continuing therapy".[48] Dr Stafraci was of the opinion:[49] that despite the mother's episodic anxiety and depression, her parenting ability was unimpaired; that the couple's relationship was not fragile, but strong and indeed strengthening; and, that *"the family is in fact strengthening"* during the proceedings.

The co-parent's treating psychiatrist, Dr McCausland, said that:[50] his patient's mild depressive illness did not impair her parenting abilities, and was improving; she was likely to make a full recovery; and, was dedicated to being Patrick's parent. Guest J was satisfied:[51] that "despite the restricted environment and difficult venue, the father has managed to build a genuine bond and attachment to Patrick"; that Patrick "enjoys contact periods with the father, that they interact well together and that Patrick derives both warmth and comfort when they are together"; and, "that the father acts appropriately, patiently and affectionately towards Patrick".

Expert Witnesses

In the course of the proceedings, Guest J received expert evidence from Dr Robert George Adler, Mr Vincent Papaleo, and Dr Neil Coventry.

- Dr Robert George Adler

Guest J explained[52] that Dr Adler was a consultant child and adolescent psychiatrist, engaged by the Child Representative pursuant to Federal Magistrate Phipps' orders of 11 July 2001. Dr Adler recommended prioritising the psychological bond of the `nuclear' family unit over the biological bond which Patrick shared with the respondent,[53] and advised that Patrick should have familiarity rather then an active relationship with him.[54] The

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48 At ¶ 159.
49 At ¶ 172-174.
50 At ¶ 168-169.
51 At ¶ 187-188.
52 At ¶ 203.
53 At ¶ 206.
54 At ¶ 207.

basis of such limited contact would be to protect the nuclear family, giving primary responsibility for Patrick's best interests to his psychological parents (the applicants), so as not to confuse Patrick.[55] Dr Adler's view was that increased contact could increase "stress levels within the nuclear family", thus having repercussions for the child.[56] Cross examination of Dr Adler persuaded Guest J that his recommendations were not reliable, as it revealed "a number of significant factors quite outside [his] knowledge".[57] His Honour found aspects of Dr Adler's evidence to be "unconvincing and suggestive of favour towards the applicants",[58] and had "no hesitation" in rejecting Dr Adler's recommendations.[59]

- Mr Vincent Papaleo

Guest J introduced[60] Mr Papaleo as a clinical psychologist specialising in child and family psychology, who recognised the matter as being one of "immense complexity" involving "a clash of values, beliefs, societal expectations [and] a direct challenge to issues relating to parenting".[61] Mr Papaleo's fundamental view was that psychological relatedness, the "issue of bonding and attachment", was the "primary consideration when determining the welfare of children".[62] He was *"unequivocally committed to the belief"* that it was important that Patrick know his father, and thought contact should be regular, but not so as to interrupt *"the stability and security of his immediate family unit"*[63]. Mr Papaleo was concerned that the "applicants intended to diminish the relevance of the father in the life of Patrick", and that there was *"virtually no likelihood that without the intervention of the court that* [sic] *Patrick will have a relationship with his father"*.[64] Mr Papaleo believed more focus should be paid to the impact on Patrick of the respondent's absence in his life, rather than a minimal contact solution which focussed more on the needs of the mother and co-parent.[65] His proposal was "geared towards establishing a relationship" between Patrick and the respondent..[66] Mr Papaleo explained to the court that the parties exist in a very *"different model anyway* [to the `conventional' family] *and – we are having to make the rules on our feet as we go"*, and that *"we have to reinvent the fatherly relationship in this situation...Hopefully it is a*

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55 At ¶ 208.
56 At ¶ 226.
57 At ¶ 210-211.
58 At ¶ 219.
59 At ¶ 229.
60 At ¶ 230.
61 At ¶ 233.
62 At ¶ 235.
63 At ¶ 237.
64 At ¶ 242-244.
65 At ¶ 243.
66 At ¶ 250.

loving, caring, familiar, male adult figure in [Patrick's] *life who also happens to be his biological parent*".[67] Guest J accepted Mr Papaleo's evidence finding it "persuasive and insightful".[68]

- Dr Neil Coventry

Guest J explained Dr Coventry was the current treating psychiatrist of both the mother and co-parent. Dr Coventry endorsed Dr Adler's contact recommendations as reasonable,[69] but his Honour, in rejecting the evidence, commented that he did not regard Dr Coventry's opinion "in the same light as an expert witness", as his views were not those "of an objective, independent and impartial witness", but rather were "hampered by partisanship",[70] owing to the fact that he had solely been informed by his commissioning party, the applicants.

5. Section 68F(2) Factors

Guest J made reference to s 68F(1) of the Act, which requires that a trial judge must consider s 68F(2) matters in determining the best interests of a child, and to "consider those matters that are relevant to the proceedings having regard to the evidence touching upon each of them".[71] Guest J was satisfied Patrick was a "bright, happy and contented child" who shared a loving relationship with his primary care-givers,[72] and that despite the applicants' negative attitude, Patrick was "familiar with his father, comfortable in his presence and gains considerable reward and benefit from their mutual interaction".[73] His Honour hoped the applicants would, post-judgment, achieve a better understanding of Patrick's best interests and "actively foster" the child's relationship with the respondent.[74] Guest J remarked, "It is up to them to seize [closure]".[75]

His Honour was also satisfied that the respondent had the capacity to provide for Patrick's needs, and stated that "Patrick has much to gain from contact with his father".[76] His Honour expressed his general view that parents should encourage their children to have contact with absent

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67 At ¶ 245-246.
68 At ¶ 255.
69 At ¶ 256.
70 At ¶ 257.
71 At ¶ 261. Guest J referred to *Smith v Smith* (1994) FLC 92-498 at 81,084 and *Taylor v Taylor* (1996) 92-661.
72 At ¶ 262.
73 At ¶ 263.
74 At ¶ 264.
75 At ¶ 264.
76 At ¶ 265.

parents, and remarked that:[77]

> The Applicants should subjugate their own feelings and accept orders of the Court in the spirit of co-operation if they are to work towards Patrick's best interests...Each of them should inculcate in Patrick a proper attitude of respect for his father, notwithstanding their beliefs.

6. Guest J's Conclusion

His Honour commented that the couple's demonstrated "no contact attitude" was, on the evidence, "plainly contrary to Patrick's best interests",[78] and as such, that he would not accede to the proposed orders of their original application.[79] Rather, the respondent's proposal of gradually increasing contact revealed a "responsible awareness to the current situation and promotion of Patrick's best interests", and Guest J agreed with Mr Papaleo's observation that it was better for Patrick to have *"three loving parents"* than just two, and to have a connection with the respondent's family.[80] The respondent's proposal, as Mr Papaleo said, gave the bulk of Patrick's time to the mother and co-parent, thus respecting and supporting the *"importance of his parents and their care for him"*, whilst providing the respondent with *"regular contact that breeds and fosters familiarity"*.[81] Further, Mr Papaleo recommended that the respondent's contact with Patrick not be supervised, as the idea of the contact was that as the respondent *"becomes more familiar...Patrick transfers the sense of trust to him and invests in him as a safe person"*.[82]

7. The Orders

In the event, Guest J ordered[83] that the contact arrangement orders of 2 June 2000[84] be discharged, and replaced with a new set of arrangements. From the date of the judgment until 11 September 2002, the respondent would have contact with Patrick each alternate Sunday for a period of four hours. Contact would gradually increase so that by September 2004, the respondent would have contact with Patrick: on alternate weekends from after school Friday to before school Monday; during half of all school holidays; on Father's day; and, for a period of two hours on the

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77 At ¶ 267.
78 At ¶ 271.
79 At ¶ 277.
80 At ¶ 279.
81 At ¶ 282.
82 At ¶ 284.
83 At ¶ 336.
84 ¶ 5 of the Orders.

respondent's birthday and Patrick's birthday. Further, Guest J discharged the appointment of the child representative, and amended paragraph 3 of the June 2000 orders to include:

> *...AND THAT the father do have responsibility for decisions concerning the child's immediate care, welfare and development whilst the child is having contact with him.*

8. Commentary

The importance of this decision lies in Guest J's recognition of the shortcomings of the relevant legislation, which, designed with a heterosexual model in mind, fails to account for, recognise, and protect, individuals such as the parties to these proceedings. As his Honour observed,[85] an important issue in the proceedings was whether the respondent, as a sperm donor, could be considered as a `parent' within the meaning of the Act, or the *Child Support (Assessment) Act* 1989 (Cth).[86] Guest J cited[87] *B v J* (1996) FLC 92-716,[88] where Fogarty J held that a sperm donor for a lesbian couple was not a `parent' within the meaning of the Assessment Act. This was due to the operation of s 5 of the Assessment Act, which provides that the "parent" of a child born as the result of an "artificial conception procedure" is a "person who is a parent under section 60H of the Family Law Act 1975".[89] However, the operation of s 60H of the Act, as Guest J noted,[90] regards a biological father as a "parent":

> *only* if there is a specific State or Territory law which expressly confers that status on a semen donor for the purposes of the *Family Law Act*.

Accordingly, as no such specific laws exist in Australia, Fogarty J held the donor in *B v J* was not a parent under the Assessment Act. Guest J explained[91] that the effect of all the State and Territory laws in Australia is to:

> positively provide that the donor of semen does not incur any liability or retain any rights in relation to children born as a result of artificial insemination.

Guest J observed[92] Fogarty J's obiter suggestion in *B v J*[93] that a non-parent under the Assessment Act could still possibly be a parent under the Act, due

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[85] At ¶ 285.
[86] ("the Assessment Act").
[87] At ¶ 286.
[88] ("*B v J*").
[89] S 5(b) of the Assessment Act.
[90] At ¶ 291.
[91] At ¶ 293.
[92] At ¶ 296.
[93] At 83,620.

to the Act's non-exhaustive definition of "parent", and remarked that:[94]

> such a conclusion could have serious and unintended implications for sperm donors...Contrary to agreement and intention, both known and unknown and donors may find themselves with significant responsibilities as well as rights...[This] highlights the substantial difficulties of attempting to incorporate same-sex families into global definitions of parenthood premised on a heterosexual model.

Therefore, Guest J advised that the "*Family Law Act* can and should be read in light of such state and territory presumptions", thus, for the time being, excluding sperm donors from the definition of "parent".[95] His Honour recognised that in light of the respondent's "ongoing efforts to build a relationship with [Patrick]", it was strange that he was denied the legal identity of "parent", and yet, equally strange "would be the case of an unknown donor who deposits his semen at a sperm bank only to find that he has parental responsibilities under the *Family Law Act* for any child conceived of his genetic material".[96] Guest J concluded[97] that "Where this leaves individuals such as the father is a matter for the legislature". As the situation stood, His Honour noted[98] that the Act could recognise the respondent as a person "significant to [Patrick's] care, welfare and development",[99] who could apply for a parenting order,[100] and be conferred with certain parental responsibilities.[101]

In the course of making recommendations for the legislature, Guest J noted[102] that there had been no appreciable legislative progress since 1996 when Fogarty J made the following comment:[103]

> It is a reality of life [that] 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 these situations.

Guest J advised revision of the definition of "parent" in 60H of the Act, to "take into account that there are varying arrangements between donors and prospective mothers",[104] and declared that the States will need to

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[94] At ¶ 299-300.
[95] At ¶ 301.
[96] At ¶ 301.
[97] At ¶ 301.
[98] At ¶ 308.
[99] As per s 60B(2)(b).
[100] Under s 65C.
[101] Within s 61D(1).
[102] At ¶ 309-310.
[103] In *B v J*, at 83,621.
[104] At ¶ 312.

decide who is a `parent' (for the purposes of State law) uniformly, or else "it may become appropriate to ensure that the Commonwealth is armed with adequate powers to enact such laws".[105] His Honour re-emphasised[106] that parties to artificial insemination should plan parenting arrangements prior to conception, but reminded that consideration of s 65E and s 68F(2) will "dictate the outcome for the child". Revision of Parenting Plans[107] to encompass three way agreements could be considered, to enable individuals such as the parties in these proceedings to take advantage of the available counselling and supportive programs,[108] and to resolve child residency and maintenance issues.[109] Guest J observed[110] that while the 1995 amendments to the Act may at the time have been perceived as *"state of the art"*:[111]

> they failed in significant respects to move beyond the general situation of a child being born into and/or living in a heterosexual household...Part VII proceeds from assumptions about the child's family which have no application in the present circumstances. A review of the federal law in this area should be considered so that families such as are involved in the present proceedings are not precluded from the substantial protections of the Act.

His Honour further noted that despite the recent legislative recognition of same-sex relationships in many States,[112] "many areas of State law...continue to discriminate against gay and lesbian Australians", such as in Victoria, where lesbian women (such as the applicants) are "prohibited from accessing assisted reproductive services", due to the operation of the *Infertility Treatment Act* 1995 (Vic). Guest J stated:[113]

> It is time for State laws to be enacted to make available to lesbian women and their known donors a well regulated scheme with all of the safeguards, medical and otherwise available to heterosexual couples. There is no doubt that the parties in this case would have benefited from such services and may not be in the position they are today had they been able to access counselling currently available to heterosexual couples.

Guest J concluded his judgment with a number of observations on the issue of the modern family, and argued[114] that it would:

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[105] At ¶ 313.
[106] At ¶ 314-315.
[107] In Division 4, Part VII of the Act.
[108] At ¶ 316-317.
[109] At ¶ 318.
[110] At ¶ 319.
[111] Original emphasis.
[112] His Honour cited the *Statute Law Amendment (Relationships) Act* 2001 (Vic) and the *Property (Relationships) Act* 1984 (NSW) as examples.
[113] At ¶ 322.
[114] At ¶ 325.

> stultify the necessary progress of family law in this country if society were not to recognise the applicants as a `family' when they offer that which is consistent and parallel with heterosexual families, save for the obviousness of being a same-sex couple. The issue of their homosexuality is, in my view, irrelevant.

His Honour observed that gay and lesbian families are a growing phenomenon in Australian society,[115] and that the varying complexity of gay and lesbian family forms is not recognised in s 60H of the Act.[116] The proceedings before him, Guest J said:[117]

> in critical ways atypical of those usually heard in the Family Court, have brought into sharp relief a number of significant issues which the Court will face in modern `family' litigation.

His Honour spoke of equality, and of Patrick's and his family's right to it, and cited[118] the Hon Madame Justice Claire L'Heureux-Dube in *Egan v Canada* (1995) 2 SCR 513 at 543 where her Honour said:

> Equality...means nothing if it does not represent a commitment to recognising each person's actual worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less than capable for no good reasons, or that otherwise offend fundamental human dignity.

Guest J concluded his judgment thus:[119]

> Having regard to the issues addressed...it is time that the legislature considered some of the matters raised, including the nature of parenthood, the meaning of `family', and the role of the law in regulating arrangements within the gay and lesbian community. The child at the centre of this dispute is part of a new and rapidly increasing generation of children being conceived and raised by gay and lesbian parents. However, under the current legislative regime, Patrick's biological and social reality remains unrecognised. While the legislature may face unique challenges in drafting reform that acknowledges and protects children such as Patrick and the family units to which they belong, this is not a basis for inaction.

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[115] At ¶ 327-328.
[116] At ¶ 330.
[117] At ¶ 331.
[118] At ¶ 334.
[119] At ¶ 335.