



3 September 2010

C69, 71.6

JM; rp

The Honourable Stephen Wade MLC  
Shadow Attorney-General  
Parliament House  
North Terrace  
ADELAIDE SA 5000

Dear Mr Shadow Attorney

***Family Relationships (Parentage) Amendment Bill 2010***

I refer to your letter of 4 August 2010 seeking comment on the Private Members' Bill. The Bill has been considered by the Society's Children and the Law Committee and the Family Law Committee

Part A of the response that follows is the response of the Children and the Law Committee, which the Family Law Committee endorses. Part B contains additional comments from the Family Law Committee.

**Part A**

The Bill brings South Australia in line with most other States in recognizing the status of a non biological co-parent who is in a same sex relationship with the biological mother of the child as having full legal status as a parent of the child.

The legal system, particularly the family law system, is being asked to deliberate on the best interests of the children of these relationships on a regular basis. It is desirable that our State legislation be aligned with other jurisdictions as the family law system is federal and there should be consistency across Australia. More importantly however it is in the best interests of children for their social parents to have legal status as parents.

The Children and the Law Committee endorse and support the amendments.

We do however believe the amendments fall short in failing to adequately address an important social reality and that is the desire of a growing number of sperm donors to be known donors and to play a role in the upbringing of the child born as a result of their sperm donation. This is an increasingly common scenario as lesbian couples seek out sperm donation to start a family, often from homosexual males. Sperm Donation agreements are sometimes executed pre-conception to outline the agreed role of the sperm donor as a father.

The proposed amendments to the *Family Relationships Act 1975 (SA)* ("*the Act*"), s.10 C(4), reflect the current state of legislation at s 10E of *the Act*. This section removes any legal status of a sperm donor as a parent of a child born as a result of a fertilization procedure.

We suggest the time is right to amend this section of the proposed Bill to recognize the role of sperm donor fathers as the biological father's in some limited situation.

The Family and Federal Magistrates Courts are seeing a growing number of cases in this area and changes recognising the status of the sperm donor as the biological father would be helpful in some situations. Retired Family Court Judge Guest called for the States to enact such legislation in *Re Patrick [2002] FamCA 193* ("*Re Patrick*") (see discussion below).

Our proposed amendment would be:

*This section does not prevent a sperm donor who has entered into a Sperm Donation Agreement prior to the birth of any child born after a 'fertilization process' from seeking enforcement of the terms of that agreement or orders" in the child's best interests in the appropriate State or Federal Court.*

There have been an increasing number of cases in which known sperm-donors (most commonly gay men) have agreed to provide their genetic material for the purpose of artificially inseminating a woman (most commonly of a lesbian relationship), upon the understanding that they would have involvement in the life of the child. Once the child is born, the mother and co-parent sometimes renege on the understanding and phase out the involvement of the sperm donor. The sperm donor subsequently applies to the Court for 'parenting orders' allowing him to spend time with the child. The common point of contention in these cases is the arrangements that were made prior to conception regarding the sperm-donor father's involvement. This lack of clarity results in lengthy consideration of the legal rights of the sperm donor, whom by law, is not recognised as a "parent".

The view which has been increasingly recognised in the Courts in recent years is that sperm donor fathers should have some involvement in the child's life (see discussion of recent cases below).

Proposed amendments to *the Act* in 2009, inserted a new division (Division 3) which introduced the concept of 'Lawful surrogacy under recognised agreements'. This requires the entering into of a surrogacy agreement before conception. Surrogacy is a very different process to the one in which we have described above, however a similar agreement could be used in the event of "known sperm-donor fathers". The agreement would ensure that all parties are in agreeance as to rights, duties and obligation that the sperm-donor (and the other parties). This may include the paying of child support, a role as equal "parent", occasional visits as a family-friend or as the "weekend father" for example. A sperm donation agreement, if signed by all parties becomes at the very least a documented indication of the intention of the parties when entering into the genetic material donation process. Guest J in *Re Patrick [2002] FamCA 193* gave much consideration to the intention of the donor at the time of entering into the process.

The recognition of the rights of the sperm-donor as a biological father, could be embraced in the legislation by allowing for an exemption in s10C(4) in circumstances where there is a pre-existing written agreement between the mother (and co-parent) and the sperm donor father.

### ***Re Patrick [2002] FamCA 193***

In *Re Patrick [2002] FamCA 193*, a lesbian couple sought the help of a gay man to act as sperm donor in order for them to conceive a child. The father did so upon the understanding that he would have an active role in the life of the child. The mother and co-parent did not inform the father of the child's birth and did not inform him of their whereabouts thereafter.

The father brought an application for Final Orders which would, *inter alia*, allow him shared equal responsibility of the child and increasing contact time.

In allowing the application, Guest J said [at 301]:

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".

He further went on to say [at 322]:

322. 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.

It was apparent from this case, that Guest J felt that it was in the interests of the child that the child has an opportunity to have a relationship with his father. It was acknowledged that this homo-nuclear family structure was one that was not recognised by the current laws, but that in any event, each member of this family had the right to be accepted and given the rights of any other person. The Court made Orders that the sperm-donor father have contact with the child, and such contact increased incrementally as the child grows older.

### ***H v J [2006] FamCA 1398***

In circumstances similar to those in *Re Patrick*, Guest J made clear his opinion on the role of the sperm donor father [at 14]:

The role of the applicant is not and can never be, in the circumstances discrete to these proceedings, likened to a "parental" role arising out of a traditional heterosexual union. The family in this case, in addition to A is comprised of the mother and the co-parent whose relationship, now tested with time, sits seamlessly with what I had to say in *Re Patrick* (supra).

Guest J seemed to believe that it is important that the father be legally recognised and have a position in the life of the child, but that the father not be recognised as a "parent", for the sake of the definition of the "family". Guest J quoted the views of Professor Millbank's in 'The Status of Known Sperm Donors under the Family Law Act', Australian Family Lawyer Vol 18 No. 4 page 30 at 37 [at 15]:

In my view, for the reasons outlined above, it is absolutely inappropriate to ascribe parental status to known donors. This is not to suggest that men who are known to and involved with children (whether biological parents or otherwise) should have no form of legal recognition. Rather, any form of recognition must be alive to two vital facts that are amply demonstrated by the sociological research on lesbian and gay families: firstly, that for most families it is the mothers who form the core family unit; and, secondly, that known donors engage in a range of roles from limited or casual acquaintance with the child to occasional or frequent avuncular or warm 'family-friend' contact, to regular 'Sunday-Dad' contact

There can be no 'one size fits all' ascription of parental status to known donors, who occupy a wide range of roles. Recognition of known donors must be flexible, and adapted to the individual circumstances of the family involved. ..."

**Part B**

The proposed amendments (at paragraph 4) do not appear to adequately define the term "co-parent" and as a result the term is ambiguous and confusing.

On reading the Act as a whole it is unclear whether the term is intended to include any different number of co-parents, including for example a "parent" pursuant to Part 2A, a person living in a same sex relationship with the "mother" of the child, or a person that is the female partner of the "mother" but who is not otherwise living in a domestic relationship with the mother.

The proposed amendments do not address the inconsistency between how the children of heterosexual couples who are not married and who do not live together and the children of homosexual couples who do not live together are treated.

Yours sincerely

A handwritten signature in cursive script that reads "Jan Martin".

Jan Martin  
**EXECUTIVE DIRECTOR**