Neutral Citation Number: [2008] IEHC 96

THE HIGH COURT

2007 No. 26M

BETWEEN

J. McD

APPLICANT

AND
P.L. and B.M.

RESPONDENTS

Judgment of Mr. Justice John Hedigan delivered the 16th day of April, 2008.

1. The application herein is brought under s. 6(a) of the Guardianship of Infants Act 1964, by the applicant, whom I shall refer to as "A.", for an order appointing him as guardian of a male infant whom I shall refer to as "D.". The infant was born on 2nd May, 2006 and is the child of the first named respondent whom I shall refer to as "B". The infant D. was conceived by B. as a result of a sperm donation by A. The second named respondent, whom I shall refer to as "C", is the female partner of B. In addition, under s. 11(4) of the Guardianship of Infants Act, A. seeks an order for a right of access to D.

The Parties

A. is a single gay man aged 41. Following qualification he worked in the United States for ten years. He returned to Ireland and has worked here since.

B. is 41 years of age. She was born and raised in Australia and is an Australian national. She attended university in Sydney and after she qualified worked there for eighteen months, did research for a year and then travelled to the U.K. In 1995 she met her partner C. with whom she lived for eight years before moving to Ireland.

C. was born in Ireland and is an Irish national. When she was a year old she moved with her family to England where she was raised. She attended Leeds University and after qualifying in her chosen profession worked in Belfast and London before moving back to Ireland where she is now the holder of a permanent post.

B. and C. are in a long term single sex partnership since 1995 formally solemnized by a Civil Union in the U.K. in 2006.

The background.

2. These proceedings were commenced by an *ex parte* application made by A. on 22nd March, 2007, in which he was granted an interim order by Abbott J. restraining B. and C. from removing D. from the jurisdiction of the High Court and authorising the Gardaí, if necessary, to prevent his removal.

3. The matter continued on the following day before Abbott J. At the end of that hearing an order was made allowing B. and C. to take D. out of the jurisdiction for the purpose of a vacation in Australia from Sunday 25th March, 2007 returning to the jurisdiction on or before midnight on 9th May, 2007. The Court further ordered that thereafter D. not be removed from the jurisdiction without leave of the Court, pending determination of these proceedings, that a report be prepared pursuant to s. 47 of the Family Law Act 1995 and certain other ancillary matters. Section 47 of this Act provides as follows:-

> *"1. In proceedings to which this section applies, the Court may, of its own motion or on application to it in that behalf by a party to the proceedings, by order give such directions as it thinks proper for the purpose of procuring a report in writing on any question affecting the welfare of a party to the proceedings or any other person to whom they relate from-*
>
> > *(1) Any other person specified in the order*
> >
> > *(2) In deciding whether or not to make an order under subsection (1), the court shall have regard to any submission made to it in relation to the matter by or on behalf of a party to the proceedings concerned or any other person to whom they relate.*
> >
> > *(3) A copy of a report under subsection (1) shall be given to the parties to the proceedings concerned and (if he or she is not a party to the proceedings) to the person to whom it relates and may be received in evidence in the proceedings".*

4. The proceedings were adjourned to 30th March for the purpose of nominating an assessor to prepare the s. 47 report.

5. Following submissions by both sides, the Court refused a stay pending an appeal of that part of the order directing a s. 47 report. The Court proceeded to appoint Dr. Gerard Byrne as assessor.

6. The matter subsequently was appealed to the Supreme Court on 27th April, 2007. The respondents sought a stay on the order directing a s. 47 report. The Supreme Court also considered the issue of the injunction, restraining the removal of D. from the State save for the six week period ending on 9th May, 2007. It was informed that it was the hope of B. and C. to relocate to Australia until June, 2008. The Supreme Court, by a majority of 2 to 1, dismissed the appeal and affirmed the interlocutory orders of the High Court in respect both of the travel injunction and the order for a s. 47 assessment. It remitted the matter to the High Court so that the matter might proceed.

7. On 30th July, the matter next came before the High Court, (Sheehan J.) by way of an application for interim access pending the full hearing. Following a hearing in which A. offered himself for cross-examination, and Dr. Brendan Doody, a Consultant Psychiatrist and Child Psychiatry expert, also gave evidence, the Court ordered interim access to D. for A. on Saturday, 25th August and Saturday, 15th September for periods of one and a half hours each, in the presence of either or both B. and C. in their home or some other venue convenient to their home. This access took place without incident on the said dates.

8. The case came before me for hearing on 2nd October and continued for 14 days concluding on 27th November, a date set aside for submissions. In the course of the hearing I heard evidence from A., B. and C. I further heard Dr. Gerard Byrne who also submitted his

report as assessor appointed by the High Court pursuant to s. 47 of the Family Law Act 1995.

9. I also heard evidence from Dr. Antoinette D'Alton, a Consultant Child Psychiatrist and received a copy of her report herein dated 28th September, 2007. Dr. D'Alton was called by A. and gave evidence as his expert witness. I further heard Ms. M. B., a friend of the parties, Ms. F.L., Mr. P.W. and the mother of A. All these last were called on behalf of A. I further heard a Dr. J. A. and Dr. P. B., friends of B. and C. who were called as witnesses by them.

10. As a result of hearing these witnesses, together with reading the various affidavits submitted in these proceedings to date, together with the s. 47 report submitted to the Court and the report of Dr. D'Alton, the factual background to this case appeared as follows:

11. The respondents who have been in a long term relationship since 1995 and who made a Civil Union in the UK, live openly as a single sex couple. They decided that they wished to have a child who would be a part of what they consider to be their own family unit. To this end, over an extended period of time, they considered this course of action with some care. They consulted with friends, including some male friends whom they asked to consider being a sperm donor to enable B. to conceive. Eventually they entered into an arrangement with a male friend, J. C., who was a gay man living in Amsterdam. As a result of their considerations on the matter and after some discussion with him, they drew up an agreement with J.C. as follows:-

> "Agreement on Sperm Donation by J.C. to P. L./B.M.
>
> P. and B. have lived together as a couple for over 7 years and decided that they would like to have a child. J. is a long-term friend and has agreed to act as a sperm donor. This arrangement was agreed upon in preference to an anonymous sperm donation (as it would be in the interest of a child to have knowledge of their biological father).
>
> The child will know that J. is his/her biological father. The child will be encouraged to call him (by his Christian name.)
>
> Birth Certificate:
>
> J. doesn't mind if his name is included or not on the birth certificate, and is agreeable to whatever P. and B. decide upon this matter.
>
> Parental Role:
>
> J. agrees that the child's parents are P. and B. J. would like to have some contact with the child but will be under no obligation to do so. He sees his role as being like a 'favourite uncle'. He will not have any responsibility for the child's upbringing and will not seek to influence the child's upbringing.
>
> Contact Arrangements:
>
> J. will be welcome to visit P., B. and their child at mutually convenient times. This will be at the discretion of P. and B. J. wants to make sure that the child will establish a solid relationship with P. and B. , as parents and will not want to interfere with this in any way.
>
> Financial obligations:
>
> P. and B. will be fully responsible for the child's upbringing and J. will have no financial obligations to the child."
>
> Child's contact with J's extended family:
>
> The child's extended family will be the extended families of P. and B. Any contact with J's extended family will be at the discretion of P. and B.
>
> This agreement was drawn up at ……..on 03/05/03
>
> Name: …… Date: ……..
>
> Address: …….. Date: ……
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> Name: …….. Date: ……..
>
> Address: …….. Date: ……..
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> Name: …… Date: ……
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> Address: …… Date: ……"

12. The agreement was printed out by C. and signed by all three on 3rd May, 2003.

13. In the view of B. and C., the essence of this agreement, and central to their intention, was that the donor would have no parental role, its parents being B. and C. The donor would adopt a role as "favourite uncle" and would have contact with the child at B. and C's discretion. He would have no responsibility in the child's upbringing and no financial obligations to it. It would be B. and C's decision as to whether J. C.'s name would appear on the Birth Certificate.

14. The whole point of this arrangement was that B. and C. considered it preferable that the child would have knowledge of its biological father rather than use an anonymous sperm donation. Further, they would have a firm family unit consisting of themselves as the parents, i.e. two mothers with their child.

15. Throughout 2003, B. attempted to conceive through this arrangement. This involved travel to and from Amsterdam at appropriate times. She gave up her job to enable her pursue their hopes of success. The many attempts were unsuccessful. She sought assistance in fertility clinics in Ireland but was refused on the basis that she was not in a heterosexual relationship. Subsequent to this, in 2004, she attended at a fertility clinic in London where during that year she attempted to become pregnant. She was unsuccessful in this endeavour. From the beginning of 2005, B. returned to her arrangement with J.C. and his donations continued until July, 2005.

16. The respondents first met with A. at a street party near their home on 18th December, 2004. There seems some confusion as to the exact circumstances of their introduction. A. states emphatically in his affidavit of 28th June, 2007, that B., whom he did not know before, approached him directly and asked him to be a donor. He swore that as he had never met either of them before he found this a little embarrassing and he declined. The evidence of the respondents was that they met at the party, there was some discussion among friends of donor insemination but only in a jocose fashion. Subsequently the friend who invited them, Ms. M.B., contacted them and said she had asked A., who had been introduced to them at the party, if he would be interested in being a father and he had said he would think about it. With their agreement, she then exchanged telephone numbers. Ms. M.B. was called by A., but on subpoena at her insistence because she did not wish to take sides. Her account of their meeting seems more in line with the respondents and A. did not continue his version of the first encounter in his evidence. In any event, the parties first met in December, 2004 and subsequently there was telephone communication between them. It was arranged to meet in B. and C's house on 12th January because Christmas was intervening.

17. They met again on 19th January and on 2nd February. There is some disagreement as to whether the question of the respondents' project and his role in it was discussed at the very first meeting. The respondents think it was, he does not. I do not think much hangs on exactly when discussion began seriously about donor insemination but it would seem likely it was on the occasion of the first meeting as that was the reason for the meeting in the first place.

18. The respondents are very clear that they set out in detail during those meetings the nature of the relationship they envisaged. In particular, they say it was clear that A. would have no parenting or father's role. The intention was that the respondents, together with the child, would form a family unit in the "normal" sense of that word, i.e. two parents and a child albeit the parents in this case would be two mothers. The donor would have a role in the nature of a favourite uncle. Other more practical matters were discussed such as the need to ensure the donor was healthy and in particular had no sexually transmitted disease or other physical or mental problems.

19. B. noted in her diary entry for the second meeting on the 19th January that she gave A. a copy of the "contract" with J.C. and a book entitled "*It's a Family Affair – The Complete Lesbian Parenting Book*" by Lisa Saffron. A. accepts he received the book but denies he received the contract. He maintains he never saw a contract until August of that year when he finally agreed to donate his sperm. He further indicated that he did not really read through this book and in particular did not read the parts of it referring to the uncle role. I find his account of these matters unconvincing. In respect of the book, since in his evidence he accepted they discussed the "favourite uncle" role, it seems highly unlikely he did not read those sections of the book relating thereto. The relevant section is at the beginning of the book under the heading "You and the Donor" and only a few pages into this section has a heading "uncle donor – distant or close".

20. A. is a highly intelligent and somewhat punctilious man. I cannot believe he did not carefully study the book, in particular, the relatively short part dealing with "the uncle role". As to the contract, I note B's diary entry to the effect that she gave it to A. on 19th together with the book. There was some doubt expressed by A. as to whether this entry was authentic. This was not pursued and since I find the applicant's evidence in relation to the book to be unreliable, I think the probability is that following the detailed conversation which it is agreed took place, he was in fact given both the book and the copy of the contract with J.C. as noted in B's diary on 19th January. The fact that the respondents had taken so much trouble in preparing this contract with J.C. in the first place, seems to me to further confirm my view in this regard since I would have thought it was something central to their thinking at the time.

21. Following this, A. attended the Wellman clinic on 21st February, 2005. This, he maintained in his evidence, was in pursuit of a general investigation of his genitourinary health. However, the evidence shows that he kept the respondents informed of this check-up and shared the results with them. This was at the very least an indicator that the prospect of a possible sperm donation was central to his thinking at that time. In March, by arrangement through C., A. attended Dr. Grainne Courtney at St. James Hospital for a further check up of this nature. All of this showed a thoroughly practical and intelligent approach to the project and is far more in line with the respondents' account of the preliminary discussions than the rather vague approach outlined by the applicant in his account of these events.

22. On 22nd March, 2005, A. informed the respondents that he had changed his mind and no longer wished to proceed. The respondents were very disappointed as things had seemed to be progressing very well. In his written submissions at paragraph 1.3, he gave as his reasons his dissatisfaction with the fact that J.C. would be giving donations at the same time. This is quite at variance with his evidence that had such an alternation with J.C. ever even been mentioned, he would have walked away from the project. Between March and the end of July, contact was maintained on a sporadic basis by telephone. There is some dispute as to whether C. visited A. at his house on 2nd May but in any event, it seemed to me that what continued was an effort by the respondents to maintain some minimal level of contact, in hope, perhaps, of a change of mind on A's part.

23. In late July, A. indicated to the respondents that he had changed his mind and he was now interested in proceeding. It seems there was some further discussion about the contract and its terms. This was not pursued further then as A. said that everything had already been agreed and that there was nothing further to discuss. It seems reasonable to conclude that this was because the main points had already been discussed and were agreed.

24. A. came to dinner in the respondents' house on the 9th August. The timing of donations was discussed as B's fertile period was underway. The respondents allege that the contract with J.C. was printed off their computer but was amended to substitute A's name and also to delete the description "long term friend" replacing it with the word "friend". The contract they say was then given to A. The respondents say the contract was not signed by him and they did not understand that he would be making his first donation that very night. They gave him some specimen jars.

25. A's evidence is that he does not recall being in the respondents' home that night and does not in fact think that he was because he had some professional engagement. He maintains that he did not see any contract until the 30th August, after they had learned that B. was pregnant. He does, however, agree he made his first donation on 9th August, that very same night.

26. I prefer the evidence of the respondents in regard to events at this time because whilst theirs is consistent and backed by the

available evidence, his seems confused and contradictory. It seems improbable that he would make a donation on the night of 9th August without any prior notification just by phoning up C. It is much more probable that he was in their house. The contract he exhibits first in his affidavit dated 22nd March, 2007, is dated 9th August and contains the amended details referred to above but not the later ones made. He himself seems to acknowledge in his affidavit at paragraph 12, that he did in fact see a number of drafts of the contract and that he did not keep a copy of what he referred to as "the initial first agreement" which can only be the contract with J.C. It seems to me that A. did receive a copy of the contract with J.C. in January and again on 9th August, this time with his name exchanged for J.C.'s.

27. On 25th August, A. called to visit and met B. She informed him that she was pregnant. Subsequently, there was some further discussion in relation to the contract. At his request, a final paragraph was added dealing with the event of the death of B. and C. and continuing contact as per his history of involvement and also providing for his opinion being considered in relation to providing for guardianship. The signed contract was as follows:-

> "Agreement on Sperm Donation by J. McD. to P. L./B.M.
>
> P. and B. have lived together as a couple for over 9 years and decided that they would like to have a child. J. is a friend and has agreed to act as a sperm donor. This arrangement was agreed upon in preference to an anonymous sperm donation (as it would be in the interest of a child to have knowledge of their biological father).
>
> The child will know that J. is his/her biological father. The child will be encouraged to call him (by his Christian name.)
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> Birth Certificate:
>
> J. doesn't mind if his name is included or not on the birth certificate, and is agreeable to whatever P. and B. decide upon this matter.
>
> Parental Role:
>
> J. agrees that the child's parents are P. and B. J. would like to have some contact with the child but will be under no obligation to do so. He sees his role as being like a 'favourite uncle'. He will not have any responsibility for the child's upbringing and will not seek to influence the child's upbringing.
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> J. will be welcome to visit P., B. and their child at mutually convenient times. This will be at the discretion of P. and B. J. wants to make sure that the child will establish a solid relationship with P. and B. , as parents and will not want to interfere with this in any way.
>
> Financial obligations:
>
> P. and B. will be fully responsible for the child's upbringing and J. will have no financial obligations to the child.
>
> Child's contact with J's extended family:
>
> The child's extended family will be the extended families of P. and B. Any contact with J's extended family will be at the discretion of P. and B.
>
> In the event that P. and B. should pass away, J's contact with the child should continue uninterrupted, as per his history of involvement. Also, J's opinion should be considered in terms of deciding the best guardianship arrangements for the child.
>
> This agreement was drawn up at ……..on 03/05/03
>
> Name: …… Date: ……..
>
> Address: …….. Date: ……
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> Name: …….. Date: ……..
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> Address: …….. Date: ……..
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> Name: …… Date: ……
>
> Address: …… Date: ……"

28. It is to be noted that, save for this last paragraph, the agreement between the parties was as had been first discussed in January, 2005.

29. The relationship that existed between A. and the respondents from September, 2005 until the birth of D. in May, 2006, was one that seems to have been viewed differently by the parties. For the *ex parte* application A., painted a picture of a somewhat more intimate, almost familial relationship between himself and the respondents than emerged during the full hearing. It seemed to me that what actually evolved was a relationship of friendship which remained somewhat at arms' length. They met about once per month during this time. He was helping out with the renovation of their house. His invitation, disinvitation and re-invitation to B. and C's Civil Union ceremony in London seemed representative of that kind of distance and of a kind of uncertainty as to the nature of the relationship. A further example was the occasion where B. and C. had dinner with A. and a female friend of his from the U.S. When

this person referred to how lucky the new baby would be to have three such excellent parents, B. was very upset. The following day she phoned A. to remonstrate with him for allowing such comments to pass uncorrected. Her concern was that he was representing himself in a way that was not in accordance with his agreed role, i.e. an uncle. In his evidence he confirmed this incident and accepted that he reassured her he had not changed his view as to his having an uncle rather than a parental role.

30. The circumstances of the birth also gave rise to certain conflicts of evidence in relation to the surrounding arrangements. Those circumstances involved his taking the respondents' dog, his visiting B. and C. and the new baby in hospital, the aborted visit with his sister and the arrival home. It seemed to me that there is evidence of a relationship seen by the parties from very different perspectives. His arrival at the hospital was clearly very unwelcome to B. Her recollected thought of "what is he doing here" appeared telling and very much in accordance with what transpired later. A.'s outburst when B., being very unwell after the birth asked C. to tell A. not to bring his sister in to visit, was very much the opposite end of that spectrum. "This behaviour had better change" according to C. was his comment when C. told him they should not visit. He did not deny this incident but does not recall what his words were. His further claim that they had "dragged" his sister up from Arklow as C. recollected it, seemed in accordance with his own recollection of the incident although it was he who had asked to bring her in to visit. Allowing for heightened emotions at the time, it did seem to me to evoke a relationship between the three that was very far removed from the familial or intimate one represented by the applicant in his *ex parte* application. Moreover, B's anger with C., for going to visit A. and his sister after this angry telephone conversation in order to "placate" him as she put it, showed the extent to which A could disrupt the more than ten year relationship of B. and C. The final noteworthy incident at this time was the occasion of the return home. A. saw this as a kind of normal celebratory occasion and invited himself to drop in with a bottle of wine to celebrate. B. still very unwell, returning to a flat that was not ready to receive mother and baby was, it was quite clear from the evidence, very upset indeed by this uninvited intrusion as she seemed to see it. The arrival of the well meaning Georgian ladies from the neighbouring flat to see the baby and offer their good wishes only seemed to exacerbate the situation which ended with B. in tears. The arrival home of the baby was a disaster as seen by the respondents. It seemed to me that the applicant, until he heard this evidence from B., thought the occasion had been quite normal. His view and theirs of this incident could scarcely have been more different. It seems clear to me that he saw himself at this stage in the role of a new father rather than the uncle role they had envisaged and which had been agreed.

31. The period from May, 2006 to the end of July, 2006, is represented by the applicant in his submissions as one involving a close and intimate relationship. He seemed to be describing a familial relationship in which he occupied the role of "*paterfamilias*". The picture emerging from the evidence seemed quite different. The respondents seemed to wish to try to maintain a friendly relationship with the applicant. They repeatedly referred to him as the man to whom they owed a debt of gratitude for the joyful presence of baby D. They agreed to meet some of his friends and they brought the baby down to visit A's parents. It was clearly a joyful time for all.

32. However, A.'s view of this period in his submissions and in his affidavits did not seem in accord with what emerged in evidence. The parties met approximately once per week at this time. They went for one walk together with baby D. The respondents visited A. on just one occasion and, as noted, visited his parents. It was somewhat different to the picture painted previously by A. of "regularly visited each other", "took [baby] for long walks in his buggy" and "had dinner in each others homes". As it appeared from the evidence, at all times it was A. pressing to visit them, to have them visit his parents and to bring his parents to visit the respondents' home.

33. Even allowing for the hindsight involved in giving evidence of this period in the relationship, it seemed to me that B. was sensitive to the apparently changed perception by A. of the relationship and wary of it. C. seemed less sensitive to this change and, as with the visit to placate A., more willing to try to accommodate the interest that A. was showing in baby D. The visit of A.'s parents to the respondents in their home at the end of July, 2006, seemed from the evidence however, to be an event that gave both the respondents to look more carefully at what was happening.

34. In August they travelled to Kerry for their holidays with baby D. B. described these two weeks in Dingle as a chance to get out of the house, which had building work ongoing, and to have their first family holiday. It was also a chance to reflect on "what had been happening to us in those first three months". B's evidence in this regard indicated their thinking at this time which led to what has been described as a sea change in the relationship. They considered A. was being intrusive. He kept inviting himself, albeit politely. Before he would leave he would make an arrangement for the next time. This then meant they had to keep that time free. Before the birth they had only met once a month. After that there was pressure to be meeting weekly. They concluded that A. had stepped over the line as it were, that he was no longer behaving as an uncle and was intruding in their family life.

35. The respondents resolved to discuss this situation with the applicant and arranged a meeting. This meeting took place in the Marine Hotel in Sutton on 3rd September, 2006. It turned into a very fraught occasion and not surprisingly both sides have rather different recollections of it. As the respondents saw it, they explained to him that in their view he was not behaving in a way that was in accordance with the agreement. He described himself as bewildered by what he saw as a change in their attitude. In cross-examination he agreed the respondents had in fact told him that they thought he had changed and was behaving differently to the role agreed. He agreed they put certain incidents to him which seemed to demonstrate this. He also accepted they expressed concern that he was portraying himself as a father, and that he was changing from an uncle role to a father role. He agreed that he had probably said he had not changed his view of his role.

36. He, for his part, felt this meeting constituted a sea change in the relationship. He was told they had become too close and that a greater distance and formality was required. He believes that B. said that his brother-in-law in Scotland was to be the preferred male role model. He says he was told his family was being too intrusive.

37. Although there was some disagreement about details of this meeting, it was clear it was a very difficult one. Perhaps one of the things A. felt most keenly was the suggestion of another preferred male role model. The respondents deny this was what was either said or meant. Their reference to the brother-in-law was as the uncle role model they had in mind, i.e. at a distance and waiting to be invited. The baby, they said in evidence, would have many male role models. The respondents think the meeting was very tense whilst A. thinks it was conducted in an aggressive way. In any event, it is agreed it ended when he said to B. that if he had known things would turn out this way he would never have gone along with it. The respondents believed the meeting was calm but tense and ended when he became emotional and said this.

38. The respondents' concern continued because they felt that A. had not engaged with the concerns they had expressed. They felt he had "blanked them" as their counsel put it to him. He did not disagree with that.

39. The immediate aftermath of this meeting was that a few days later, having telephoned, he called to their house to collect a DVD player and DVDs he had loaned them along with a few other household things he had also loaned them. Apparently, few words were exchanged but it was agreed between him and C. that they would have another meeting.

40. This meeting took place in Farmleigh on 8th October. The meeting was polite. Baby D. was present. At the end of the meeting A. suggested that he would like to see baby D. again and suggested once a month on the first weekend. However, it appears he used the word "access". The use of this word, according to the respondents' counsel in cross-examination "froze their blood". It suggested something completely different from the arrangement agreed. It also suggested to them that he had taken legal advice. They did not agree to this proposal.

41. The final meeting of all three at this stage took place in Clontarf Castle Hotel on 14th November. There is some dispute on the details but it appears the meeting was heated. At some stage A. demanded a paternity test. He was told this was not necessary. Much of the matters that had been raised at the Sutton meeting were discussed again. A. further stated "I am a father. I have rights". To the respondents this crystallized their fears that A. had changed from the agreed role of "uncle" to that of father with all that it implied as to control and parenting rights. The meeting ended acrimoniously.

42. A further meeting was arranged by C. with A. alone in "The Yacht" a licensed premises in Clontarf on 22nd November, 2006. This meeting took place with B's knowledge. She may not have been aware originally of it. C. explained B. had been having very serious health problems. There is some disagreement concerning his hearing a threat that they would move permanently to Australia. This was stated in A's first and second affidavit that grounded his *ex parte* application but not repeated by him either in his direct evidence or in cross examination. In his direct evidence and in cross examination, he agreed that in fact C. told him that they would not be going to Australia for Christmas but would instead be going from early January until March. In fact, due to B's illness that departure was postponed to March.

43. C. suggested that the best course of action would be if he backed off and gave them all some space. She indicated it would be better if he waited until she contacted him.

44. This was the last occasion on which the applicant had communication with the respondents until C. telephoned him on 20th March, 2007, to arrange to meet him so that he could see them before they departed for Australia, on 24th March. He suggested a meeting the following week but C. said this would not be possible. She did not indicate they were leaving for Australia before next week. At this stage, they had decided to go to Australia for one year with C., taking up a temporary position there. It seems at this stage that A. decided to seek an order preventing them from leaving with the baby. He did not say anything about this to C. on the phone on 20th.

45. The state of knowledge of A. about their plans to go to Australia is difficult to unravel. He certainly knew they had postponed their plan to visit for three months over Christmas. As his counsel in the *ex parte* application told the Court, the respondents were going to Australia on 24th March for eight months, he probably knew about this extended period since January because, as appears from the evidence, that was the only time when an eight month period was mentioned. It was referred to in an e-mail when they were seeking to rent their house in January, 2007, to someone who would also look after their dog. In any event, because of the changes in plans, together with the lack of any communication between the parties, it is probably reasonable to assume that a certain measure of confusion may have been present in the applicant's mind as to their intentions regarding going to Australia. It must, however, also be noted as appeared clear to me from the evidence, that the respondents made no secret of their intentions in this regard and most of their friends and acquaintances were aware of their plans.

46. On 22nd March, 2007, A. obtained *ex parte* in the High Court from Abbott J. an interim order restraining the respondents from removing Baby D out of the jurisdiction together with certain ancillary orders. On 23rd March, 2007, Abbott J. further ordered that the respondents be at liberty to take Baby D. with them to Australia from 25th March, 2007, until 9th May, 2007. He ordered the preparation of a report pursuant to s. 47 of the Family Law Act. The applicant's Notice of Motion was amended to allow a claim for interim access.

47. Subsequently, this order was upheld by the Supreme Court and interim access occurred without any noteworthy incident. Further, Dr. Gerard Byrne was nominated as assessor and his report was submitted to the Court.

48. The above is an account of the evidence as presented before me on the matters that I consider central to the issues before the Court. My findings on these issues are as follows:-

49. As to the enforceability of the agreement, I will deal with that later. At the least, it was intended to express the wishes of the parties. At its heart is the wish that this single sex couple should have a child whose sole parents they would be. Rather than have an anonymous sperm donor, they wished to have a known donor so that any child born of this arrangement would be able to know the identity of its biological father. They wished this donor to have a role like that of a favourite uncle. He was not to be a parent. The parents were to be the two partners and they alone would decide whether the donor's name would appear on the Birth Certificate. The donor would have no responsibility for the child's upbringing nor seek to influence it. Contact arrangements would be solely at the discretion of the two partners. The clear intent was that a family unit, which the two partners believed they had, would be extended by the addition of a child born to one but parented by both. The donor would not occupy the role of father. The family unit would consist of two mothers and the child. The evidence of the respondents and the witnesses called on their behalf was that they made this arrangement crystal clear to the men with whom they discussed the possibility of becoming a sperm donor. At the request of the applicant, the contract also made provision for his continuing contact as per his history of involvement and consultation on guardianship in the event of the death of the respondents.

50. It seems to me that the above summarizes the essential nature of the agreement.

51. The applicant was given the J.C. agreement on January 19th, 2005, at the same time as he was given the book on lesbian parenting. I find also that the essential heart of that agreement was discussed with him and that he was clear as to the role suggested for him. There is no dispute but that he then very responsibly underwent medical tests to ascertain his suitability as a donor. This was confirmed. He subsequently considered the matter and decided not to proceed. He notified the respondents of this on 22nd March. Between March and July, a certain measure of communication was maintained between the parties. On 23rd July, A. met B. and told her he had changed his mind and would now proceed with the project. On a brief discussion in relation to details of the agreement, he indicated that all had been agreed already and he stated that there was nothing more to discuss. On 9th August, he came to the respondents' house and had dinner there. Afterwards, he was given a copy of the agreement made with J.C. but with amendments made to exchange his name for J. C's and to describe him as a friend rather than as a long term friend. He was further given a number of specimen jars and he left. He did not sign the agreement that night. Later on that evening, he called C. to say he had a donation for collection. C. went to his address, met him outside and collected the donation. Further donations were made on the 10th and the 11th.

52. On 26th and 29th August, B. had positive pregnancy tests and on A.'s calling by, she told him the news. It was agreed that

nothing would be said until the end of the first trimester. At this time, the respondents were overjoyed and so was the applicant. They each told their families. Their relationship then continued on much as it had before. They met about once a month. The picture of an intimate almost familial relationship during this period, as portrayed in the affidavits of the applicant grounding his *ex parte* application, was not borne out in the hearing. A more arms length type of relationship seemed to continue.

53. In January, 2006, the respondents had a Civil Union ceremony in London. A. was originally invited, then disinvited and then re-invited. It was explained that this was due to the changing nature of the occasion as the respondents saw it. It seems to me that it was also indicative of the uncertain nature of the relationship.

54. As the due date for B's delivery approached, certain arrangements were made by the respondents. Among these was an arrangement that when the time arrived, A. would take the respondents' dog and mind it for a few days. They were then living in a top floor flat and had nobody to look after the dog.

55. On the evening of 1st May, 2006, B. and C. went into the Rotunda and B. was kept there. C. contacted A. and he came and took the dog.

56. B. had a difficult delivery and the baby was born the next day, the 2nd May, 2006. C. who had been at the hospital with B. throughout, went home to refresh herself.

57. Whilst there, A. phoned and asked if he could come into the hospital. There is some disagreement as to what transpired in the next few days. I found C. to be a thoroughly reliable and credible witness and I accept her account of these events. She was surprised to hear he was nearby because she had understood he was in Arklow, having collected the dog. He asked if he could come into the hospital. She thinks she rang B. to ask but is not sure. She thinks B. probably was not in a state to think clearly anyway. C. agreed and A. made his own way into the hospital as C. very firmly and clearly recollects it. She neither contacted him nor did she bring him in. He stayed a while. His visit was most unwelcome to B. who was very obviously not well.

58. The following day he phoned C. to ask if he could attend the hospital again with some family and friends the next day. He wanted to bring his mother and father, his sister and an American visitor. C. indicated this was too many people to bring. He pressed and indicated he would come with his sister and his American friend. C. agreed to this but the following day B. was feeling much worse and not up to having visitors. C. rang A. to cancel the arrangement. A. had apparently just arrived in Dublin with his sister, herself pregnant, after a difficult drive. He was extremely angry and berated C., accusing her of dragging his sister up from Arklow. The phrase C. most remembered was his comment, "This behaviour better change". C. found this incident deeply shocking. Although she told B. he was not happy, she did not dare tell her what he had actually said until much later. C. felt she ought to go and see A. and did so that evening with some photographs. The earlier conversation was not mentioned. When she returned to the hospital, B. was very angry at C. for, as she put it, "pandering" to him. This incident revealed to C. a side of A. she had never seen before. It deeply disturbed her.

59. The next day B. and C. went home with Baby D. The apartment was very unprepared for the arrival. They were not there long when A. phoned and asked if he could come around. The respondents agreed and very shortly afterwards he arrived with a bottle of wine. The visit was not a success and in the end B. was crying and asked A. to go and buy some small blankets as a way of getting him to go.

60. Through the summer there followed a series of visits by A. to the respondents' home. There was one occasion when he accompanied them on a walk with the baby in his buggy. The respondents felt it important to maintain friendly relations with A. and tried to do this. The respondents' belief that he was pressing himself upon them seems to be correct. All visits were at his suggestion and tension grew between B. and C. because B. felt C. should be more assertive and should not be giving in to his requests for visits so readily. It seems A. was oblivious to this and to the sense of the respondents that he was not behaving in the role to which he had agreed. The final event of this period was the visit of A's parents to B. and C's house. B. and C. felt that A's parents were behaving in a way that seemed quite at variance with the relationship they envisaged as appropriate. B. and C. considered this was because A. was representing himself to his parents as having a very different role from that of "uncle".

61. On their holiday in Dingle in August, the respondents concluded that A. should be spoken to by them and told of their concern. In the meeting that followed on 3rd September in Sutton, it seems clear to me that A. did indeed "blank them" as they put it. He insisted he had not changed his role notwithstanding the examples they gave him of behaviour inconsistent with that of an uncle. The result of this meeting for the respondents was a growing alarm at his refusal to accept their concerns and do something about them. For A. the result of this meeting was that it seemed to him that he was no longer welcome to visit and this meant he might not be able to see Baby D. as often as he wished.

62. The concern of the respondents deepened further at the meeting on 8th October, when he used the word "access" in relation to seeing the baby. The respondents saw this as a dangerous development which clearly indicated a mindset quite at variance with that of an uncle.

63. The final meeting of the three and Baby D. was on 16th November. The applicant never adequately explained the bizarre request for a paternity test. I can only conclude he was advised to do this against the possibility that his paternity would at some future stage be denied. It should be noted that he had been acknowledged from the very start as the biological father. This was a heated meeting at which he said "I am a father, if I am a father I have rights". From this point on, the respondents knew that the applicant saw himself as a father rather than as an uncle. This meant father as normally understood in the social sense. No one had ever denied his biological paternity. This view of himself was not consistent with his role as agreed.

64. In the *ex parte* proceedings in his grounding affidavit, A., at paragraph 8, swore that he was asked by the respondents to become involved in the conception and parenting of the child. On Friday 23rd, the return date for the interim order, according to himself on cross examination, he told B. he wanted to be a father and parent. Her recollection of this encounter was that he said he had always wanted to be a father and parent. This, she said, was the first time he had ever said this. It made her feel he had tricked her and she said made her feel sick.

65. Further, in paragraph 12 of his affidavit sworn 26th June, 2007, he stated that he had always wanted to have a child. Later on in his cross-examination on 30th July, 2007, at its commencement he gave evidence that he had always wanted to be a father, that from the outset he wished to have a parental role in relation to the child and that he would have a full role in the child's life as a father. However, in his evidence at this hearing in cross-examination at day four, the applicant accepted that the above was contrary to the terms he had agreed with the respondents. He agreed the discussions he had had with them was on the basis that he would not, in fact, have a parenting role. He agreed that that was acceptable to him. He agreed he had changed his mind about his

role, and that he was asking the respondents to accommodate his change of mind, and he agreed that he had understood and accepted the terms of the agreement at the time he entered into it.

66. It is to be recollected that after the dinner incident with A.'s American friend who referred to "three excellent parents", A. went to some length to reassure B. that he did not want a parenting role and was not representing himself as a father.

67. In the light of the above, I am driven to the conclusion that the applicant misled the respondents as to the role which he saw himself playing in any child's life. From the beginnings of their discussions in January, 2008, he never admitted to them what his true intentions were. He considered the project carefully at that time and decided in March not to proceed. In July, he decided to proceed and upon being presented again with the draft agreement now changed to include his name, made no protest and ultimately signed an agreement that provided he would have no parenting role and that he would have contact with the child, only at the discretion of the respondents. The additions that were made at his request served in my view only to confirm that, save for the possible death of both respondents, the role he would pay vis-à-vis the child would be one of an uncle.

68. Although the parties conducted themselves throughout the hearing with dignity and decorum, it was possible to discern the nature of the relationship that exists between them. It seems to me that between A. and C. there is one of, at best, "armed neutrality". C. no longer trusts her judgment of A. Between A. and B. there clearly exists a reciprocal relationship that can only be described as poisonous. It is, I think, accurately described by Dr. Byrne in his report. Between A. and the respondents, he finds there exists a relationship characterised by feelings of betrayal and violation. There is no trust between them and the respondents are very distressed psychologically by their sense of his invasion of their "family integrity" and their integrity as parents. The evidence as I heard it clearly confirmed this view of Dr. Byrne's.

69. As to the relationship between A. and Baby D., I found nothing in the evidence to suggest Dr. Byrne's view was incorrect. I have no doubt that A. has himself formed a bond with the baby but there has been no opportunity for the baby to have formed any attachment to him. It seems clear that Dr. Byrne's view that there is no real relationship between Baby D. and A. other than a biological one is well founded.

The Section 47 Report.

70. Dr. Byrne was appointed by the Court to prepare a report pursuant to s. 47 of the Family Law Act 1995, and this was presented to the Court at the outset of the proceedings. Dr. Byrne appended to his report an article from "Paediatrics" which is the journal of the American Society of Paediatrics. The study referred to therein was considered in the case of *Zappone & Anor. v. Revenue Commissioners & Ors*. [2006] IEHC 404 by Dunne J. She found it was based upon studies that may not have been conducted in a manner that was the norm in modern research. Nevertheless, she noted there was no evidence in the report to suggest that children brought up by same sex couples fared any worse than those brought up in heterosexual families. I felt obliged like Dunne J. to approach this article with some caution.

71. Dr. Byrne's comprehensive report was based on his interviews with the parties including a meeting between them and Baby D. His opinion in summary is that it is accepted that a child should have knowledge of both parents. It is an important part of the identity formation of a child. It is also accepted that a child should have access to both its parents unless there are compelling reasons against. Access should be such as to allow a meaningful relationship to develop. Dr. Byrne considers that B. and C. feel a huge amount of distress at what they consider A.'s betrayal of them. They feel that, in effect, he used B. as a surrogate mother. They have a sense of invasion by him of the integrity of their family unit. He thinks that they feel violated by A. and considers that to be a very important and fundamental matter. There is, he believes, no trust between A. B. and C. The contrary is the case. A.'s view that his relationship with Baby D. is like that of a father where the parents have separated is not correct according to Dr. Byrne. There was never a family involving A. and B. He thinks that if A. were to have access it would take place in an atmosphere of deep distrust and where the child's mother and her partner, the family unit, feel that they had been violated and betrayed by the father. Dr. Byrne sees grave problems of conflict attendant upon arrangements for access likely to cause psychological damage to D. He feels he will have enough psychological challenge growing up with same sex parents without adding other challenges.

72. Dr. Byrne believes that D. has no relationship with A. other than a biological one. Upon the arranged meeting he did not recognise A. nor did he exhibit any attachment behaviours. This does not surprise Dr. Byrne because A. has not been with D. since his birth for any appreciable length of time and has never been in a caretaking relationship. To establish such an attachment relationship for D. to A. at D's age would require A. to see him at very frequent intervals, three times a week, according to Dr. Byrne.

73. Dr. Byrne expresses concern about A's motivation. He does not believe he thought things through in relation to the whole project. He thinks he is a lonely and somewhat melancholic person. Although the idea of having a child seemed attractive to him, he never really examined his motivation in participating in the sperm donation or of his ultimate role with any child born thereof. Doubting his true motivation in seeking access, Dr. Byrne is not convinced he would remain involved.

74. In his conclusion, Dr. Byrne opines that A. should not have any role in D.'s life that gives him rights that could interfere with D.'s family life with B. and C. In the result, Dr. Byrne advises against rights of access or guardianship. It is his belief that B. and C. would act in D.'s best interests by involving A. in D.'s life in a way that would promote D.'s psychological interests and their own ability to parent him effectively.

75. I also heard evidence from and received the report of Dr. Antoinette D'Alton who was called on behalf of A. notwithstanding that Dr. Byrne had been appointed by the Court on A.'s own application. Dr. D'Alton did not have the opportunity to meet B. C. or D. Her report is based on an account of events given her by A. and A's solicitor, on the sperm donation agreement dated 11th September, 2005 and on telephone calls with both A.'s employers.

76. This basis is, in my view, superficial. One of the grounds upon which she bases her summary and opinion is very dubious. The decision to conceive a child was not in fact made in the context of a friendship, as she believes, but in the context of a new relationship between A. B. and C. which came into existence solely for the purpose of a donor insemination project. Prior to this they did not even know each other. Secondly, it is not correct that in September, 2006 B. and C. "effectively wished" to exclude A. from D's life. The purpose of that meeting was to return the role of A. in D's life to the uncle role agreed. Throughout the hearing B. and C. repeatedly indicated that they saw a role for A. in D's life.

77. In her evidence, Dr. D'Alton, in my view, dealt very superficially with the central point of Dr. Byrne's thesis, i.e. the grave difficulty in building a positive relationship involving A., B. and C., bearing in mind the level of mistrust and feeling of violation and betrayal that existed between them. Her approach seemed to be that they should all just "get on with it". Whilst this approach has at first blush certain superficial attractions, it fails to engage with the real problem which is whether the "getting-on-with-it" in such circumstances is actually possible without causing more harm than good.

78. I did not find her evidence very convincing and consider that the report commissioned by the Court under s. 47 is a more reliable guide. In any event, I consider that the expert nominated by the Court should, save in certain exceptional circumstances, be preferred to that of an expert witness called by one party.

79. There appears to be no direct authority on the status of a s. 47 report in this jurisdiction.

80. One Irish case was cited before me by both sides on this point, *L.(D) v. T.(D)* (Unreported, Supreme Court, 9th November, 1998). In that case, Murphy J. dealt with the role of the medical expert in childcare proceedings. Although I do not find this case to be directly on point, the judgment cited to me does suggest that unless the medical expert misled himself or was misled, the Court ought to accept his conclusions on an assessment of the persons interviewed. Furthermore, in *Re: W (Residence)* [1999] 2 F.L.R. 390 cited by the respondents, the Court of Appeal in England dealt with the role of the report prepared by the Court Welfare Officer. Although this position is clearly different from that of the reporting expert under s. 47, there are sufficient similarities described in the following extract from the judgment of Thorpe L.J. at pp. 394 and 395 to assist in determining the attitude that the Court should adopt in this jurisdiction to the s. 47 report:-

> *"In relation to the role of the Court Welfare Officer, it cannot be too strongly emphasised that in private law proceedings, the Court welfare service is the principle support service available to the judge in the determination of these difficult cases. It is of the utmost importance that there should be free co-operation between the skilled investigator, with the primary task of assessing not only the factual situations but also attachments, and the judge with the ultimate responsibility of making the decision. Judges are hugely dependent upon the contribution that can be made by the Welfare Officer, who has the opportunity to visit the home and see the grow ups and the children in much less artificial circumstances than the judge can ever do. It is for that very good practical reason that authority has established clearly, since at least the decision of this Court in W v W (A minor: Custody Appeal) [1988] 2 FLR 505, 513 that Judges are not entitled to depart from the recommendation of an experienced Court Welfare Officer without at least reasoning that departure. The more recent decision of this Court in Re: A. (Children: 1959 U.N. Declaration) [1998] 1 FLR 354 emphasises the importance of the judge testing any misgivings that he may have developed from the written report with the Court Welfare Officer in the witness box".*

81. It seems to me that the s. 47 report should, at the very least, be accorded the same status as that accorded to a medical expert in childcare proceedings. Indeed, because the expert producing a s. 47 report does so on the instructions of the Court rather than either party, the report should be accorded great weight. Save for grave reasons against, which I think the Court should set out clearly, the s. 47 report ought to be accepted in its recommendations.

The enforceability of the agreement.

82. The respondents argue that the agreement is a valid binding contract. It was discussed in detail by the parties thereto and its terms are clear and unambiguous. The respondents argue that if an unmarried mother can consent to the adoption of her child, then by analogy a biological father such as the applicant surely also can contract out of any rights he might have in relation to the child. If a mother can waive her rights then, as a general principle, so can a sperm donor. Furthermore they argue, parents regularly reach agreement on custody, access and guardianship and it has never been alleged that such agreements are either illegal or invalid.

83. The applicant argues that the agreement was signed after B. became pregnant and in any event is neither binding nor enforceable under Irish law. This is so because the terms of any such agreement cannot be enforceable unless they coincidentally serve the child's best interest. Further, he argues, the agreement was contrary to public policy, that there was no intention to create legal relations and that the terms were too vague and ambiguous. Lastly, the book "It's a Family Affair – the Complete Lesbian Parenting Book" by Lisa Saffron contains advice at pages 18 to 19 to the effect that a written donor agreement is not binding or enforceable and is useful only to the extent that it highlights the issues that need to be addressed. The book's advice is that such an agreement may be useful depending on what weight a judge gave to it.

84. Examining the agreement on sperm donation dated 11th September, 2005, and signed by A., B. and C., the following may be described as its main terms:

(i) A. agreed to donate his sperm.

(ii) The child will know A. as its biological father and will be encouraged to call him by his Christian name.

(iii) B. and C. would decide whether A's name goes on the baby's Birth Certificate.

(iv) The child's parents would be B. and C.

(v) A.'s role will be like "a favourite uncle".

(vi) A. will have no responsibility for, nor influence in the child's upbringing.

(vii) A. would like to have contact with the child.

(viii) A.'s contact with the child will be at the discretion of B. and C.

(ix) A. will have no financial obligation to the child.

(x) The child's extended family will be that of B. and C. Contact with A's extended family would be at the discretion of B. and C.

(xi) In the event of the death of B. and C., A's contact with the child should continue as theretofore and A's opinion should be considered in deciding the best guardianship arrangements.

85. It seems to me that save for (i) above, all the other terms involve matters in which the child has an interest.

86. It does not appear there are any Irish authorities on the enforceability of sperm donation agreements.

87. I was referred to the case of *Re: Patrick* [2002] FamCA 193 where the Family Court of Australia dealt with a case of a sperm donation agreement. In regard to such agreements Guest J. stated (at para. 215 of the judgment):-

> *"An agreement absolving a father from the obligation to pay maintenance for a child would not be enforceable directly or by way of estoppel. Nor would an agreement absolving the father from any other aspect of parental responsibility. Equally, a written agreement which provided for a donor to have frequent contact with the child could not prevail over a finding by the Court, in a given case, that contact was not in the best interests of the particular child. Whilst agreements might be valuable in avoiding, pre-empting or resolving inter-personal disputes between the individuals in donor insemination arrangements, it is the considerations in s 65e and s 68F(2) of the Act [best interests considerations] rather than the terms of any agreement which would dictate the outcomes for the child".*

88. It seems to me that the above reflects the predominance of the child's interest that characterises Irish law where a conflict arises between the various parties in any family unit. This leads me to the conclusion that sperm donor agreements, such as herein, may constitute a valid contract but are enforceable only to the extent that the rights of any child born as a result thereof are not prejudiced. As noted above in the agreement herein, save for (i) all its other main terms involve matters in which the child D. has an interest. As this in reality comprises the entire agreement, it follows that the agreement is only enforceable to the extent that the child's welfare is protected.

The rights of the natural mother.
89. The rights of the mother under Irish constitutional law are well established and clear. She possesses a constitutional right to custody of her child which is a personal right under Article 40 of the Constitution.

90. In the case of *G. v. An Bord Uchtála* [1980] I.R. 32 O'Higgins C.J. at page 55 described the mother's rights as follows:-

> *"But the plaintiff is a mother and, as such, she has rights which derive from the fact of motherhood and from nature itself. These rights are among her personal rights as a human being and they are rights which, under Article 40, s.3, sub-s.1, the State is bound to respect, defend and vindicate. As a mother, she has the right to protect and care for, and to have the custody of, her infant child. The existence of this right was recognised in the judgment of this Court in The State (Nicolaou) v. An Bord Uchtála. This right is clearly based on the natural relationship which exists between a mother and child. In my view, it arises from the infant's total dependency and helplessness and from the mother's natural determination to protect and sustain her child".*

91. He continued further;-

> *"The child also has natural rights. Normally, these will be safe under the care and protection of its mother".*

92. It seems to me that the Court should proceed upon the presumption that the mother will act in the best interests of her child and the onus lies heavily upon any person alleging otherwise to satisfy the Court that it should intervene in the arrangements she makes for the welfare of her child.

The rights of the sperm donor.
93. These rights can be regarded as at least no greater than those of the natural father as set out in s. 6A of the Guardianship of Infants Act 1964 (as inserted by s. 12 of the Status of Children Act 1987), i.e.:-

> *"(1) Where the father and mother have not married each other, the court may, on the application of the father, by order appoint him to be a guardian of the infant".*

94. This section has been interpreted in a number of Supreme Court judgments and I was referred to two in particular which I have found helpful.

95. In *J.K. and V. W.* [1990] 2 I.R. 437 dealing with the position of the unmarried father in relation to his child, Finlay C.J. at page 446 stated:-

> *"The right to apply to be appointed guardian of the infant under s. 6A of the Act of 1964 (as inserted by the Act of 1987) is a right to apply pursuant to a statute which specifically provides that the court in deciding upon such application shall regard the welfare of the infant as the first and paramount consideration".*

96. On page 447 Finlay C.J. continued:-

> *"I am satisfied that the correct construction of s. 6A is that it gives to the natural father a right to apply to the court to be appointed as guardian, as distinct from even a defeasible right to be a guardian. The discretion vested in the Court on the making of such an application must be exercised regarding the welfare of the infant as the first and paramount consideration.*
>
> *The blood link between the infant and the father and the possibility for the infant to have the benefit of the guardianship by and the society of its father is one of many factors which may be viewed by the court as relevant to its welfare".*

97. In *W. O'R. v. E. H.* [1996] 2 I.R. 248, a case stated, the Supreme Court applied these conclusions and Hamilton C.J. adopted the above passages. In answering question four asked in that case, he stated (at pp. 269 and 270):-

> *"The rights of interest or concern in the context of the guardianship application arise on the making of the application. However, the basic issue for the trial judge is the welfare of the children. In so determining, consideration must be given to all relevant factors. The blood link between the natural father and the children will be one of the many factors for the judge to consider, and the weight it will be given will depend on the circumstances as a whole. Thus, the link, if it is only a blood link in the absence of other factors beneficial to the children, and in the presence of factors negative to the children's welfare, is of small weight and would not be a determining factor. But where the children are born as a result of a stable and established relationship and nurtured at the commencement of life by father and mother in a de facto family as opposed to a constitutional family, then the natural father, on application to the Court under s. 6A of the Guardianship of Infants Act, 1964, has extensive rights of interest and concern. However, they are subordinate to the paramount concern of the court which is the welfare of the children".*

98. From the above authorities, it appears the following are the established principles of Irish law which I should apply in this case to determine the rights of the applicant as a sperm donor:

(l) He has a right merely to apply to be appointed as a guardian. He has no right, not even a defeasible right, to be appointed a guardian.

(2) In any such application, it is the welfare of the child that is the first and paramount consideration.

(3) To establish the extent of the rights and interest of the applicant as a sperm donor, and not as a member or part of a stable and established relationship, requires the Court to seek factors other than the blood link which are or might be beneficial to the child. Where the Court finds the presence of factors negative to the child's welfare, the blood link is of little weight and would not be a determining factor. Where there are positive factors which are or would be beneficial to the child, there may be rights and interests inherent in the sperm donor. All factors must be taken into account but at all times it is the welfare of the child that is paramount.

The rights of the child.

99. The applicant claims the child would be discriminated against were he to be denied access to his biological father. The respondents deny this is so in this case and anyway argue that in the circumstances of this case it would be in his best interests not to have Court ordered or supervised access.

100. It is common case that as a general proposition, the "non-marital child" cannot be discriminated against by a denial of access to its father.

101. Moreover, it is quite clear that there is no discrimination permitted in Irish law between marital and non-marital children. (See *G. v. an Bord Uchtála*.) The Status of Children Act 1987 abolished any such discrimination. Further, the U.N. Convention on the Rights of the Child and specifically Article 9(3) provides that all children have a right of access to both of their parents although it must be noted that this convention, although ratified by Ireland, has not been incorporated into Irish law.

102. It is also clear from the authorities cited above that the courts may regulate guardianship, access and custody matters in relation to all children in accordance with the statutory framework that requires them to place the child's welfare as the first and paramount interest.

103. I note again the observation of O'Higgins, C.J. in *G. v. an Bord Uchtála* (cited above) at page 55 where under the heading "The Child's Rights":-

> *"The child also has natural rights. Normally, these will be safe under the care and protection of its mother".*

The rights of the *de facto* family.

104. A further interest may exist in addition to that of A., B. and D. This is the *de facto* family unit of B., C. and D. The concept of the *de facto* family as opposed to the constitutional family is one now well established in family case law in Ireland. In the above cited case of *W. O'R. v. E.H.*, the Supreme Court in answer to question number 5, stated (at page 270 of the judgment):-

> *"The decision of the European Court [of Human Rights in Keegan v. Ireland (1994) 18 E.H.R.R. 342] is not part of the domestic law of Ireland. The family referred to in Article 41 and 42 of the Constitution is the family based on marriage. The concept of a 'de facto' family is unknown to the Irish Constitution.*
>
> *The Irish Supreme Court, however, in its decision in J.K. v. V.W.[1990] 2 I.R. 437 recognised the existence of 'de facto families' and also the fact that a natural father who lived in such a family might have extensive rights of interest and concern of the kind referred to in reply to the previous question."*

105. The answer to question four is already cited above. Further, in the same case, Denham J. in her judgment concurring with Hamilton C.J. pointed out (at p. 273):-

> *"But, where the children are born as a result of a stable and established relationship and nurtured at the commencement of life by father and mother in a de facto family as opposed to a constitutional family, then the natural father on application to the Court under s. 6A of the Guardianship of Infants Act, 1964, has extensive rights of interests and concern. However, they are subordinate to the paramount concern of the Court which is the welfare of the child".*

106. Later on again in the same case, Barrington J. in his dissenting judgment at page 283, was in agreement with the rest of the Court on this point where he stated:-

> *"The relationship between natural parents and their child can be compared with that existing between married parents and their children under Article 42 of the Constitution but the group does not form a unit group or institution within the meaning of Article 41. The relationship will give rise to reciprocal duties and rights but the manner in which these will, or can, be expressed will vary greatly with the circumstances. On the one hand, the parents may be living together in what could be described as a de facto family. On the other hand, the circumstances attending the child's conception or birth may be so horrific as to make it undesirable, or unthinkable, that the parents should live together".*

107. These *de facto* families were in both cases composed of a heterosexual couple.

108. The question is whether a *de facto* family composed of a same sex couple can give rise to duties and rights or have any status in Irish law. It is clear that Irish constitutional law, just as with heterosexual *de facto* families, does not recognise the concept of a same sex *de facto* family. Yet the Supreme Court has recognised the existence of *de facto* families in the above cases. The silence of the Constitution on the matter did not preclude the Supreme Court from accepting the existence of the same. It seems clear, therefore, that the silence of the Constitution in relation to same sex *de facto* families does not necessarily preclude this Court from coming to the conclusion that such units also should be recognised as existing and as having certain rights and duties. Because they are unknown constitutionally, it is hard to see how the recognition of such *de facto* families could in any way challenge the constitutional sanctity of marriage between a man and a woman. (Under Article 41 of the Constitution).

109. If, as appears, Irish law is silent on the question of homosexual *de facto* families, is any guidance to be found anywhere else that may assist? The European Convention on Human Rights Act of 2003 incorporated the European Convention on Human Rights (E.C.H.R.)

into Irish law albeit at a sub-constitutional level. Section 2 of the Act provides as follows:-

> *"2. - (1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.*
>
> *3. - (1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.*
>
> *4. - Judicial notice shall be taken of the Convention provisions and of-*
>
> > *(a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction,*
> >
> > *(b) any decision or opinion of the European Commission of Human Rights so established on any question in respect of which it had jurisdiction,*
> >
> > *(c) any decision of the Committee of Ministers established under the Statute of the Council of Europe on any question in respect of which it has jurisdiction,*
>
> *and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments.*
>
> *5. - (1) In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as 'a declaration of incompatibility') that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions".*

110. Considering these provisions, McKechnie J. in *T. v. O* [2007] I.E.H.C. 326 at paragraph 36 observed:-

> *"In addition, under s. 5 of the Act, both the High Court and Supreme Court may grant what is termed a 'declaration of incompatibility' in circumstances where it is not possible to interpret and apply a statutory provision or rule of law in a manner which complies with Ireland's obligations under the Convention. However, such a declaration does not affect the legal validity of the provision or rule of law in question, and any rectifying measure is for the legislature and not the Courts. Accordingly, as can be seen, this Court should apply the provisions of the convention in the interpretation and application of any statutory provision or rule of law, insofar as it is possible to so do in accordance with the established canons of construction and interpretation".*

111. I respectfully agree and would add that the primary source for interpretation and application of the E.C.H.R. is the domestic courts of the Member States. This is the principle of subsidiarity which is fundamental to the Convention structure for the protection of human rights. Under this principle it is the domestic courts which have the primary obligation to interpret and apply the E.C.H.R. They are in the front line and it is only upon their failure to do so that the European Court will step in. The European Court is primarily a supervisory body and is subsidiary to the national systems safeguarding human rights. (See *Handyside v. U.K.,* [1979-1980] 1 E.H.R.R. 737. This subsidiarity principle is based upon three provisions of the Convention:-

"Article 1. Obligation to respect human rights.
The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention."

112. Under this provision it is the State, in this case Ireland, which first and foremost has the obligation to secure the rights contained in the E.C.H.R.

"Article 13. Right to an effective remedy.
Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

113. Thus, again it is upon the individual State concerned that the Convention lays the burden of remedying violations found.

"Article 35. Admissibility criteria.
"(1) The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

114. The Court in Strasbourg, therefore, will not admit any case which has not first been taken through the national courts save for certain instances not relevant herein.

115. The above three articles lay firmly and clearly upon the Irish courts the duty to secure a remedy where required and apply the rights contained in the Convention. The Court in Strasbourg is the last resort and comes into the picture only where the domestic courts fail to do so. Under the Convention, human rights, like charity, begin at home.

116. For this reason, in the light of the apparent silence of domestic law on the question of same sex couples, I turn to the E.C.H.R. to see if any assistance appears therefrom. I do so mindful of the fact that it is the Constitution that prevails in Ireland and that therefore any rights that this Court finds to arise under the Convention can only be applied by the Court absent a constitutional conflict.

Article 8
Right to respect for private and family life

> *1 Everyone has the right to respect for his private and family life, his home and his correspondence.*

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

117. The concept of family life in article 8 is an autonomous one which must be interpreted independently of the national law of the contracting States, (see *Marckx v. Belgium* [1979-1980] 2 E.H.R.R. 330. In the case of *Keegan v. Ireland* [1994] 18 E.H.R.R. 342 the European Court of Human Rights ruled (at p.360 para. 44):-

> *"The Court recalls that the notion of the 'family' in this provision is not confined solely to marriage based relationships and may encompass other de facto 'family' ties where the parties are living together outside of marriage".*

118. Further in *X, Y and Z v. U.K.* [1997] 24 E.H.R.R. 143 paras. 36 and 37 the European Court of Human Rights (Grand Chamber) citing the above two passages in the context of determining what constituted 'family life' within the meaning of article 8 continued (p. 166):-

> *"36. When deciding whether a relationship can be said to amount to 'family life', a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means (See, for example, Kroon v. Netherlands loc. cit.).*
>
> *37. In the present case, the court notes that X is a transsexual who has undergone gender reassignment surgery. He has lived with Y, to all appearances as her male partner, since 1979. The couple applied jointly for and were granted, treatment by A.I.D. to allow Y to have a child. X was involved throughout the process and has acted as Z's 'father' in every respect since the birth (See paras. 14-16 above). In these circumstances, the Court considers that de facto family ties link the three applicants.*
>
> *It follows that Article 8 is applicable".*

119. I am unaware of any case to date in which the European Court of Human Rights has found that a lesbian couple living together in a committed relationship enjoy the status of a *de facto* family relationship to which article 8 is applicable. However, *X, Y and Z* cited above seem to demonstrate a substantial movement towards such a finding. As noted above, it is this Court which has the primary responsibility to interpret and apply Convention principles. To that end, I have come to the conclusion that where a lesbian couple live together in a long term committed relationship of mutual support involving close ties of a personal nature which, were it a heterosexual relationship, would be regarded as a *de facto* family, they must be regarded as themselves constituting a *de facto* family enjoying rights as such under article 8 of the E.C.H.R.

120. Moreover, where a child is born into such a family unit and is cared for and nurtured therein, then the child itself is a part of such a *de facto* family unit. Applying this to the case here it seems clear that between B., C. and D. there exist such personal ties as give rise to family rights under Article 8 of the European Convention on Human Rights. Those rights cannot be exhaustively set out here but should, absent any conflict with Irish law, be equivalent to those of a family under article 8. Where there is such a conflict, Irish law must prevail, although ultimately that may involve the State being in violation of article 8 of the Convention. In such circumstances, the court may make a declaration of incompatibility and it will then fall to the legislature to bring the State back into compliance with the Convention in whatever manner it sees fit.

121. The significance of this herein is that because B., C. and D., the child, enjoy rights as a *de facto* family, this is a factor which must come into play in determining the central question in this case which is whether A. should be granted guardianship rights such as would ensure he had access to the child.

The Decision.

122. A. seeks an order appointing him guardian of the child D. As a natural father married to the child's mother, he has a right to apply to court for such an order but no more. He does not even have a defeasible right to be appointed a guardian. In determining whether to make such an order, the Court must regard the welfare of the infant as the first and paramount consideration as per section 3 of the Guardianship of Infants Act 1964. This means that the Court must also take into account other considerations because, as pointed out by Walsh J. in *G. v. An Bord Uchtála* the use of the words "first" and "paramount" indicate there may be other considerations. However, the welfare of the child is to be the superior or most important consideration.

123. The applicant further seeks an order under s. 11(4) of the Guardianship of Infants Act 1964, as amended by the Status of Children Act 1987, seeking access to the child herein. Section 11(d) as inserted by the Children Act 1997, directs the court to have regard to whether the child's best interests would be promoted by maintaining personal relations and direct contact with his father and mother on a regular basis. The applicant also claims rights under article 8 of the European Convention on Human Rights. In this claim, the Court must have regard to the question as to whether there exist such close personal ties as could give rise to family rights under this article. He claims such ties with the child herein.

124. The respondents argue that the parties had a clear agreement that the applicant now wishes to set aside. Under this agreement he would not occupy the role of father, would not be a guardian and his access to the child would be at the discretion of the respondents. He now was seeking to set aside all three of these elements whose waiver by him was central to the agreement.

125. They further argue that the child's best interest and welfare would be secured by his growing up as a child within a well established, loving family unit as opposed to a childhood within a dysfunctional, triangular relationship characterised by anger, distrust and feelings of violation and betrayal. They argue the child has no attachment to the applicant but would be apprised of knowledge of the existence and identity of his biological father at age appropriate moments in his development. They would arrange contact for the child with his father at similarly appropriate times.

126. Pursuant to s. 47 of the Family Law Act 1995, a report has been prepared by a court appointed expert, Dr. Gerard Byrne, Consultant Psychiatrist. Dr. Byrne, following extensive interviewing of all parties, weighed the arguments favouring access and guardianship for the applicant and those against. The Court should give considerable weight to this report since it is the only independent psychiatric assessment of the situation and was prepared with full access to and consultation with the parties. It should depart from its recommendation only for grave reasons which should be clearly set out.

127. Dr. Byrne's central findings may be summarised as follows:

(i) A child should have knowledge of both its parents.

(ii) A child should also have access to his parents save for compelling reasons against.

(iii) Children brought up in same sex families do not suffer gender confusion thereby.

(iv) The respondents, rightly or wrongly, feel a huge amount of distress at what they perceive to be the applicant's betrayal of them. They feel this to be destructive and a threat to their integrity as a family. They have a feeling of violation by the applicant and this is a very important and fundamental matter. There is no trust between the applicant and the respondents.

(v) Dr. Byrne considered the parties could not co-operate with each other in such a way as to avoid exposing the child to conflict.

(vi) Conflict between the adults in a child's life causes psychological damage and it would be most unwise to introduce the child into such a situation of almost certain conflict.

(vii) There is no relationship presently existing between the applicant and the child. The applicant has never been with the child for any appreciable length of time and certainly not long enough at the child's age to establish any attachment by him to the applicant. The applicant has never been in a caretaking relationship with the child.

(viii) To establish such a relationship at the child's age would present a significant challenge for all the adults.

(ix) Dr. Byrne doubts the applicant's motivation in seeking access. He thinks that he has never really examined his motivation in participating in the sperm donation project. Dr. Byrne is not convinced he would remain involved.

128. Dr. Byrne concludes and advises the Court that the applicant should not have any role that gives him rights that could interfere with the child's family life with the respondents. He recommends against either guardianship or rights of access. He believes the respondents will act in the child's interests by involving the applicant in an appropriate way in the child's life.

129. Dr. Antoinette D'Alton also gave evidence as an expert called on behalf of the applicant. She did not have the opportunity to meet or interview B., C. or D. She recommends there should be ongoing involvement of A. in D's life because in general the conventional wisdom is that that course is beneficial for a child unless there is some contra indication. She finds no such indication and believes the parties can and should work out some *modus vivendi*.

130. It seems to me that whilst it must be accepted that, in general, it is beneficial to a child to have access to both its natural parents, there may be circumstances where this is not so. Dr. Byrne in his report considers such circumstances to exist here. They are essentially that the relationship between A., B. and C. is so poor that only conflict of a psychologically damaging kind to the child is likely to occur. He bases this opinion on his finding that B. and C. consider themselves betrayed, deceived and violated by the applicant. He does not think that A. did actually deceive them but nonetheless believes that their feelings in this regard are genuine and that this is a very important and fundamental matter. There is no trust between the parties and he finds it difficult to see how they could ever co-operate in such a way that would not expose the child to conflict.

131. In my view, the evidence has amply confirmed Dr. Byrne's view in this regard, save that I do not agree with his view that the applicant did not deceive the respondents as to his true intentions in entering into the sperm donation agreement. I think he did as I have found above. In consequence, it seems to me that the respondents have, in fact, substantial grounds for their feelings of betrayal and violation and this, in my view, lends even more weight to Dr. Byrne's opinion.

132. The child currently lives in a loving, secure *de facto* family. There is no dispute but that the respondents are excellent parents to this child and the psychological evidence before the Court is that whilst he will encounter some problems growing up as the child of a same sex couple, he should suffer no gender confusion as a result thereof. As things stand, the child's future seems secure in a well ordered, loving and supportive family environment. Set against that is the probability of a future within a conflicted, dysfunctional and highly unpredictable relationship that would include, by court order, the presence either through guardianship, access or both of the applicant. Were the Court to order the latter, I have no doubt the parties would do their best to implement the order. What, however, would be the cost to the child? It seems to me the cost is likely to be the loss of a tranquil and calm upbringing. I further note the evidence of the respondents which I believe to be entirely genuine that their wish is that the child should know the identity of his biological father – that after all was the whole point of this agreement – and that he should have contact at an age appropriate time.

133. I must further note Dr. Byrne's doubts as to whether the applicant would remain involved.

134. On these considerations, I conclude that the welfare of the child herein, which must be the paramount and first interest, lies in his continuing in the care, custody and guardianship of his family composed of B., C. and himself and that there should be no court ordered access to the applicant herein.

135. I could, on this basis alone, refuse the application but as other issues have been raised and argued, I feel compelled to deal with them also.

136. The applicant claims rights under article 8 of the European Convention on Human Rights in that there exists between him and D. such ties of a close personal nature that give rise to family rights under the article. Is article 8 applicable to the relationship between A. and D?

137. The applicant cites the case of *M. v. Netherlands* (App. 16911/90) (judgment of 8th February, 1993) which is a decision of the former European Commission on Human Rights. In this case, the Commission found that a sperm donation does not of itself give rise to respect for family life with a child born thereby. The specific circumstances must be examined to determine if in fact there exist "close personal ties" that give rise to the same.

138. The facts of M were somewhat similar to those of this case, although in that case there was no agreement waiving his parental rights. The applicant in his submissions at para. 7.2 attempts to distinguish the case from his own. However, he does so by claiming an "intertwining" of the lives of himself, B. and C. prior to the birth. This was not borne out by the evidence. The post birth society he alleges with the respondents and D. was also not borne out by the evidence as set out in this part of his submissions and the intimacy claimed seems greatly exaggerated. In reality, it seemed on the evidence that in M the relationship with the child was closer,

e.g. M. had at least weekly contact with the child on his own as a babysitter. The Commission did not find these ties to be sufficient. The ties that emerged in the evidence in this case did not seem to me to support the existence of close personal ties between A. and D. such as would, in addition to the biological link, give rise to family rights under article 8. It is also significant that unlike in M, in this case there was a written agreement signed by the applicant waiving any parental rights. Finally, Dr. Byrne in his s. 47 report expresses the view that there is no relationship between A. and D. other than a biological one. In all the circumstances, I conclude that article 8 is not applicable to the relationship between A. and D. and consequently no family rights arise thereby.

139. As to the applicability of article 8 in respect of the relationship between B., C. and D., it is clear from the evidence that B. and C. live together in a loving, committed and supportive relationship which they have formalised by a Civil Union ceremony in the United Kingdom, albeit a civil union unrecognised in Irish law. They have lived together for the last thirteen years. They decided to try to have a child within this relationship and embarked upon a long and arduous path towards that end. With the help of the applicant they finally succeeded and since the birth of D. in May, 2006, their relationship now includes a child supported and nurtured by them. This relationship seems to me to clearly comply with the requirements of the European Court of Human Rights as set out in *X, Y and Z v. U.K.*, which I have outlined above. In the result, it seems to me that there exists between the parties such close personal ties as give rise to family rights under article 8 and I find that the relationship of B., C. and D. herein is that of a *de facto* family within the meaning of article 8 of the European Convention on Human Rights.

140. Thus, this *de facto* family has such family rights as may arise under article 8 which do not conflict with Irish law. Where any conflict exists, Irish law must prevail and the Court would be limited to the making of a declaration of incompatibility under s. 5 of the European Convention on Human Rights Act 2003.

141. I can find nothing in Irish law to suggest this family composed of two women and a child has any lesser right to be recognised as a *de facto* family than a family composed of a man and a woman unmarried to each other and a child. Indeed, it seems to me that the State has a strong interest in the recognition, maintenance and protection of all *de facto* families that exist since they are inherently supportive units albeit unrecognised by the Constitution.

142. It is in this context that the Court should weigh the claim by the respondents that the integrity of their family would be violated by any order of guardianship or access in favour of the applicant. As noted above, the Court is obliged to weigh considerations in addition to the paramount interest of the child. In this case it seems to me that the evidence I heard, including the evidence of Dr. Byrne and his s. 47 report, lead to the conclusion that it is highly probable that the integrity of this family would be seriously and even possibly fatally broken by such orders in this case. This is a consideration that must weigh heavily on the Court in coming to a decision as in this case. It also must be borne in mind that such a possibility must also bear heavily upon the welfare of the child. It seems to me that adding these factors into the equation the Court must conclude that on this basis, in addition to the paramount welfare of the child, the orders sought should be refused.

143. I must observe in conclusion that the absence of any provisions in Irish law taking account of the existence of same sex couples and securing their rights under article 8 of the European Convention on Human Rights seems something that calls for urgent consideration by the legislature. Included in this consideration should be the situation where such a couple wish one of them to bear a child. The evidence presented to the Court in this case was that this was something that was happening with greater frequency throughout the world than might have been thought heretofore. A range of issues arise for consideration; access to fertility facilities, the need for counselling, the rights and likely problems of the parties among themselves, possible succession rights between child and biological father – all are matters that require careful consideration and possible regulation. It is to be hoped that current consideration of the position of *de facto* families in Irish law may help to avoid in the future the emotional trauma to which the parties in this case have been subjected.