**FAMILY COURT OF AUSTRALIA**

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| **groth & banks** | **[****2013] FamCA 430** |

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| FAMILY LAW – CHILDREN – applicant provided his genetic material in a consensual IVF program at a time when he was not living with the respondent mother – no dispute as to the biology but is the applicant a parent at law? – parenting orders made. |

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| Assisted Reproductive Treatment Act 2008 (Vic)  Child Support (Assessment) Act 1989 (Cth)  Judiciary Act 1903 (Cth)  Family Law Act 1975 (Cth)  Status of Children Act 1974 (Vic) |

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| *Aldridge and Keaton* [2009] FamCAFC 229; 42 FamLR 369  *CDJ v VAJ* (1998) 197 CLR 172  *Donnell v Dovey* [2010] FamCAFC 15  *Goode v Goode* (2006) FLC 93-286  *Lennon & Lennon* [2011] FamCA 571 (unreported 9 July 2011)  *Northern Territory v GPAO* [1999] HCA 8, 196 CLR 553  *Re J and M – Residence Application* [2004] FMCAfam 656  *Re Mark: An Application Relating to Parental Responsibilities* [[2003] FamCA 822](http://www.lexisnexis.com/au/legal/search/runRemoteLink.do?langcountry=AU&linkInfo=F%23AU%23FamCA%23year%252003%25page%25822%25sel1%252003%25&risb=21_T8792362433&bct=A&service=citation&A=0.8761464333417676); (2003) 179 FLR 248; [(2003) 31 Fam LR 162](http://www.lexisnexis.com/au/legal/search/runRemoteLink.do?langcountry=AU&linkInfo=F%23AU%23Fam+LR%23decisiondate%252003%25sel2%2531%25year%252003%25page%25162%25sel1%252003%25vol%2531%25&risb=21_T8792362433&bct=A&service=citation&A=0.24276345663816257); (2003) FLC 93-173  *Tobin v Tobin* (1999) FLC 92-848  *University of Wollongong v Metwally and Ors* [1984] HCA 74, (1984) CLR 447 |

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| **APPLICANT:** | Mr Groth |

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| **RESPONDENT:** | Ms Banks |

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| **Independent children’s lawyer:** |  |

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| **FILE NUMBER:** | MLC | 865 |  | of | 2012 |

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| **DATE DELIVERED:** | 11 June 2013 |

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| **PLACE DELIVERED:** | Melbourne |

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| **PLACE HEARD:** | Melbourne |

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| **JUDGMENT OF:** | Cronin J |

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| **HEARING DATE:** | 26, 27, 28 February; 1, 4 March 2013 |

REPRESENTATION

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| **COUNSEL FOR THE APPLICANT:** | Mr North SC with Mr Wood |

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| **SOLICITOR FOR THE APPLICANT:** | Nicholes Family Lawyers |

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| **COUNSEL FOR THE RESPONDENT:** | Mr Robinson |

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| **SOLICiTOR FOR THE RESPONDENT:** | Forte Family Lawyers |

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| **COUNSEL FOR THE INDEPENDENT CHILDREN’S LAWYER:** | Ms Harris |

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| **SOLICITOR FOR THE INDEPENDENT CHILDREN’S LAWYER:** | Victoria Legal Aid |

# Orders

IT IS DECLARED BY THE COURT:

* 1. Mr Groth and Ms Banks are the parents of the child J born … October 2010; and
  2. The presumption in s 61DA of the *Family Law Act 1975* (Cth) is not rebutted.

IT IS ORDERED

(1) That the applicant and the respondent have equal shared parental responsibility concerning the major long-term decisions for the child.

1. That the child live with the mother.
2. That otherwise all extant parenting orders are discharged as and from the first relevant date under these orders commencing in June 2013.
3. That the child spend time with the applicant, Mr Groth, as follows:
   1. For the months of June and July 2013, on each Wednesday and each Saturday for a period of four hours from 9.00am until 1.00pm;
   2. For the months of August and September 2013, on each Wednesday and each Saturday from 9.00am until 3.00pm;
   3. For the months of October and November 2013, on each Wednesday and each Saturday from 9.00am until 4.00pm;
   4. For the months of December 2013, January 2013 on Wednesdays and Saturdays from 9.00am until 6.00pm;
   5. For the months of March 2014 to April 2014 on each Wednesday from 9.00am until 6.00pm and each alternate weekend on the Saturday between 9.00am and 6.00pm and the Sunday between 9.00am and 6.00pm;
   6. For the months of May 2014 until the end of 2014, on each Wednesday from 10.00am until 5.00pm and during each alternate weekend from 10.00am Saturday until 12 noon on Sunday;
   7. Thereafter, during each alternate weekend from 10.00am Saturday until 5.00pm on Sunday and on each Wednesday from 10.00am until 5.00pm.; and
   8. Once the child commences primary school on each Wednesday from after school until 7.30pm and each alternate weekend from the conclusion of school on Friday until the commencement of school on the following Monday morning.
4. That the child spend one half of all school term holidays be agreement and in default of agreement the first half commencing in the second year of his schooling and two weeks during the long summer holidays be agreement and in default of agreement from 1 January commencing in the January of his third year at school.
5. That the child spend time with the applicant as follows:
   1. on Father’s Day from 10.00am until 5.00pm each year;
   2. for two hours on both the child’s birthday and the father’s birthday from 4.00pm until 6.00pm;
   3. from 3.00pm on 24 December 2014 until 11.30am on 25 December 2014 and for a similar period in each even numbered years;
   4. from 11.30am on 25 December 2013 until 3.00pm on 26 December 3013 and for a similar period in each odd numbered years.
6. That the father’s time if it falls on Mother’s Day shall be suspended from 10.00am on Mother’s Day.
7. That the hand-overs of the child that do not occur at a school or kindergarten shall commence outside of the mother’s house and the mother shall collect the child from the father’s house at the conclusion of any time other than at kindergarten or school.
8. That the parties attend upon Mr P for the purposes of assisting them to implement these orders and such costs shall be borne by the applicant father.
9. That the child attend the one medical clinic unless in an emergency and the mother advise the applicant of the name of that clinic and sign all necessary documents to enable the applicant to not only attend but to have access to the child’s records and be informed of any medical treatment.
10. That the Independent Children’s Lawyer is discharged from the proceedings.
11. That pursuant to s.65DA(2) and s.62B, the particulars of the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders and details of who can assist parties adjust to and comply with an order are set out in the Fact Sheet attached hereto and these particulars are included in these orders.
12. That all outstanding proceedings be otherwise dismissed.

**IT IS NOTED** that publication of this judgment by this Court under the pseudonym *Groth & Banks* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

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| Family Court of Australia at Melbourne |

FILE NUMBER: MLC 865 of 2012

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| Mr Groth |

Applicant

And

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| **Ms Banks** |

Respondent

**Independent Children’s Lawyer**

REASONS FOR JUDGMENT

1. The child J (“the child”) was born in October 2010 to Ms Banks (“the mother”). The child was conceived by assisted reproductive technology (“IVF”) and the genetic material used was that of Mr Groth (“the applicant”).
2. In March 2012, counsel for the mother submitted that the applicant was not a parent and that he had done no more than provide his genetic material for use in an artificial conception procedure conducted under the *Assisted Reproductive Treatment Act 2008* (Vic), which amended the *Status of Children Act 1974* (Vic).
3. Counsel for the mother submitted that it was not sufficient to point to the biological link and that the word “parent” in the *Family Law Act 1975* (Cth) (“the Act”) contemplated more than the person who was the donor of genetic material**.** Despite the complexities of the legal issues which were clouded by the facts as presented by the parties, it was the mother’s case that she did not have a problem about whether there was time between the applicant and the child but rather how it was structured. Her major concern was that the applicant should not have parental responsibility in the sense of being responsible for decisions about the child. The mother accepted that the applicant was entitled to seek parenting orders because he had an interest in the welfare and development of the child. For the reasons that follow, unless I am wrong about the synopsis of the law and its consequences, the applicant’s alternative reliance on s 65C(c) is unnecessary. If reliance upon that provision was necessary, I would still find that the applicant has such an interest. In that case also, s 64B(2)(c) provides the power to make the orders I propose in relation to parental responsibility.
4. For the purposes of the legal argument, the mother relied upon s 15 of the *Status of Children Act 1974* (Vic) which creates an irrebuttable presumption of law that if a woman becomes pregnant as a result of an “IVF” procedure and a child is born, the man who produced the semen used in the procedure is not the father of the child. In a second submission filed in November 2012 in anticipation of this hearing, the mother’s counsel submitted that the conception and birth of the child were undertaken by the mother in expectation that she would be a single mother and that the applicant would only have an avuncular role in the child’s life.
5. The submission on behalf of the applicant carefully examined the complex legal position. The chief submission was that for the purposes of Part VII of the Family Law Act, “parent” means a child’s biological parent unless there is express provision for an alternative. It was submitted, inter alia, that;

* The applicant is undoubtedly the child’s biological progenitor;
* The word “parent” is not exhaustively defined in the Act;
* By virtue of its language, Part VII of the Act envisages that there are two parents, that is, the biological progenitors of the child unless they are otherwise displaced by express provisions in the Act;
* Section 60H does not apply where the mother was not married or in a de facto relationship;
* The *Status of Children Act 1974* (Vic) does not apply here because s 79 of the *Judiciary Act 1903* (Cth) does not bring it into operation and alternatively, s 109 of the Constitution provides that the Commonwealth law prevails in the event of inconsistency between the Commonwealth and State laws.

# Who is a parent under the Family Law Act 1975 (Cth)?

1. In s 4(1) of the Act, the word “parent” is not exhaustively defined. The section reads:

parent, when used in Part VII in relation to a child who has been adopted, means an adoptive parent of the child.

The definition is unhelpful where the child has not been adopted. The lack of a comprehensive definition means that the word “parent” should be given its ordinary dictionary meaning. That approach is consistent with the use and obvious intention used throughout the Act but also in the authorities considered below.

# Authorities

1. The word “parent” was considered by the Full Court in *Donnell v Dovey* [2010] FamCAFC 15. That was a residence dispute involving a child whose mother had died and where the child was being cared for by the mother’s sister. The father sought the return of the child to his care and the case raised Aboriginal cultural issues and indigenous child-rearing practices. In the course of the judgment, the Court (Warnick, Thackray and O’Ryan JJ) referred to the definition and proceeded on the basis that “parent” meant a biological or adoptive parent. They referred to, but did not decide, what was described as the difficult issues associated with children born as a result of artificial conception procedures.
2. Reference to an earlier Full Court decision in *Aldridge and Keaton* [2009] FamCAFC 229; 42 FamLR 369 does little to assist because although it concerned artificial conception procedures, the facts concerned a person with no biological connection and an alleged de facto relationship.
3. In the context of child maintenance payments, the Full Court in *Tobin v Tobin* (1999) FLC 92-848 considered who is a “parent” under the Act. The Court noted that in relation to artificial conception procedures in s 60H the term “parent” was not used, but instead the language referred to “the child of the woman” or “the child of the man”. The Court held that for the purposes of Part VII, Div 7 the word “parent” took its natural meaning as the biological mother or father of a child. The Court in *Tobin* considered s 29(2) of the *Child Support (Assessment) Act 1989* (Cth), where the legislature had set out categories or circumstances under which the Child Support Registrar was to be satisfied that a particular person was a parent of a child. In *Tobin*, the Court referred to those categories or circumstances and noted that the determination of who is a parent “carries with it an element of biological parentage” (see page 85-940).
4. In *Re Mark: An Application Relating to Parental Responsibilities* [[2003] FamCA 822](http://www.lexisnexis.com/au/legal/search/runRemoteLink.do?langcountry=AU&linkInfo=F%23AU%23FamCA%23year%252003%25page%25822%25sel1%252003%25&risb=21_T8792362433&bct=A&service=citation&A=0.8761464333417676); (2003) 179 FLR 248; [(2003) 31 Fam LR 162](http://www.lexisnexis.com/au/legal/search/runRemoteLink.do?langcountry=AU&linkInfo=F%23AU%23Fam+LR%23decisiondate%252003%25sel2%2531%25year%252003%25page%25162%25sel1%252003%25vol%2531%25&risb=21_T8792362433&bct=A&service=citation&A=0.24276345663816257); (2003) FLC 93-173, Brown J considered the differing positions of a sperm donor who was unknown or anonymous, and a donor who had entered the process with the intention of fathering a particular child. Her Honour held that a person in the latter position was rightly considered a “parent” for the purposes of the Act. If this were not the case, there would be no need for legislation such as the *Status of Children Act 1974* (Vic) to remove the rights and responsibilities that might otherwise attach to anonymous or unknown donors.
5. Brown J reproduced the Oxford English Dictionary definition of a parent, being “a person who has begotten or borne a child”, which was also relied upon in *Tobin*. In *Re Mark*,the man had donated his genetic material with the express intention of fathering a child he would parent. Moreover, her Honour found at [59],

[t]he fact the ovum was fertilised by a medical procedure, as opposed to fertilisation in utero through sexual intercourse, is irrelevant to either his parental role or the genetic make-up of [the child].

1. The applicant here submits that the same course should be taken in this case. His argument is that the course of conduct leading to the conception of the child is clearly distinguishable from a donor who does not wish to have an involvement in the child’s life. Concerns of public policy, such as those raised by Guest J in *Re: Patrick (An Application Concerning Contact)* [2002] FamCA 193 at [298] that unknown sperm donors could be considered “parents” under such an interpretation become irrelevant because the Act does not impose obligations on an unknown person who has donated biological material.
2. Thus, the interpretation of “parent” in the Act allows each case to be determined on its particular facts.
3. The fact that a child has two parents who are her or his biological progenitors permeates the language of the Act. The whole Commonwealth statutory concept as outlined in the Part VII of the Act is one in which biology is the determining factor unless specifically excluded by law. I return to those exclusions below.
4. Part VII of the Act contains multiple references to the parents of the child as “either” or “both”. These can be found at s 60B(1)(a), 60B(2)(a) and (b), 60CC(2)(a), 60CC(3)(d)(i), 61C(2), 65C(a), 66B(2), 66F(1) and 69C(2). The logical presumption which follows is that the legislature envisaged two parents when dealing with parental responsibility under the Act.
5. The applicant fits that presumption in the Act of who is a parent. He is the biological progenitor and one of two people who set about a course of conduct with the intention of fathering a child. On the face of the language in the Act and the facts here, a logical conclusion would be that the applicant is the parent of the child. If one turns to the sections of the Act that displace biological progenitors as parents, little changes.

# Section 60H

1. Section 60H deals with children born as a result of artificial conception procedures. The Act provides for the displacement of the donors of genetic material as parents. For example, biology is displaced and a person defined as a parent by adoption (ss 4, 60HA(2), 60HA(3), 61E, 65J and 66B) or surrogacy arrangements (s 60HB). Section 60H provides that opportunity and sets out the circumstances in which the child is not the child of the person who provided the genetic material.
2. Section 60H provides three categories for children born as a result of artificial conception procedures. They are;
   1. where the child is born while the mother is married to or the de facto partner of another person – 60H(1);
   2. where a child is born to a mother and under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of that woman – 60H(2);
   3. where the child is born to a mother and under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man – 60H(3).
3. In this case, (a) above does not apply as the mother was neither married nor in a de facto relationship. Nor does (b) assist because it has no direct relevance. Category (c) has no application because no prescribed law of a State or the Commonwealth has been made.
4. Section 60H should be interpreted as expanding rather than restricting the categories of people who could be a child’s parent (see *Re Mark***:** *An application relating to parental responsibilities* (2003) FLC 93-173 per Brown J and *B v J* (1996) FLC 92-716perFogarty J). In *B v J* (1996) FLC 92-716, Fogarty J made a textual comparison with the *Child Support (Assessment) Act 1989* (Cth) to support his conclusion that the provisions of 60H should not be read as a blanket exclusion (at 83-620);

In the case of the Assessment Act, it is the word “means” which makes it clear that the provision is exhaustive. Prima facie, s 60H is not exclusive, and so there would need to be a specific provision to exclude people who would otherwise be parents. Relevantly here, that means the donor of genetic material.

1. Guest J departed from this view in *Re: Patrick (An Application Concerning Contact)* [2002] FamCA 193, taking the position that the presumptions in the State legislation should be taken into account in the absence of express provisions to the contrary in the Commonwealth law. But that requires consideration of the role of s 79 of the *Judiciary Act 1903* (Cth) in incorporating State law and I return to that further below. Where s 60H is not enlivened on the facts, and the issue of who is a parent is provided for under the Commonwealth legislation, there is no need and indeed no precedent for looking to State legislation as an interpretive aid for the Commonwealth law.
2. Thus, s 60H does not operate on these facts to restrict the applicant from being a parent because the mother was neither married nor in a de facto relationship. In addition, s 60H(2) is not relevant because the mother is the biological mother. Only in the event that a child is a child of a man because of s 60H(3) would the biological father of the child to whom that provision applied, cease to be the father of the child and a parent for the purposes of the Act. There is no person here that would displace the applicant as a parent under s 60H(3).

# Sections 69V and 69VA of the *Family Law Act 1975* (Cth)

1. The power to determine parentage by scientific testing was referred to the Commonwealth by the Parliament of Victoria in sub-s (3)(1)(c) of the *Commonwealth Powers (Family Law – Children) Act* *1986* (Vic). This enabled the Commonwealth to legislate in respect of:

the determination of a child’s parentage for the purposes of the law of the Commonwealth, whether or not the determination of the child’s parentage is incidental to the determination of any other matter within the legislative powers of the Commonwealth.

1. In 1995, as a consequence of the referral of power, the Commonwealth enacted s 69V of the Act, giving the Court the power to make an order to require any person to give evidence material to the question of parentage of the child.
2. Section 69VA was enacted by the *Family Law Amendment Bill 1999* to enable the Court to make a declaration of parentage for the purposes of all laws of the Commonwealth. There is no dispute before me that the applicant is the biological progenitor of the child J. It is therefore unnecessary to make an order under s 69V that testing be undertaken to determine the child’s biological parentage.
3. Although the declaration as to parentage is conclusive evidence for the purposes of all laws of the Commonwealth (see the recent decision of Ryan J *Ellison and Anor & Karnchanit* [2012] FamCA 602) no declaration has been sought by the applicant. For the reasons set out above about the meaning of “parent” for the purposes of Part VII of the Act, I am satisfied that the applicant is a “parent” of the child J. It is therefore unnecessary to make a 69VA declaration as to parentage.
4. Whilst the applicant is a parent under the Commonwealth Act, it is also important to turn to the relevant State legislation because on its face, it would appear to have the effect of excluding the applicant from being a parent to the child.

# The Status of Children Act 1974 (Vic)

1. The mother pointed to s 15 of the *Status of Children Act 1974* (Vic). Section 15 of that Act commenced operation on 1 January 2010 as a result of amending legislation. The explanatory memorandum indicated that its purpose was to bring Victoria’s law into line with other States and while it was enacted as a result of research by the relevant law reform body, it seems clear that it was primarily designed to protect semen donors and IVF programs.
2. Section 15 creates an irrebuttable presumption that where a woman who has no partner “undergoes a procedure as a result of which she becomes pregnant”, the man who provided the genetic material is not the father. This presumption applies as a result of the wording of s 15(1)(b), “whether or not the man is known to the woman”.
3. Counsel on both sides referred me to a variety of decisions most of which I have already mentioned and all of which preceded the amendment to the *Status of Children Act 1974* (Vic). All examined the same sorts of problems that I have to address: see *Re Patrick* (2002) 28 Fam LR 579, *Re Mark* (2003) 31 Fam LR 162, *Baker and Landon* (2010) 43 Fam LR 675, *Re B and J* (1996) 21 Fam LR 186 and *Re J and M – Residence Application* [2004] FMCAfam 656. All of those decisions are indications of the law grappling with science and community attitudes.
4. The relevant question in this matter is whether the determination of parentage for the purposes of the laws of the Commonwealth should follow the meaning of “parent” under the *Family Law Act 1975* (Cth)as I have interpreted it, or whether the applicant is excluded by the irrebuttable presumption just mentioned. The question invites consideration of two crucial elements of the federal legal system;
   * + - 1. The incorporation of State laws into Federal jurisdiction unless the Commonwealth law “otherwise provides” because of ss 79 and 80 of the *Judiciary Act 1903* (Cth); and
         2. Section 109 of the Constitution, which provides that where two laws are in conflict, the Commonwealth law prevails.

# The Judiciary Act 1903 (Cth)

1. The applicability of s 15 of the *Status of Children Act* depends on whether this Court is obliged to follow its provisions by virtue of ss 79 and 80 of the *Judiciary Act*. The relevant parts of these two sections provide as follows:

79. (1) The laws of each State and Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

…

80. So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

1. Section 79 applies State and Territory statutory law as a law of the Commonwealth. Section 80 confers power on courts exercising federal jurisdiction to determine cases by applying and developing the common law of Australia if the statutory law does not apply.
2. Section 79 should be applied first to see whether State or Territory legislation applies. In *Northern Territory v GPAO* [1999] HCA 8, 196 CLR 553, Gleeson CJ and Gummow J said that the objective of s 79 was to facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law, elements of which may comprise the laws of the state or territory in which the jurisdiction was being exercised together with the laws of the Commonwealth but subject always to the overriding effect of the Constitution itself. That in turn also enables some focus on the question of whether or not the laws of the Commonwealth and the State are irreconcilable.
3. Section 79 of the *Judiciary Act 1903* (Cth) makes clear that the laws of Victoria are binding on this Court if it is exercising federal jurisdiction unless those laws are otherwise provided by the law of the Commonwealth. The *Status of Children Act 1974* (Vic) is not binding here, because Part VII of the *Family Law Act 1975* (Cth) has provided an applicable and sufficient law as to parentage as required by ss 79 and 80 of the *Judiciary Act 1903* (Cth).

# Section 109 of the Constitution

1. In the alternative, it was argued that if the State law did apply it would be inconsistent with the law of the Commonwealth in Part VII of the *Family Law Act* by impairing, altering or detracting from the right to be a “parent”. Section 109 of the Australian Constitution clearly provides that in the event of inconsistency of two validly enacted laws, the Commonwealth law prevails.
2. In *University of Wollongong v Metwally and Ors* [1984] HCA 74, (1984) CLR 447, the High Court set out the law clearly. Gibbs CJ (at [7]) said:

When a law of a State is inconsistent with a law of the Commonwealth and becomes, to the extent of the inconsistency, invalid, the invalidity is brought about by s109 of the Constitution and not directly by the law of the Commonwealth (authorities and citations omitted). The Commonwealth Parliament cannot enact a law which would affect the operation of s109, either by declaring that a State law, although not inconsistent with any Commonwealth law, shall be invalid, or that a State law which is inconsistent with a Commonwealth law shall be valid. If there were a direct conflict between a Commonwealth law and a State law as, for example, where one law forbids what the other commands, or one takes away a right which the other confers, an assertion in the Commonwealth law that it was not intended to be inconsistent with the State law would be meaningless and ineffective. However, when there is no direct inconsistency between the two laws, the question is whether the State law is inconsistent with the Commonwealth law because the latter intends to cover the subject matter with which the State law deals, and an indication in the Commonwealth law of the intention of the Parliament in that regard would be material and in most cases decisive.

1. If the applicant is a “parent” under the Commonwealth Act, a right inheres in him that the state legislation, by s 15, seeks to deprive. The Acts are, therefore, directly inconsistent. The inconsistency arises only when parentage has been held to exist under the *Family Law Act*, and as a consequence, the presumption in sub-s 15(2) of the *Status of Children Act* does not exist because that provision is inoperative.
2. Counsel for the mother submitted that the applicant signed a document acknowledging that he had no legal claims or responsibilities in relation to any child born as a result of the procedure and that he had always wished to be just a “sperm donor”. Because the State law does not apply, there is no need to deal with that further.
3. I find accordingly that the applicant is a parent of the child J.

# The parenting dispute

# Background

1. The mother and the applicant knew each other for a number of years but had not lived together since 2002.
2. The applicant is 41 years of age and the mother 42. They met in 1991 and lived together between August 2001 and February 2002. When their relationship concluded in 2002, they executed a financial agreement to finalise the division of their property. They met again in 2004 but since that time, their relationship has been limited to that of being friends rather than as de facto partners.
3. The friendship relationship however, extended to the applicant providing the mother with financial assistance for her mortgage payments, a motor car, car insurance and airfares for a holiday.
4. In December 2007, the applicant was diagnosed with testicular cancer and had one testicle removed. He then made a decision to freeze some of his sperm. The mother knew of the cancer.
5. In January 2008, the mother approached the father and suggested that they have a child together. Because of the applicant’s illness, that is significant because she was aware that he was about to undergo chemotherapy.
6. I find they agreed that they would parent any child born as a result of their decision but at the same time, their relationship would be that of separated parents. They did not intend to live as a united couple but as friends.
7. In February 2008, the parties attended a medical specialist in sperm collection. To that specialist, the mother described the applicant as her partner. Shortly thereafter, the applicant underwent surgery and 15 straws of sperm were harvested and frozen.
8. In 2008, the IVF Program understood the parties were a couple and in 2009 the mother completed forms describing the applicant as the “donor” of sperm but also that she was his partner. She then underwent cycles of the program and became pregnant. She gave birth to the child in October 2010. The relationship between the parties was sufficiently sound and cooperative at that stage for the applicant to be present at the child’s birth. There was no dispute about paternity nor that the applicant would not fulfil some parenting roles. To the extent that during the hearing before me, the words that the applicant “was just a donor” were used, the mother responded in cross examination that:

[The father] was always going to be more than a donor.

1. The bizarre twist arose in the parties’ relationship because to the point in time where the child was born, neither party had told their respective families that the applicant was his father.
2. The applicant’s family was not even aware of the birth of the child. The mother’s family was aware that she was undergoing the IVF program and obviously had become pregnant but was not aware that the sperm was that of the applicant. The mother’s unchallenged evidence was that her parents thought that the donation was anonymous.
3. After the birth of the child, the applicant visited the mother where she lived with her parents and where he was simply described as “[applicant’s first name]”. The family remained unaware of the truth.
4. During this time, the applicant financially assisted the mother. He paid for the IVF procedures and also for the consultations for the extraction of his own sperm. Such was the relationship that the mother obtained a rebate for the IVF expenses.
5. Towards the end of 2010, the mother’s grandmother died. The grandmother’s children had been devised her residence but the mother’s uncle wanted to sell his one half of the property. The mother’s family could not buy out the uncle and a family discussion occurred. The mother suggested to the applicant that he buy the uncle’s interest. The applicant responded by offering to provide the necessary $205,000 if that sum was recognised in the form of a trust for the benefit of the child. The mother and the applicant agreed that the applicant would lend the money to the mother for that specific purpose. They then attended a solicitor to draw up a loan agreement. The mother agreed that this property interest was to be the child’s. That necessitated the child’s interest being held by the mother on trust and that was to be done by declaration of trust.
6. The appointed solicitor drafted a loan agreement to which changes were made by the parties but ultimately, despite consensus and indeed the payment by the applicant of the $205,000 to the mother, the final document was never executed. That caused not only significant angst for the applicant because his money had been provided but also stress for the mother because she felt that executing the agreement would be seen as a concession by her of the applicant’s parentage of the child. What it did lead to was litigation in the Supreme Court brought by the applicant. I return to this topic below.

# Paternity becomes publicly known

1. In around August 2009, notwithstanding his friendship with the mother and her involvement in the IVF program, the applicant began a relationship with his current partner. Without the mother’s knowledge, the applicant was dating but not living with his current partner. Because of the nature of the relationship of the mother and the applicant, that new relationship should not have been troublesome but its exposure had a significant impact on the mother.
2. It was not until the middle of 2011 that a dramatic change in the parties’ relationship occurred.
3. In about August 2011, the applicant’s current partner, who knew of the existence of the child but who was unaware of the paternity, came across text messages between the mother and the applicant. They naturally disturbed her because she knew that the applicant had been a friend of the mother and she wondered about his intentions. She challenged the applicant who asked her to trust him. The applicant then had little choice but to broach the subject with the mother and he did so.
4. This was a contentious subject but I find the applicant told the mother of the prospect of this family finding out about the child because of what his partner then knew. It is hard to discern whether it was the prospect of the paternity being exposed or the fact that the mother became aware of the applicant’s partner that caused her the most anger and anxiety. Either way, I found her reaction understandable.

# The respective extended families

1. The relationship between the mother and the applicant’s parents had never been good. About 12 years ago, the mother took out an intervention order against the applicant’s mother. That ended their association. It also contributed to the applicant not being candid with his own extended family about his on-going relationship with the mother and I find, about the birth of the child.
2. The applicant said he did not know the exact reason for the intervention order against his mother but he denied that there was still bad blood from his mother’s perspective. Just the same, his parents were kept in the dark about the child. He said that his parents and sister had not liked the mother in the past and they had “moved on” but he gave a different version given to a counsellor in August 2011. In evidence, he said he had speculated that his parents would have not approved of him bringing a child into the world, born outside of a marriage. I have doubts about that answer because when the applicant’s parents ultimately came into contact with the mother, it seems that the relationship was still frosty and even today, is not cordial. Nothing I heard suggested that there was any reason for the secrecy other than the parents did not approve of the mother and possibly of the applicant’s relationship with her.
3. Having said all of that, the applicant did tell his parents about the child in a letter which he handed to his father and to their credit, according to the applicant at least, they were excited and wanted to meet the child.

# The confrontation between the applicant and the mother leads to proceedings

1. A number of factual disputes were put in issue by the mother and because they were said to indicate an underlying fear by the mother of the applicant and justified a sole responsibility order, it is important to mention them.

# August 2011

1. The mother acknowledged that when the applicant’s parents were told of the child, the applicant’s time with the child was reduced. The mother was evasive about why that was so in that she replied that the applicant’s time with every member of her family was reduced. This was an extension of the mother’s position that the applicant was really visiting her family rather than fulfilling some parenting role with the child. She denied that her awareness of his new relationship had anything to do with the reduction in his time with the child but I find there is no other plausible explanation. That must be the case because when the father was cross-examined, it was put to him by the mother’s counsel that he had not been frank with the mother having regard to what she had gone through in the IVF program. The whole line of cross-examination was that the mother was surprised and hurt by his conduct.
2. The only plausible conclusion I can draw is that when the relationship soured, the mother did not want the applicant in her life any longer. A curtailing of his time with the child was the consequence. In a very frank answer, the mother acknowledged that in the latter part of 2011 what she was hoping for was to get “the old [Mr Groth] back genuinely interested in me”. That, along with what happened at an IVF counselling meeting, reinforces the conclusion just drawn.
3. In early August 2011, both parties attended counselling through the IVF clinic and the notes of that meeting were in evidence. The mother conceded she told the counsellor that she felt deceived and disappointed. It was a distressing meeting and one in which some candid things were said. What stands out however is that when the applicant and the mother had originally entered the program, their purpose was to have a child. The attendance on the counsellor well after the child’s birth was to find a way that the applicant could tell his parents. The notes indicate that the counsellor saw the applicant’s legal position as a problem and she recommended that the mother needed to obtain legal advice. Despite her evidence in cross-examination about what positive role the applicant was to have, the mother’s very clear view as articulated at the counselling was that he was simply a sperm donor. That position was strongly encouraged by the counsellor.
4. The mother began ignoring the applicant’s telephone calls. Indeed, she was trying to completely avoid him and the consequence of that was a reduction of the child’s time with him.
5. In a letter in August 2011 written to the mother, the father enclosed a document which has all of the identifying features of proposed consent orders or perhaps a parenting plan but the mother conceded she did not read it all. Her justification was that she had advice from her IVF counsellor that she was protected under the law as a sole parent and consequently, did not have to take any notice of the applicant. Even if there was some legal position to justify that stance, the applicant was the progenitor and could have made an application for parenting orders as a person interested in the child. Even taking that view into account, she maintained that the applicant’s role in the child’s life was only as a friend of hers and even that, in her view, was contingent upon their friendship continuing.
6. The mother’s case was that the applicant had been demanding and bullying about his time with the child and her counsel cross-examined along those lines. The applicant was accused of pushing for orders or a parenting plan with legal help and that the documents he presented the mother were self-serving. On the face of the “consent orders” document and at first blush, that might be so but a careful examination of it shows it was simply a precedent form and I accept that the applicant used it as a way of endeavouring to find a solution to the impasse. The document referred to “children” and “school holidays”. Perhaps most telling was a suggested handover point at “[B]”. The applicant’s consistent position was that he had been trying to get back to his earlier time with the child and had been thwarted for months. I accept that position. I find that having regard to the mother’s position, he had little choice if he was to have any role in the child’s life. The mother’s evidence was that he had really shown more interest in being a participant in her family life than having a role as a parent to the child but I reject that.
7. Despite her case being put that the applicant was bullying and demanding, in cross-examination she conceded that his language in correspondence was neither. He wrote asking for photographs and she ignored his request. He wrote urging a meeting but was rebuffed. Despite that, the applicant persisted and some contact did occur.

# The period from November 2011 to February 2012

1. In November, the child met his paternal grandfather and to her credit, the mother was present.
2. As weeks went by, the applicant persisted in wanting time with the child regularised but the mother was unresponsive. She had mentioned to the applicant her desire for the child to attend S School so the applicant obtained the relevant forms and sent them to her but received no response. He made clear he would meet expenses.
3. Whilst I accept that the mother strongly wanted to separate herself from the applicant, in the background, her counsellor was advising her to keep him at a distance and reduce his visits.
4. Throughout November and December, the mother, to use the word she conceded, “stonewalled” and that led to proceedings beginning. She said she felt pressured because of what she described as correspondence with “legalistic overtures”. Having read the written material and heard both parties cross-examined, while I find that the mother was frustrated no doubt because of the advice she was receiving, so too was the applicant. I find he was putting sensible suggestions which, when rejected or ignored, left him with no choice but to issue proceedings. Outwardly through the prism of the court proceedings, the relationship between the parties could be viewed as conflictual and at a point of stand-off but they went to see psychologist Mr P who observed a much more child- focused and reasonable approach to resolution. I return to Mr P’s observations below.

# Time begins under supervision

1. I made an order by consent of the parties on 5 November 2012. The relevant provision in the order read that the applicant was to spend two hours per week with the child at a venue to be agreed (and failing agreement at nominated places) under the supervision of an “organisation” nominated by the Independent Children’s Lawyer. It further provided that the mother was to be present for no more than 30 minutes at the commencement and not more than 10 minutes of the conclusion of those times. Effectively, the mother was to be the security blanket for the child to ensure that he went comfortably yet she handed that task to the maternal grandmother.
2. When asked why she thought the time was to have been supervised, the mother said it was a much more gentle approach if the child had someone around. Nothing in the evidence supported such a need as the child already knew the applicant.
3. Ironically, there was a notation to the orders that reads that the independent supervisor was to be a person not known to either party. I say ironically because that also meant not known to the child.
4. The parties chose a commercial organisation known as Dial an Angel and Ms Y was the employee who supervised and who attended to give evidence.

# The supervisor’s evidence

1. Ms Y has no apparent formal training and no qualifications. She said her role was to facilitate time between the child and the applicant. She had a copy of the order but knew very little about the dispute. She said she was “there for the child” but there were occasions where she was some distance away. There was a time when the child played on equipment and she stood back such that whilst she could see what was going on, she could not hear what was said.
2. Counsel for the mother cross-examined the supervisor about her responsibilities and the best explanation she could give was that she was there for the “general wellbeing of the child”. This was a person unknown to the child, appointed by an organisation perhaps known to the Independent Children’s Lawyer but not the parties although accepted by them, in circumstances where the mother’s view was that the applicant lacked parenting skills and required supervision to ensure an emotional attachment occurred. Whilst parties agree to these arrangements, sometimes out of desperation, the Court should have a careful consideration of these types of arrangements particularly where they are expressed as being supervisory. A supervisor who does not know what the perceived problem is can hardly supervise it.
3. Counsel for the mother, through his line of questions, indicated that the mother had been concerned about the supervisor not being present all of the time yet that was not what the supervisor had apparently been asked to do; she was there for the general wellbeing of the child whatever that meant.
4. The supervisor had no knowledge of what the problem was between the parties and as such, could not possibly have known what she was supposed to avoid occurring during her supervision.
5. The parties had no control over the individual supervisor who was a contracted employee of the service to which they had committed albeit under the recommendation of the Independent Children’s Lawyer. The parties each placed their faith in that service but apparently for different reasons. The supervisor told me that, to the extent the applicant needed to be able to show he could care for the child, he did so after two sessions.
6. Thus, for the balance of the supervised sessions, the supervisor was superfluous except perhaps to give the mother comfort that the applicant was not alone with the child.
7. The supervisor had not been provided by the mother with any medical information or other important details. At best, she knew the child had chest problems.
8. I express again my concern about the use of these organisations without some control at least by the parties if not by the Court. This evidence was largely of little use.

# The photograph shop incident

1. Bearing in mind the supervisor’s views that, after two visits, the applicant had the necessary skills to care for the child, an incident occurred just before the final hearing began which showed the unresolved issues of the mother as well as the appropriateness of the father as a parent.
2. On 21 February 2013, the child spent time with the applicant. The maternal grandmother had delivered the child to the applicant at a shopping centre. The applicant along with the supervisor took the child to a photography shop so that some pictures could be taken. They went to the rear of the shop and the photographer took control. It seems she said to the child to give “daddy a hug”. As this was occurring, the maternal grandmother appeared and remarked “He’s not daddy, he’s [applicant’s first name] and the Court will decide next week whether he is daddy”. To the embarrassment of the applicant (and no doubt the confusion of the photographer) the grandmother took the child out of the shop.
3. When the grandmother gave evidence, she said she observed the applicant going into the shop. Her complaint was that the applicant had not told her he was going to have the photos taken and furthermore that he was “supposed to be bonding with [the child]”. She said that there should have been consultation about this picture-taking exercise and had that occurred, the child could have been dressed differently. That was a spurious answer and entirely inconsistent with the reality of what happened. It did her little credit. More importantly, the grandmother acknowledged that the child was surprised but not upset. That indicates to me that the child was quite comfortable with the applicant and indeed, would have been surprised to see his grandmother.
4. The child went off to continue playing but the interference had understandably dampened the enthusiasm of the applicant to continue and it seems he had little further real interaction that day. In my view, accepting that the purpose of this contact was to enable an attachment to be formed giving rise to the child being comfortable and secure to go with the applicant as well as for the mother to feel secure that the child would be well-cared for and be returned, this was most unfortunate. Because of this incident, when the hearing concluded, I discharged the supervision.

# The future relationship between mother and the applicant

1. Having found that the applicant is the child’s parent and having regard to the views of Mr P about how the parties interacted with one another during his sessions with them, the prospect of how decisions are made for the child would seem encouraging. However, it was clear from the mother’s case that she viewed the applicant as a bully and demanding and a person who would use his family’s wealth and power to disadvantage her in relation to planning and decision-making for the child. I can only determine the matters on the evidence and there were a number of examples that showed the mother’s argument about the father was unreasonable even factoring in that she had a counsellor advising her to distance herself from him as well as legal advice that he had no legal standing.

# The R property

1. I have already mentioned how the applicant provided $205,000 to the mother on the conditional basis that it was effectively for the child. Counsel for the mother carefully cross-examined the applicant about that money in the context of the mother’s allegation that the applicant was bullying her. One allegation the mother used was that he threatened and indeed issued Supreme Court proceedings over the money. As an allegation of bullying, that assertion against the applicant was unfounded.
2. After the applicant paid the $205,000, the August 2011 events unfolded. Upon learning of the applicant’s new relationship, the mother contacted the solicitors who had been tasked with sorting out the loan agreement and the trust declaration and told them to “shelve” the agreement, bill the file and close it. This telephone call by the mother occurred after the distressing August IVF counselling appointment mentioned above. By that stage, the $205,000 had already been used by the mother.
3. In cross-examination of the applicant, it was put to him that as part of his approach to things dealing with the mother, he had issued Supreme Court proceedings against her over the money and that she had paid him his money back. That simple analysis does no justice to what actually occurred. Indeed, it was only in cross-examination of the mother that the full picture emerged.
4. It will be remembered that there had been the loan and an agreement between the parties to declare the trust. The applicant did not bring the Supreme Court proceedings to get his money back. An examination of the writ showed he sought specific performance of the agreement and for the establishment of what had been the mother’s agreement to create the trust. To avoid a confrontation but certainly not to resolve the issues, the mother borrowed $205,000 and paid it back to the applicant.
5. The saga did not end there. The applicant then approached the mother to be a joint trustee with him because he decided to proceed with a trust of his own with the money returned by the mother. The mother declined and when she was cross-examined about why she had rejected the applicant’s new approach, she said she was unaware of the current trust position. That was an unusual answer because it was apparent from the applicant’s affidavit. She then declined the applicant’s offer to be jointly involved in any future decisions with him. In an implausible answer, the mother said she did all of this because it might possibly mean that she could lose sole control of the child. I cannot accept that.

# Child support

1. The applicant has been sending cheques monthly and the mother has not banked them. Her response was that she was fearful that he might use the acceptance against her and then she added that he might want them back. Nothing I heard would suggest any possibility of that happening. I accept that her former answer was the correct one.

# Legal costs

1. There was even a contentious subject of the mother’s legal costs. In their respective dealings with Mr P and as a way of resolving the parenting issues, the applicant offered to assist by paying the mother’s legal fees yet despite various discussions between the parties’ lawyers, those representing the mother did not provide any details which would have at least enabled the applicant to determine what contribution he would make. Again, I accept that this was all part of the mother’s fear that any concession by her may amount to an acknowledgement of the applicant’s role as a parent.

# Communication problems

1. The mother admitted that there was no communication or even exchange of pleasantries and despite being asked to proffer a solution, she said it could not happen. In the witness box, she gave an impression of being resigned to an outcome over which she had no control and no input. Yet the lack of responsiveness brought with it problems. The lack of response to the applicant’s emails and telephone calls was explained by the mother as due to his demanding nature and pressure but I find that the mother’s lack of response meant the applicant pressed on and not unreasonably, to resolve the dilemma.
2. There was even an argument between the parties as to whether the child had asthma and the mother was content for the father to make his own contacts with doctors. When pressed about the issue, the mother said that the applicant had been made “aware” of issues. I accept the mother’s answer that she would never put the child at risk of harm but her inability to work out a way of satisfactorily communicating creates the potential. When cross-examined, the mother agreed that important information such as sleep times, daily activities and illness could be communicated by email. Without not only that mode of communication but also the commitment, the child could be put at risk if one parent was treating a problem and the other was oblivious to it.
3. The mother’s case was that there was an intractable conflict which would make any form of cooperative parenting impossible. I am not so convinced.

# Mr P

1. Mr P is a clinical psychologist whose expertise was accepted by all parties. He became involved as a result of an order made on 5 March 2012 for a family report to be prepared. He then met and observed the parties over the majority of that year. His sequential reports show the parties’ progress.
2. In March 2012, he saw the litigation as having a substantial impact on both parties with the mother feeling “besieged and attacked, powerless” and her relationship with the child compromised. He felt the applicant saw that litigation was the only option to secure time with the child.
3. Mr P thought the relationship was unusual but over the years, the parties had been a great support to each other. He also thought it important to note that the mother chose the applicant for the purposes of obtaining his genetic material and that the applicant gave it knowing why it was being sought. In other words, this was a planned conception.
4. Mr P observed that although the mother described the applicant as just a donor, that was not how she and they had behaved.
5. Of the child, Mr P said that he had one mother and one father and there was a distinction between the issues of the parties and those that affected the child. The proceedings had at that time, already taken a toll upon the mother which to some degree compromised her ability to parent the child. Ironically and prophetically, Mr P expressed concern that the proceedings would create division, stress, enduring resentment and potential for ongoing litigation. However, he pushed on and found the parties were able to reach agreement even about such things as the applicant being included on the child’s birth certificate as the “father” but the stumbling block seemed to him to be the applicant’s claim for regular time with the child.
6. Thus, throughout the early part of 2012, Mr P recommended a relationship between the applicant and the child. It is significant in the context of this stressful hearing that Mr P felt the mother was positive about that relationship.
7. By October 2012 however, Mr P found disagreement about the interpretation of shared parental responsibility. He opined that each party viewed the position of the other with great suspicion and psychologically, both were affected. The applicant was stressed, anxious and preoccupied with the issue whilst the loss of trust of the mother in the applicant was profound. Mr P made recommendations as the litigation was increasing in its intensity towards the final hearing.
8. The positions of the parties with Mr P were entrenched. The applicant was pursuing overnight time but Mr P said it would be distressing and disturbing to the child because the mother was the child’s secure base and safe haven. To change that without cooperation and a cohesive plan would have been significantly deleterious for the child’s development. Mr P said that that would manifest itself in anxiety which would cause the child to be clingy, to regress, be unsettled and importantly, that he would not likely cope. He thought that that would happen regardless of whether or not the applicant saw that manifestation of the problem.
9. The opinion of Mr P very much guides my determination because little has changed for the child. The child had seen the applicant in and out of his house having some interaction with him but was otherwise called “[applicant’s first name]”. Because of the parties’ deteriorated relationship, the applicant was virtually excluded from the child’s life for several months at a critical time of his development.
10. Despite the recommendation of Mr P, the applicant filed an amended application seeking a much faster introduction. Then, in November 2012, Mr P saw the parties again. He opined that the child had only just begun to form a relationship albeit that it was a positive one. However, that development could come at a cost. Mr P said:

What is at one level a complex matter is at another level simple and straightforward. When the world is viewed through [the child’s] eyes, having his parents involved in his life and all that they have to offer should clearly be to his advantage. If that relationship is ensconced in conflict, ill feelings, feelings of persecution and mistrust, anger and disdain, the outcome for [the child] is likely to be significantly less positive. While it had been my hope that (the mother) and (the applicant) would be able to elevate above their conflict, their lack of trust, their suspicion, their doubt in each other is so great that any hope of a better outcome has dwindled.

…any projective recommendation reflects a blunt instrument that lacks finesse and sensitivity, that it may impact substantially and adversely upon (the mother) and her mental health and thereby contribute to a worse outcome for [the child].

1. Whilst the opinion of Mr P has a generic flavour about it, I am satisfied that the applicant feels that orders are necessary if he is to be involved in the child’s life. The descriptions in the opinion really relate to the mother. It is the last part of that opinion that needs careful consideration. I find on the evidence that whilst he was more immediately worried about the parties and the impact of court orders upon them than upon the child, he was of the view that:

It is of course equally concerning from my perspective for [the child] to be denied an opportunity to have a relationship with his father and his father’s family and to not have a sense of being whole and complete.

1. In her evidence, the mother agreed that she made concessions in the discussions with the applicant and Mr P. Mr P thought that in the sessions, although matters went up and down, it was not just a case of the applicant insisting upon achieving what he wanted; there was generally co-operation and goodwill including on the thorny issue of joint decision making. Mr P saw them a number of times but after consensus at a meeting had been reached, they had gone away to document things and it was then that things all fell apart. The mother’s position was that whilst agreement may have been reached, she changed her mind because of what she described as the complete breakdown in communication, the tension and sadly, the lack of even pleasantries. The applicant was far more optimistic about hurdles being overcome. So too was Mr P who thought that given structure within which to work, the parties would sort things out.
2. Counsel for the mother questioned Mr P about a negative impact caused by forcing orders upon the mother and his view was that if the mother felt forced to comply with orders, it was “not great” and that at some point, the impact had to be “considered”. Counsel for the Independent Children’s Lawyer probed Mr P about what would happen to the mother if orders for the child to spend time with the applicant were made. He thought the mother gave the very clear impression that she thought the current time with the applicant was too long for the child’s age yet he acknowledged it would not be a problem in the not too distant future. Indeed, Mr P thought that the child’s attachment would proceed in a predictable way but that depended upon there being a consistency of contact.
3. When she was cross-examined about her own health, the mother said that she would keep herself active, enrol in a course and she also had the support of family and friends. She acknowledged that in the fullness of time, this would all become routine. Perhaps she was being more optimistic in her answers under the stress of cross-examination than the reality of her true position but she also acknowledged that she would happily do whatever the Court ordered if it was for the benefit of the child. Thus the concern of Mr P may not become a reality.
4. The mother relied upon an affidavit of evidence from her father who was not required for cross-examination. He had observed that when he first became aware of the applicant being “[the child’s] donor”, he noticed the mother under significant stress such that she lost weight and reported trouble sleeping. He said she was on edge and emotional. That had to be contrasted with the earlier period where she was very happy and flourishing in motherhood. Thus, the grandfather was able to point to the August 2011 period where things changed dramatically. One must ask why that was so bearing in mind that the mother always knew that the applicant was the child’s father and that during the period prior to that August, she was flourishing as a mother. That evidence highlights the fact that it was the decision to make the paternity public that caused the mother’s anxiety. The communication between the applicant and the mother then broke down, and that was the problem rather than the conduct or involvement of the applicant.
5. Thus I find there is no evidence that supports the proposition queried by Mr P in November 2012 that there will be an adverse outcome for the child if orders were made having an adverse impact on the mother.
6. By February 2013, there were apparent conceptual and cognitive shifts in the child because he now had another person significantly in his life but there had been little change between the applicant and the mother.
7. Mr P left no doubt that it was best for the child for the applicant to have a significant role, as distinct from an avuncular role, in his life but that the time issue had to be handled carefully.

# Other witnesses

# Ms C

1. Ms C is a receptionist and the current partner of the applicant. She described her relationship with the applicant as a loving and committed one of three years. She has twins aged seven years.
2. Ms C confirmed how she became aware of the existence of the child J. Despite the circumstances under which the arrangement became public, she had no difficulty continuing her relationship with the applicant and supporting him. She described the applicant’s close bond with his extended family.
3. The importance of Ms C’s evidence which I accept, is that it highlights the dilemma that the applicant faced as a result of the agreement he originally made with the mother.

# Mrs Z

1. The applicant’s sister gave evidence. She is married and has three young children one of whom is of similar age to the child J. She described her family’s close relationship yet she was also unaware of the child until the applicant told his family. She appeared emotional about that. She talked of an arranged meeting with the mother and the child at a café which went well even if it was strained. She observed the child and gave him a present. The child appeared a happy little boy. Whilst I find there was consensus that they would meet up again, the mother subsequently contacted her and said that she could no longer see the child because she wanted to wait for these proceedings to be concluded.
2. I was impressed with Mrs Z who appeared interested and willing to help not only the applicant but also the mother. She did not have reservations about the applicant’s parental capacity and to the extent that he needed assistance, she was willing to provide it. I find that with Mrs Z helping the applicant, the child would not be at risk of harm.

# Dr V

1. The applicant relied upon an affidavit of his doctor as evidence of his physical capacity to care for the child. There was nothing particularly controversial in that evidence but the mother required the doctor for cross-examination. What that showed was that the applicant has some difficulty in long term sitting but is otherwise fit enough to play sport.
2. The doctor was asked about a medical certificate that had been provided to the applicant that suggested he was incapable of being on a jury because of the requirement to sit for long periods of time. Dr V did not write the certificate and she disagreed with the opinion in it so that took the matter no further.
3. Nothing I heard would suggest any of the applicant’s past cancer issues creates a disability for him concerning caring for the child. Indeed his partner would suggest otherwise.

# The maternal grandparents

1. Of the two witnesses that the mother relied upon, only the maternal grandmother was required for cross-examination and that largely related to the photograph shop incident.
2. The affidavit endeavoured to set out that there is good communication between the grandmother and the applicant yet the photograph shop incident would suggest otherwise.
3. The evidence of both maternal grandparents was focused on the issue of communication and the applicant’s capacity as a parent of a young child. The grandmother complained that the applicant asked why he could not take the child overnight and rather than indicate the sorts of reasons as articulated by Mr P and indeed common sense, the grandmother said she could not speak to him for “legal reasons” which concerned the issue of an allegation of waiver of legal privilege surrounding her husband.
4. In relation to the grandmother’s view about the applicant’s parental capacity, she pointed to allowing the child to run into shops and in the street and ask “inappropriate” questions about whether the child needed his nappy changed. She also referred to an incident where the child wanted her to stay when the contact commenced and when she asked the applicant, he agreed. The concern I have is that nothing the grandmother said or indeed did, suggested she was supportive of any positive relationship between the child and the applicant.
5. Despite her view that the applicant did not have the appropriate skills to care for the child, the objective evidence of the supervisor (about whom she was critical for lack of attention) would suggest otherwise.
6. I have already referred briefly above to the evidence of the maternal grandfather. He has observed the poor relationship between the parties and was critical of the applicant. Like his wife, he too was critical of the applicant’s parenting skills in respect of things like putting up a swing for the child but he offered no solution. He said that he had offered to discuss time arrangements on behalf of his daughter but it was clear that he has little regard for the applicant and those sorts of suggestions were bound to be unproductive.
7. Accordingly, the evidence of the grandparents was more directed to the negative aspects of the applicant but I have the objective analysis and opinion of Mr P which I find more reliable and helpful.

# The parties’ positions

1. The applicant relied on an amended initiating application filed 15 February 2013 together with affidavits by the applicant, his sister, medical practitioner and new partner.
2. He sought orders that he and the mother have equal shared parental responsibility for the child and that the child live with the mother. He then sought that for the future, his time with the child be built up on a cycle to which I shall later refer in these reasons. In addition, he sought special occasions with the child, options in relation to travel and a passport. He sought orders that the parties advise each other of illnesses and injury, keep each other informed as to their residential addresses and telephone numbers and that if the child was unwell, he still be able to spend time with the applicant. An order was sought that neither party denigrate the other within the presence or hearing of the child but there was no evidence to support that order at all.
3. The mother’s position was encapsulated in the amended response filed 13 February 2013. She relied upon affidavits by herself and her parents. She sought orders that the child live with her and then that if an order for parental responsibility was necessary and/or appropriate, she have that sole responsibility in relation to all major long-term issues concerning the child, save that the applicant be given an opportunity to participate in the process. She sought various orders about exchange of information about each other’s residential situation as well as injury and illness concerning the child. In respect of time between the applicant and the child, she proposed a build-up arrangement over the ensuing years all of which was designed for daytime only in the immediate future. She sought that the applicant’s time be supervised or that his sister be in substantial attendance during his time and that the applicant attend a parental skills program. The mother also sought an order that each party continue to attend upon Mr P or such other psychologist as agreed for the purposes of therapeutic counselling. She sought that the costs of that counselling be paid by the applicant.
4. The mother too sought an order that neither party denigrate the other and as I have indicated above in respect of the applicant’s position, there does not seem to be any basis for such an application.
5. The mother also sought her costs but that is not a matter that I should deal with at this stage.
6. The Independent Children’s Lawyer’s position was that her only witness was the expert Mr P. I shall refer to the final position of the Independent Children’s Lawyer below.

# Statutory issues

1. Section 60CA of the Act makes it clear that when deciding whether to make a parenting order, the court must regard the best interests of the child as the paramount consideration. Relevantly, whilst the interests of the parents may (perhaps must) be taken into account, the ultimate over-arching consideration is whether or not it is in the child’s best interests for a parenting order to be made.
2. Once it is determined that an order should be made, the Court’s subjective determination arises from s 65D which, subject to the issue of the presumption of parental responsibility, requires that an order should be made that the Court thinks is proper.
3. Both what is in the best interests of a child and what is proper must always be guided by the provisions of s 60B which sets out the Objects and Principles of the Act. It is important to note that those provisions are directed towards parents and hence the importance in this case of the very first determination. As earlier indicated, “parent” is not clearly defined but it seems to me that the focus of s 60B is more on the biological connection than the legal construct.
4. In *Goode v Goode* (2006) FLC 93-286, the Full Court set out the pathway to be followed (see para 56). It includes a mandatory consideration of the factors set out in s 60CC because they are the matters that guide the Court as to what is in the best interests of a child. The application of those principles and importantly, the discretionary assessment of the evidence, was set out by the Full Court in *Donnell & Dovey* (2010) 42 Fam LR 559 where it was said:

…the various factors contained in [ss 60CC(2)](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s60cc.html) and (3) may be seen as a series of signposts the legislature has determined are potentially important for the court to take into account in exercising its very wide discretion. Some of the signposts will lead nowhere. In some cases one of the designated signposts will provide more assistance in pointing the court in the right direction than it will in another. Sensibly, the legislature has recognised that it cannot provide an exhaustive set of signposts as the destination is uncertain and the routes by which it may be reached are as infinite as the factual circumstances that present themselves in courtrooms every day.

1. It is also timely to state that it would be a mistake to think that there is always one right answer to the question of what the best interests of the child will require. Best interests are values not facts. (*CDJ v VAJ* (1998) 197 CLR 172 at 219).
2. Section 61DA(1) requires the Court to apply a presumption that it is in the best interests of a child that the parents have equal shared parental responsibility. This presumption starts another pathway which requires the Court to consider specific time-related concepts about the parents and the child. The presumption is mandatorily rebutted if the Court is satisfied that a parent has engaged in abuse of the child or engaged in family violence (see s 61DA(2)). That is not something that I could find in this case for the reasons set out below under the heading of family violence and family violence orders.
3. That same presumption may be rebutted if the Court is satisfied that it would not be in the child’s best interests for the parents to have shared responsibility (s 61DA(4)). That was very much the focus here but to make a proper assessment of what is in the child’s best interests, the pathway earlier mentioned has to be first traversed.
4. The time considerations become relevant if an order is made for equal shared parental responsibility (ss 65DAA(1) and (2)). Those provisions do not have any application where one parent is given sole parental responsibility or where an order is made for a parent to share parental responsibility with a person who is not a parent.
5. Having found that the applicant is a parent, it is important to make findings about the child’s best interests having regard to the matters mentioned above.

# Meaningful relationship

1. It is the child’s right to have the benefit of both of his parents having a meaningful involvement in his life, subject to that being in his best interest.
2. In a very emotional way, the applicant described falling in love with the child and beginning to develop a bond with him. He described the manifestation of that as the child smiling and chuckling with him when they played. He spoke of regularly being involved in the child’s routine. The mother disputed all of that denying any “bond” existed before orders of the Court were made and maintaining that he had not participated in the child’s routine to any significant extent. Not much turns on that because it has to be considered in the context of this whole relationship being kept secret from everyone including the mother’s own family. Despite that, the mother conceded that the applicant had participated in things such as bathing but in a limited way. In something of a concession also, the mother acknowledged that since orders were made, the child was excited when the applicant arrived and was much more at ease with him when she or her family members were in view. The mother and the maternal grandmother have a very jaundiced view of the applicant so it is important to see whether there is any objective evidence to enable me to find just what sort of benefit the child receives from having any relationship with him.
3. In a November 2012 advice, Mr P said the following:

[The child] seems to be doing well. He clearly sees (the applicant) as more than just a casual figure in his life and when seen together, [the child] related warmly and well, but more importantly, when [the child] was stressed by my request that (the applicant) leave the room, [the child] sought (the applicant) out, wanted his return and felt comforted by the reunion. These observations are significant in that they show the early signs of attachment behaviour.

1. From a professional level, these “early signs” were encouraging even if it was not a strong attachment and it was obviously different from the attachment of the child to his mother. That evidence become relevant on the issue of the extent of the time between the child and the applicant but it also tends to lessen the importance of the mother’s view that the child was much more at ease when she or her family members were in view. One example of that can be seen in the photo shop incident where the child happily went with his grandmother.
2. I find the child has a strong and loving attachment to his mother and nothing I observed or heard suggested that an ongoing relationship with the applicant would affect the child’s relationship with her. In respect of the applicant, I find that there is already a meaningful relationship with the child and that absent interference as I have described, the child will continue to benefit from that relationship being fostered.
3. As for the future, Mr P captured the point succinctly when he said:

When the world is viewed through [the child’s] eyes, having his parents involved in his life and all that they have to offer should clearly be to his advantage.

The statement about what the parents have to offer was not just rhetoric. Mr P had spent several meetings talking to the parties about their aspirations and concluded that it was the implementation of the process that was the problem rather than anything else. Having heard the evidence of both parties, I find that the stumbling block is about parental responsibility, not about what is good for the child.

1. The child will benefit in the future from a meaningful relationship with both his mother and his father.

# Protection from harm

1. Nothing I heard or read would suggest that the child would be at risk in the care of the applicant. In carefully chosen words in cross-examination, the mother conceded that there was no physical risk to the child in the applicant’s care. There are however real issues about the appropriate regime of time for the child. That is not a legal construct or question but rather what the social scientists can tell the Court about what a child of the child’s development can handle both in terms of time with the applicant but also in being away from his mother. Whilst there are no doubt concerns in the applicant’s mind about the restrictions placed upon him by the mother, now that the issue of the applicant’s role is clarified, I would not find that the mother would thwart the relationship. The evidence of the grandmother to which I referred above might cause the Court to perhaps hesitate but having regard to the unusual nature of the conception and birth of the child, I would not attribute any destructive intention to the mother.

# The views of the child

1. The child is not at an age or stage of development where he is able to express his wishes and “views”.

# Facilitation of the role of the other parent

1. For the reasons outlined in the facts above, it is clear that the mother seeks for the applicant to have a very limited role in the child’s life. In cross-examination, the mother conceded that she would do things to keep herself occupied if orders were made. She thoughtfully admitted that the applicant was to be a donor “and/or father” but conceded that their relationship had broken down completely and there was little prospect of that changing. That flies in the face of some of the thoughts of Mr P who gave evidence about how co-operative and positive the parties were but the stumbling block seemed to be this issue of parental responsibility. Indeed, the mother said that if the Court made such an order she would accept it.
2. I take into account that she had been counselled and advised by the IVF program that she had that sole responsibility and had had legal advice as well. But it is clear that the applicant is not going to go away even if there was some status determination contrary to his position.
3. I am reliant upon Mr P who had a very strong view that given time, neither party would do anything to prejudice the interests of the child. I find that the mother will have difficulties in communication but that is not a basis to adopt a position of not facilitating the role of the applicant in the child’s life.

# Ability of the parties as parents

1. Nothing I heard or read would convince me that the parties do not provide appropriately and properly for all of the child’s needs. The one critical issue is how to determine the duration of time.

# Section 60CC(3)(d), (e), (f), (g) and (i)

1. The applicant’s proposed orders represent a position of some certainty for the child and the mother. The question is how far and how quickly should the Court go along the path that the applicant desires.
2. It became obvious in cross-examination that the applicant wishes to push things along faster than Mr P would have it. I am concerned about his enthusiasm which ignores the needs and capacity of the child to cope with the separation from his mother.
3. The parties live close to each other and there are people who can assist them in handovers.
4. Although the mother expressed reservation about the applicant’s ability to provide care for the child, the supervisor said that was not an issue. That of course depends upon the duration of the contact time. The child has not had lengthy periods away from the mother which is the relevant consideration. I have the evidence of the applicant’s witnesses all of whom indicate that they are supportive and will be helpful. I have already referred to that evidence earlier.
5. The mother also raised concern regarding the father’s physical capacity because of his illness. The evidence of his doctor resolves that dilemma. Nothing I heard would suggest that the applicant could not look after the child.

# Family Violence and Family Violence orders

1. The applicant gave evidence of a violent incident upon him by the mother apparently in 2002 which led to an intervention order being made against her. The mother admitted the making of the order but denied the violent incident. She maintained it was all about the applicant wanting to get her out of their then home. The mother alleged that the applicant’s mother was violent towards her culminating in an intervention order being made.
2. This evidence relates to what is required by s 60CC. That provision requires the Court to consider matters of family violence and family violence orders. I do not propose to give any weight to those issues because they have no bearing on the parenting case for two reasons. First, the dispute occurred at a time when the personal relationship was breaking down and not long thereafter, the parties resolved their differences and continued their acquaintanceship for a number of years. Secondly, the incident occurred long before the birth of the child. Nothing in the evidence suggests the applicant has any current propensity towards abuse or violence such as to give rise to a fear of her by the applicant.
3. Throughout her evidence, the mother expressed her views about the applicant and what she saw as his domination of her. Her evidence was that she had become very distressed by the applicant’s change of behaviour which was a reference to his becoming demanding of time with the child and “suddenly” wanting to be a father. She referred to the applicant refusing to talk to her and ignoring her. She described “considerable conflict” between the two of them. Her evidence was that the applicant’s approach to resolving issues was a barrage of emails and correspondence from his lawyers. Her description was that she felt “threatened” by the applicant’s demand for time with the child. The conduct of the applicant was said to have stressed the mother requiring her to need her parents’ support.
4. The applicant was cross-examined by counsel for the mother. It was clear that what was being alleged by the mother was that the difficulty was with his parents and more particularly, his mother. The applicant accepted that the mother’s fear was that his mother would take the child away. He was asked to look at the mother’s position in that she was receiving legal correspondence and the threat of legal proceedings. His response, which I accept, was that he was trying to get back to time with the child that had been curtailed by the mother. He was cross-examined about the trust to which I have earlier referred and it was clear to me that counsel was suggesting that this was an example of the applicant’s power to dominate the mother. He was asked about his application before this Court which suggested he was seeking indemnity costs against the mother and that prompted the applicant’s senior counsel to acknowledge that that had been a mistake.
5. I find that the mother’s views are coloured by her desire for the father to go away and leave her in peace. That is not something that I could find would be in the child’s best interests.
6. Having regard to the answers given by the mother in cross-examination concerning the matters earlier mentioned, I do not find that family violence has anything to do with this case.

# Parental responsibility

1. I find there is nothing in the evidence to cause me concern about parental responsibility from the perspective of either party. I accept adjustments have to be made to the way each party makes or will make decisions about the child in the future but for the reasons outlined above concerning the meaning of parental responsibility, I do not see the issue as one of significance notwithstanding the mother’s view throughout the proceeding that she could not agree to share the task.
2. Section 61DA provides that when making a parenting order the Court should presume that it is in the child’s best interests for both parents to have equal shared parental responsibility. For reasons outlined, there is no basis for me to rebut the presumption.
3. Section 65DAC requires consultation between parents who are to attempt to come to a decision about major long-term issues. It may be difficult to see how that consultation could occur when the mother says that she cannot communicate with the applicant yet again, Mr P seemed to be optimistic that it would work because neither adult would do anything about decisions that would prejudice the child. It is obviously relevant and important to determine in advance not so much whether the parties can or will communicate but rather whether their inability to make decisions together would prejudice the child. Will the parties’ relationship with each other potentially cause significant difficulties so that major health decisions or school decisions are not made or made expeditiously? Will this stand-off create stress for the child because of the pressure applied to the mother?
4. Parental responsibility refers to all of the duties, powers, responsibilities and authority which, by law, parents have in relation to children. Many of those things have to be carried out on a daily basis but the focus in this particular case is about major long-term decisions. Section 4 defines those as issues about the care, welfare and development of a child of a long-term nature. The section provides some examples but, as they must be, they are very general. The section refers to topics such as health, education, religion, cultural upbringing and changes to living arrangements.
5. The parties have experienced some dispute about what (if anything) the child has wrong with him in relation to asthma. It is not so much a dispute about the asthma that is of concern but rather how each parent dealt with it. I am again conscious that the lack of communication since August 2011 may have accounted for that, yet with Mr P decisions were made in a constructive way.
6. A sharing of parental responsibility will not create conflict even if the applicant is exuberant in respect of his ideas and the mother is hesitant if not resistant. The significant decisions that require consultation can be done with the assistance of a mediator such as Mr P if the parties need to find a method of communicating as well as a way to bridge that gap.
7. In *Lennon & Lennon* [2011] FamCA 571 (unreported 9 July 2011), Murphy J said (at para 108)

The exercise of discretion in favour of excluding one parent from consultation and decision making in respect of major long-term issues for a child is, it seems to me, a very significant step, being a very serious interference with the fundamental rights of a person. There is no doubt that the exercise of that discretion ought to be resolved in favour of an outcome which is seen to be in the best interests of the child. But, the fact that this is the paramount consideration does not, in my view, mean it is the sole consideration nor that the legitimate fundamental rights of a parent are irrelevant. (cf *AIF v AMS* (1999) 199 CLR 160; *U v U* (2002) 211 CLR 238).

I respectfully agree with Murphy J and this is a case where the Court should be hesitant about removing a parental responsibility just because of the communication problem. The parents here are intelligent and thoughtful people whose relationship sadly faltered if not failed but importantly, nothing I have heard would suggest that they would not see the best outcome for the child as of critical importance. Each appeared to me to be child-focused rather than self-centred and the applicant wants to be involved. On that basis, I expect they will find a way to make the major decisions and the child will benefit from their thoughtfulness.

# What then is the appropriate amount of time between the applicant and the child?

1. The Independent Children’s Lawyer proposed a regime wherein time was gradually built up. The proposal included increases around age and school changes. It was submitted that by early 2014, the child should be going overnight with the applicant.
2. The applicant’s position was that the overnight time should start by August 2013. In my view, that is too fast bearing in mind I have little evidence to guide me about the impact of time on the child because of his age. I am being asked to contemplate what he could manage bearing in mind the limited time he has had with the applicant and the usual expected development changes that occur in young children.
3. The mother’s position was that if appropriate, the child’s time should be limited to day time for the coming years. That did little to advance the possibility of the child having the prospect of a beneficial relationship with the applicant.
4. Mr P had not seen the child for some months when he gave evidence. He thought that there would have been a predictable attachment forming but that it would be slower than expected because the parties had not followed his suggestions.
5. Mr P thought it appropriate for the child to spend four hour blocks over six weeks and that be increased fortnightly by two hour periods until it reached a seven hour day. Presumably, to avoid a problem of regression caused by big gaps of a fortnight, Mr P thought there should also be some time in the alternate week. After that, time should go to full days on the alternate Saturdays and Sundays of alternate weeks for eight fortnights and then overnight.
6. Whatever configuration is used, there must be a necessary build-up so that the child becomes used to being away from his mother and adapting to a routine in the applicant’s life and household with which he is secure and comfortable. In many ways, the whole process is crystal ball gazing because it is dependent upon the child’s coping mechanisms. The success of this process will be assisted by how the parents address issues and particularly the applicant treading cautiously.
7. To give some certainty to the parties, I think specific dates should be set to enable each party to do some planning as well as getting the child ready for the next transition. The quality of the time rather than its quantity is what I am considering because quality reflects best interests.
8. Thus, the orders I shall make set out the formula which the parties can change by agreement if they consider the child is not coping but absent agreement or further court order, those orders in my view, reflect what is in the child’s best interests.
9. Section 65DAA requires the consideration of equal time where the presumption applies but that is irrelevant here because the applicant, sensibly, seeks limited time.
10. The Independent Children’s Lawyer supported by the applicant also pursued orders in relation to future travel involving the child and a passport. In my view it is so far removed from what I can envisage at this stage that I do not propose to make those orders. To the extent that the parties cannot sort those matters out in the future between themselves, they will have no choice but to return to court. There were also issues associated with keeping each other advised of details about injury and illness but I do not intend to make those orders either on the basis that I would expect that having regard to the matters I have set out above and in particular, the evidence of Mr P, neither party would prejudice the health interests of the child and it is unnecessary in those circumstances for me to make those orders.
11. I do however intend to make an order that the parties attend upon Mr P at the applicant’s expense for the purposes of the assistance he might provide the parties in respect of the implementation of these orders.
12. The proposed orders provide for particular months and that is to assist the parties with certainty so that if a Wednesday or a Saturday or Sunday falls within the designated month, the parties will know exactly what the child will be doing. Until 1 June, the existing orders shall remain in force.

I certify that the preceding One Ninety One (191) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Cronin delivered on 11 June 2013.

Associate:

Date: 11 June 2013