(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families

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Planned lesbian families—defined here as families in which a single lesbian woman or a lesbian couple decide to have a child using some form of assisted conception—are greater in number and more visible today than ever before, yet only a single Canadian province has attempted to address through legislation the assignment of legal parentage within them. The absence of legislation in this area is of great concern to lesbian mothers and their children who, unable to fall back on legislative presumptions or those derived from biology, live with considerable legal uncertainty. Given the unique legal and social issues raised by lesbian families, the enduring homophobia that continues to characterize their experience of family, and the lack of Canadian research in the field, planned lesbian families warrant specific empirical attention. This article tackles the question of how legal parentage might be assigned within planned lesbian families drawing on empirical data collected through 36 interviews with 49 lesbian mothers living in British Columbia and Alberta. It addresses how lesbian mothers understand and define parenthood within their own families, and how their understandings and definitions might be translated into a law reform context. It concludes by offering a law reform proposal grounded in intentionality, one that presumptively protects the lesbian nuclear family and allows for the possibility of three or four-parent families in instances where the presumptive parents have agreed to such an arrangement.

Les «familles homoparentales planifiées», s'étendant ici de la famille résultant du recours par une lesbienne ou un couple de lesbiennes à une méthode de procréation médicalement assistée, sont de nos jours plus nombreuses et plus visibles que jamais. Pourtant une seule province canadienne a cherché à reconnaître au moyen d’une loi la parenté légale dans ce contexte. Ce vide législatif préoccupe énormément les mères lesbiennes et leurs enfants qui, à défaut de pouvoir invoquer une présomption législative ou biologique, se heurtent à une grande incertitude juridique. Étant donné les aspects juridiques et sociaux uniques des familles homoparentales, l'homophobie persistante à l'égard de leur situation familiale et le peu de recherche sur le sujet au Canada, cette réalité mérite une attention empirique particulière. Le présent article aborde la question du traitement possible de la parenté légale dans ce contexte, en s'inspirant des données empiriques recueillies lors de 36 entrevues auprès de 49 mères lesbiennes vivant en Colombie-Britannique et en Alberta. Il présente en particulier leurs perceptions et leurs définitions de la notion de parenté dans leur situation familiale propre, puis cherche à traduire leurs idées et leurs définitions en la matière en des réformes législatives. L'article se termine par un projet de réforme législative fondée sur l'intentionnalité, lequel selon toute vraisemblance protégerait la famille nucléaire homoparentale et permettrait éventuellement des familles de trois ou quatre parents lorsqu'un tel arrangement est convenu entre les parents présumés.

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Lesbian families with children are greater in number and more visible today than ever before, prompting a number of social scientists to suggest that we are in the midst of a lesbian “babyboom.” While studies from the United States and Australia suggest that between 15 and 20 per cent of lesbians are mothers, the number of lesbian mothers in Canada has proved difficult to determine. The only Canadian statistics available derive from the two most recent Censuses. In 2006, it was found that of the 20,610 female same-sex couples who were willing to have their relationships recorded, 3,359 (or 16.3 per cent) were raising children. These numbers represent a 47 per cent increase in the number of children being raised by lesbian couples in the last five years.

Despite the significant increase in planned lesbian families—defined here as families in which a single lesbian woman or a lesbian couple decide to have a child using some form of alternative conception method, typically donor insemination—only one Canadian province has attempted to address the assignment of legal parentage through comprehensive legislative reform. The lack of legislation in this area is of

1. Though it is difficult to pinpoint where the term “lesbian babyboom” first originated, Kath Weston was amongst the first scholars to popularize its usage. See Kath Weston, Families We Choose: Lesbians, Gays, Kinship (New York: Columbia University Press, 1991).
4. Ibid. However, it is possible that the enormous increase in lesbian families with children in the five year period between 2001 and 2006 is a function of an increased willingness on the part of lesbian mothers being willing to declare themselves as such. At the same time, there are suggestions that the Census figures underestimate actual numbers of lesbian women raising children. For example, it is possible that a significant portion of women remain resistant to identifying their households as lesbian-headed. The Census figures also do not include those lesbian mothers who are single or separated from their child’s other parent, or who are non-custodial parents.
great concern to lesbian mothers and their children who, unable to rely on legislative presumptions or those derived from biology, live with considerable legal uncertainty. Law reform is clearly needed but is complicated by the lack of empirical research on planned lesbian families. Few studies address how lesbian mothers living in Canada understand or define their various family relationships, and no empirical research has specifically explored the legal aspects of lesbian parenting in Canada. Planned lesbian families are relatively new, complex in their structure and dynamics, and often misunderstood. While law reform can be explored using a variety of methodologies, qualitative empirical research is likely to reveal new knowledge that may be essential to the long term success of a law reform proposal.

Designed to redress the existing empirical gap and explore the possibility of law reform, the research findings presented in this article derive from a qualitative study of planned lesbian families living in British Columbia and Alberta. The purpose of the study was twofold. First, recognizing that the complex array of familial relationships within lesbian families raise a number of unique legal and social issues, the study sought to investigate how key familial concepts such as "family" and "parent" are understood and defined within planned lesbian families and how these definitions might differ from those adhered to by heterosexual families. Unlike heterosexual parents, who are typically able to equate (though sometimes fictitiously) biology with parenthood, lesbian mothers, because of the presence of a non-biological parent, must actually think about what makes someone a parent and where the boundaries of family might lie. Without biology to fall back on, lesbian mothers, sometimes in conjunction with known donors, have devised new definitions of parenthood that may extend beyond the existing normative framework. Exploring and giving voice to their definitions is likely to be an important component of any law reform proposal.

The second purpose of the study was to explore the possibility of law reform. While lesbian families are growing in number and visibility, only the Civil Code of Québec has addressed the assignment of legal parentage within lesbian families.


6. The study was approved by the University of British Columbia Ethics Committee on 14 February 2005 and was the focus of my Ph.D. dissertation.

through legislation. 8 Québec is also the only province to expressly address the legal status of known donors. 9 While little legislative attention has been given to the issue of legal parentage within lesbian families, lesbian-initiated litigation has produced a patchwork of provincial provisions that give lesbian families some degree of legal recognition. 10 Given their origin in case law, however, the existing forms of recognition are both uneven across the country and incomplete in that they respond primarily to the needs of individual litigants, most of whom conceived using anonymous donor sperm. The second purpose of the study was to produce, drawing on empirical data derived from lesbian mothers living in a variety of family configurations, a legislative reform model for common law provinces 11 that would assign legal parentage within planned lesbian families at birth. 12 Such reform would provide lesbian mothers with a degree of legal certainty at the time of their child’s birth that most heterosexual parents take for granted.

While planned lesbian families present a very visible challenge to the boundaries of the traditional family, they are actually part of a larger trend towards changing family demographics. As Judith Stacey has argued, lesbian families may be the “pioneer outpost of the postmodern family”—perhaps the most complex example of the improvisation, ambiguity and diversity that characterize twenty-first century families—but they are by no means the only family form confronting traditional norms. 13 In fact, the rise in divorce, common law couples, step-families, single mothers by choice and the widespread use of fertility services have all forced lawmakers to rethink the grounds upon which legal parentage, and its associated rights and responsibilities, are awarded. 14 However, planned lesbian families raise some unique complexities for the law that set them apart from other kinds of “alternative” families. As a result, they warrant specific and focused attention.

The most obvious ground upon which planned lesbian families can be set apart from most other forms of family is that they usually include at least one non-biological parent and therefore cannot rely on the many legal (and social) assump-

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8. The assignment of legal parentage at the point of birth is addressed in provincial legislation.
9. For a discussion of Québec’s unique legislation see Robert Leckey, “‘Where the Parents are of the Same Sex’: Québec’s Reforms to Filiation” (2009) Int’l J.L. Pol’y & Fam. 62.
11. Such a model already exists in Quebec.
12. Though designed to address the specific needs of planned lesbian families, for the sake of consistency, the model would apply to both same-sex and opposite-sex couples who rely on assisted reproduction.
tions derived from biology. Yet, lesbian families cannot be equated with other family forms that include non-biological parents, such as step-parent families. Unlike most heterosexual step-parents, non-biological lesbian mothers are typically present at conception and raise the child from birth. Put simply, non-biological mothers are not step-parents; they are usually equal co-parents from the outset.

Lesbian families are also often equated with heterosexual families created via assisted reproduction. This comparison is also not always helpful. Unlike heterosexual couples who conceive through assisted reproduction, lesbian co-parents are much more likely to know the third-party gamete provider, and, in some cases, even incorporate him within their family. Because the legal status of these donors is largely undetermined, lesbian mothers, their children and their donors experience a great deal of legal uncertainty. By contrast, heterosexual couples who conceive through assisted reproduction rarely use known donors and thus rarely encounter the legal issues raised by their presence. Lesbian parents also differ from heterosexual parents who use assisted reproduction, in that the former are largely excluded from the provincial statutory frameworks designed to address legal parentage within such families. As a result, they experience greater legal and social vulnerability than heterosexual couples who conceive in the same manner. Finally, lesbian couples cannot "fly under the radar" in the ways that heterosexual couples who use assisted reproduction often can. Without the cloak of heterosexuality, lesbian families can always be identified as including a non-biological parent and thus face more scrutiny than heterosexual families created via the same method.

Given the unique legal and social issues raised by lesbian families, the enduring homophobia that continues to characterize their experience of family and the lack of Canadian research in the field, planned lesbian families warrant specific empirical attention. This article tackles the question of how legal parentage should be assigned within planned lesbian families by drawing on data collected through 36 interviews with 49 lesbian mothers living in British Columbia and Alberta. The article begins by outlining how Canadian law currently responds to lesbian motherhood, highlighting the gaps in the existing regime. It then introduces the study and the methodological approach adopted. Finally, it turns to the interview data to consider how lesbian mothers understand parenthood within their own families. Definitions of parenthood are explored in the context of the two-mother family, as well as in relation to known sperm donors. Building on the mothers' definitions of parenthood, the article concludes by considering the question of law reform. First, it explores the mothers' responses to a series of law reform proposals. Then, drawing on the mothers' law reform preferences, it presents a draft legislative model.

15. This was the approach taken in Rutherford v. Ontario (Deputy Registrar General) (2006), 81 O.R. (3d) 81, (sub nom. M.D.R. v. Ontario (Deputy Registrar General)) 270 D.L.R. (4th) 90 (Sup. Ct.) [Rutherford] and Gill v. Murray, 2001 BCHRT 34, B.C.H.R.T.D. No. 34 [Gill], in which several lesbian couples who conceived via anonymous donor insemination brought equality claims arguing that non-biological mothers, like non-biological fathers, should be able to register as a parent on the child's birth certificate from birth.
II. THE EXISTING LEGAL FRAMEWORK: A LIMITED MODEL

As planned lesbian families have increased in number and visibility, the assignment of legal parentage within them has emerged as a contentious issue for Canadian family law. The focus of the debate has been at the provincial level, as it is provincial statutes (both family law and vital statistics legislation, and, in Québec, the books on persons and on the family in the Civil Code) that assign legal parentage at birth, and determine who can be listed on a child’s birth certificate. While provincial legislatures have largely ignored the questions posed by lesbian motherhood, the courts have exhibited a tentative willingness to recognize lesbian motherhood, particularly at the point of family formation.

As a result, most provinces and territories now provide at least some method by which non-biological mothers can secure legal rights and responsibilities in relation to their children, though not always legal parentage. For example, in all but two provinces and territories, a non-biological mother can adopt the biological child of her partner without the biological mother losing her legal relationship to the child (a “second parent adoption”). In such circumstances the non-biological mother becomes a legal parent, and the donor, if he is known, has his...
parental rights severed. In every province but Québec, second-parent adoptions are currently the only way by which non-biological mothers can secure all of the rights and responsibilities of parenthood. However, they are not without limitations. They rely on the consent of the biological mother (and the biological father in the case of a known donor), involve a waiting period, usually require hiring a lawyer, and cost several thousand dollars to complete. The waiting period and the ease with which biological mothers and donors can withhold or withdraw consent leave non-biological mothers particularly vulnerable.  

Another significant limitation of second-parent adoptions is that they do not address legal parentage at birth. Rather, they require the non-biological mother to take some positive action after the birth of the child.

In addition to second-parent adoptions, and also as a result of litigation, a number of provinces allow two mothers to appear on the child’s birth certificate from birth. The “gender neutral birth certificate” is considered to be a significant breakthrough for lesbian mothers because, unlike second-parent adoption, it can be utilized at the time of the child’s birth. However, unlike an adoption, the gender neutral birth certificate does not secure legal parentage. Rather, it is presumptive proof of parentage only, and thus rebuttable. It can, therefore, be challenged by either the biological mother or a known donor. Furthermore, in Ontario and British Columbia, the gender neutral birth certificate can only be used if the child has been conceived using the sperm of an anonymous donor. Thus, while gender neutral birth certificates do provide some legal protection to non-biological mothers at the point of birth, they are limited in their effect as well as their applicability.

The final area in which lesbian mothers have made limited legal inroads through litigation is in relation to the recognition of multiple parent families. While most lesbian mothers and their donors wish to exclude donors from the status of legal parent, a small number choose to parent their children within a three or four-parent family. Unfortunately for these families, the law has traditionally limited parentage to two individuals. However, in a recent case initiated by two mothers and their donor, A.A. v. B.B., the Ontario Court of Appeal held that a child could

20. In the decision of K.G.T., supra note 17, the biological mother not only refused to consent to the non-biological mother adopting the child, but instead consented to her new partner adopting the child. Ultimately, the court held that the new partner could not adopt the child, but that the biological mother could also not be forced to consent to the adoption by the non-biological mother. This was despite the non-biological mother having raised the child from birth and having exercised liberal access since separation.

21. In all but two provinces (Québec and Manitoba), the availability of a gender neutral birth certificate has been the result of litigation. The provinces that permit two same-sex parents to appear on a child’s birth certificate from birth are the following: British Columbia (Gill, supra note 15); New Brunswick (A.A. v. New Brunswick (Department of family and Community Services), [2004] N.B.H.R.B.I.D. No. 4; Manitoba) (Vital Statistics Act, R.S.M. 1987, c. V60, C.C.S.M. c.V60, s. 3(6), as am. by S.M. 2002, c. 24, s. 54); Québec (art. 115 C.C.Q.); Ontario (Rutherford, supra note 15); and Alberta (Fraess v. Alberta (Minister of Justice), 2005 ABQB 889, 390 A.R. 280, 278 D.L.R. (4th) 187 [Fraess]).
have three legal parents—his two mothers and his donor father.\(^2\) While this case is the only decision of its kind and not applicable outside of Ontario, or perhaps even beyond the individual facts of the case, it suggests that in families in which three adults agree that they are all parents, the courts may be willing to give legal recognition to the arrangement. Like second-parent adoptions, however, the decision in A.A. does not address legal parentage at birth. Rather, it requires parents to initiate a legal process after the child is born (one that may ultimately be unsuccessful). In a similar vein, a number of provinces allow third parties to remain involved in a child’s life following an adoption through an “openness” agreement or order.\(^2\)

Although the introduction of openness agreements was designed to respond to traditional adoption scenarios, they can be utilized by lesbian and gay families in which a donor plays an ongoing role in the child’s life. Though the donor would not be a (third) legal parent, he would be entitled to ongoing access, provided that it is in the best interest of the child.

Given the significant, though limited, legal changes achieved via litigation, it is surprising that so few provinces have engaged in a legislative response to planned lesbian families. While several provinces have legislated with regard to parentage in cases of assisted conception within heterosexual families,\(^2\) the only province to do the same for lesbian families is Québec.\(^2\) Introduced in 2002 as part of a reform package designed to grant formal relationship status to lesbian and gay couples, Québec’s Civil Code includes a series of parental presumptions applicable at the time of the child’s birth to all individuals or couples who conceive using third-party gametes.\(^2\) While it is expected that most parents will voluntarily register as parents

\(^{22}\) 2007 ONCA 2, O.J. No. 2, 278 D.L.R. (4th) 519 [A.A.]. The interveners at the Court of Appeal level, the Alliance for Marriage and Family, sought to be added as a party to the case in order to seek leave to appeal the decision to the Supreme Court of Canada. The application was rejected on the basis that the Alliance did not have standing to be added as a party (Alliance for Marriage and Family v. A.A., 2007 SCC 40, [2007] 3 S.C.R. 124, 285 D.L.R. (4th) 255).

\(^{23}\) See e.g. Child and Family Services Act, R.S.O. 1990, c. C.11, s. 145(1); Adoption Act, R.S.B.C. 1996, c. 5, s. 59.

\(^{24}\) In Québec, Newfoundland (Children’s Law Act, R.S.N.L. 1990, c. C-13, s. 12), Alberta (Family Law Act, R.S.A., 2003, c. F-4.5, s. 13(2)) and the Yukon (Children’s Act, R.S.Y.T. 1986, c. 31, s. 13), the male partner of a woman inseminated with donor sperm is deemed to be the legal father of the child if he consented to the insemination.

\(^{25}\) Arts. 538–542 C.C.Q. The Québec provisions apply to both same-sex and opposite-sex couples, as well as single parents. See also Frass, supra note 21. In that case, a successful challenge to Alberta’s Family Law Act led to changes in the parentage presumption applicable in instances of assisted reproduction. The presumption that formerly applied extended only to the male partner of the birth mother. It now extends to the female partner of a birth mother. However, the legislation itself has not yet been amended.

\(^{26}\) Arts. 538–542 C.C.Q. (these new parentage provisions were introduced alongside Québec’s civil union laws which apply to both heterosexual and same-sex couples). For a more detailed discussion of the amendments, see Leckey, supra note 9.
upon their child's birth, in situations where voluntary registration has not occurred (e.g. where the parties are in conflict), the presumptions apply. Paragraph 1 of article 538.3 of the Civil Code states: "If a child is born of a parental project involving assisted procreation between married or civil union spouses during the marriage or the civil union or within 300 days after its dissolution or annulment, the spouse of the woman who gave birth to the child is presumed to be the child's other parent." 27 This article extends traditional paternity presumptions to married or civil union spouses who enter into a "parental project" using assisted insemination. 28 The term "parental project" is defined in article 538: "A parental project involving assisted procreation exists from the moment a person alone decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project." 29 Thus, a parental project can be entered into by a couple or single person, and the gender neutral terminology indicates that the provision applies to both same-sex and opposite-sex couples. Finally, article 538.2, paragraph 1 states that "[t]he contribution of genetic material for the purposes of a third-party parental project does not create any bond of filiation between the contributor and the child born of the parental project." 30 Article 538.2 appears to exclude sperm donors from being awarded parental status if they are not parties to the "parental project." Thus, in cases of assisted insemination involving a "parental project," a same-sex couple or single lesbian woman is treated in the same manner as a heterosexual couple or single woman who conceives using the same method. However, Québec remains the only province in which the assignment of legal parentage is addressed in this way.

While planned lesbian families in Canada enjoy a reasonable level of legal recognition when compared to other jurisdictions, the existing framework is far from complete. It contains significant gaps that leave lesbian families, particularly non-biological mothers, with inadequate legal protection. Law reform is clearly needed. In the next section, I introduce the study upon which the subsequent law reform discussion and proposal is based.

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27. Art. 538.3, para. 1 C.C.Q.
28. Art. 538.2, para. 2 C.C.Q. states: "However, if the genetic material is provided by way of sexual intercourse, a bond of filiation may be established, in the year following the birth, between the contributor and the child."
29. Art. 538 C.C.Q.
30. Art. 538.2, para. 1 C.C.Q.
III. RESEARCHING LESBIAN MOTHERS: THE STUDY

The difficulties inherent in obtaining representative samples of marginalized groups, such as lesbian women, have been well documented. The stigmatization and relative secrecy that continue to characterize lesbian existence makes it very difficult to select participants through any kind of random modeling. As a result, most research with lesbian women relies on “convenience sampling,” whereby participants are found through advertising in written materials directed at lesbian readers, in physical locations frequented by lesbian women, or on electronic mailing lists to which lesbian women subscribe. While several recruitment methods were employed in this study, electronic mailing lists for lesbian and gay parents living in British Columbia and Alberta ultimately produced the bulk of the study’s participants.

Though convenience sampling is often the only method by which to build a sizeable group of participants from within a marginalized community, it can produce highly self-selected samples of friends or networks within the particular community in question. In an effort to overcome some of these deficiencies, study participants were gathered from a range of diverse backgrounds and experiences. Diversity of family configuration was especially important for a number of reasons. First, the vast majority of research on planned lesbian parenthood has deliberately focused on lesbian nuclear families, usually for the purposes of comparing lesbian families with heterosexual families. Such a starting point inevitably prioritizes the nuclear family, and may imply that families that take another form are somehow inadequate or illegitimate. By seeking lesbian mothers who parented outside of the nuclear model, I sought to displace the nuclear family as the reference point from which all discussion flows. Second, by including participants who parented within a diverse array of family configurations, I hoped to draw attention to new and innovative approaches to parenthood that are easily overlooked or even elided in more narrow studies. Finally, diverse family configurations were sought because of their remarkable absence from the mainstream legal debate over parental recognition.

32. In accordance with the University of British Columbia’s ethics requirements, all participants signed a consent form prior to the interview which gave me, inter alia, permission to use the study findings for my Ph.D. dissertation and publication in academic journals. Participants were also guaranteed anonymity. Pseudonyms have been used throughout this article.
34. The lesbian “nuclear family” is defined here as an intact two-mother family. The mothers in these families may have conceived using the sperm of a known donor but he is not included within their family structure.
Despite my original intention to include gay fathers and donors in the study, as significant stakeholders in the debate about the legal recognition of lesbian parents, they were ultimately omitted from the sample. Because many lesbians conceive using anonymous donor sperm, I had not expected to locate as many gay donors and fathers as lesbian mothers. However, the failure to recruit sufficient numbers to constitute a sample was disappointing. In recruiting the men, all of the same techniques I had used with the mothers were utilized. I also contacted two support groups for gay fathers, but both informed me that their members were men who had become parents in the context of a heterosexual relationship. From all of my advertising, only three responses were received.

It is difficult to know exactly why the response rate from fathers and donors was so low. Perhaps because many donors do not see themselves as “parents” they may have been poorly represented on the various parenting electronic mailing lists used to recruit participants. Yet the study was advertised within the gay community more generally. It is also possible that donors may not have been sufficiently invested in parenting to feel that the study was relevant to them. As my own data suggests, most donors are “occasional parents” at best, and may not have felt that their stories were particularly important. Finally, gay donors and fathers may have felt satisfied with their existing parenting arrangements and therefore had no concerns about reforming the current legal framework.

The final group of “stakeholders” left out of the study was children. Interviewing children poses a number of ethical issues that are difficult to overcome, such as the power imbalance between child and researcher. Further complicating this particular topic of research is the fact that the vast majority of children being raised within planned lesbian families are still quite young. In fact, most of the children of the women I interviewed were younger than five. It is difficult to know what children of that age could contribute to the debate. Ultimately, because there is still so little research on lesbian parents, I felt that the children of lesbian mothers could be left to future studies.

The final decision with regard to sampling was to determine from which geographical regions participants would be drawn. Ultimately, interviews were conducted with participants who lived within a 200-kilometre radius of Vancouver, Calgary or Edmonton. Vancouver, a city of approximately two million people with a thriving and visible lesbian and gay community, seemed a logical choice. Calgary and Edmonton were chosen partly because they varied in size both from each other and from Vancouver. Their lesbian and gay communities were thus much smaller and far less visible than Vancouver’s. Further, they are located within Alberta, a socially conservative province, often perceived as being more hostile to lesbians and gay men than British Columbia. Gathering participants from such communities was expected to increase the range of configurations and understandings of family represented within the study. However, few distinct trends emerged across the provinces.

Interviews were conducted between February and October 2005. Twenty-four were conducted in the Vancouver area, seven in the Calgary area, and five in
the Edmonton area. Thirty-six families and forty-nine mothers are represented within the sample. Twenty-two of the interviews were conducted with one mother alone, though most were members of a couple, while fourteen were conducted with both mothers together.

The interview schedule took a semi-structured form and was designed to address four key research questions, three of which are addressed in this article. The first relevant question explored how parenthood is understood and defined within the lesbian family, focusing in particular on parental definitions in the context of the lesbian relationship itself. The second question focused on the role of sperm donors within the lesbian family. The mothers, whether they had conceived using the sperm of anonymous or known donors, were asked how they understood the role of donors in lesbian families and in what circumstances (if any) they might understand a donor to be a “parent.” The final question focused explicitly on law reform: if the mothers were able to create their own model for the assignment of legal parentage at birth, what would they propose? To initiate the law reform conversation, the mothers were asked to respond to three loosely defined recognition models gathered from the international literature on same-sex parenting as well as existing legislative regimes.

IV. DEFINING PARENTHOOD WITH THE LESBIAN FAMILY: THE ROLE OF INTENTION AND CAREGIVING

A significant portion of each interview was spent discussing how the mothers defined parenthood within their families. Not surprisingly, given the diversity of family arrangements amongst the mothers I interviewed, most of them felt that the term “parent” should be defined broadly so as to give the concept the flexibility needed to capture the vast array of possible configurations. This usually involved expanding the definition beyond the existing legal and biological framework. Ultimately, the mothers favoured a definition of “parent” grounded in both intention and practice. Parents were the people who intended to parent a child and, once the child was born, performed that intention through caregiving. Thus, parenting was understood, as

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Edwards has argued in the broader reproductive technology context, more through relationship—socially realized caregiving ties—and less through relatedness, the abstract connections between people who are thought of as kin because of a biological connection. In fact, the focus on caregiving (or “functional family”)—that rights should extend to lesbian mothers because of what they do within their families, and not because of any prescribed status or legal formalities they have undertaken—has been the basis for many of the law reform proposals designed to recognize the legal status of non-biological lesbian mothers.

Despite the mothers’ clear belief that biological connection did not make one a parent without an intention to parent and a subsequent relationship of care, the symbolism of biological relatedness was always present even as it was displaced. The biological asymmetry of lesbian families meant that the meaning afforded to biology needed to be determined within each familial unit. First, mothers had to decide how they would understand the role of biology vis-à-vis each other. If they chose to coparent, how would they “tie in” the non-biological mother so that she felt secure in her role in the face of norms to the contrary? Second, what meaning, if any, would be given to the genetic tie of the donor?

A. Understanding Parenthood Between Lesbian Mothers

While biological mothers were assumed to be mothers in all of the families (though this was not always as straightforward as it seemed), the status of the non-biological mother was something that needed to be negotiated. For the vast majority of the couples the negotiations were brief. It was their intention to be co-parents and, recognizing the “unfair” advantage the biological mother would necessarily have, they set about making sure that the non-biological mother was somehow “tied in” to the role


38. See e.g. Paula L. Ettelbrick, “Who is a Parent?: The Need to Develop a Lesbian Conscious Family Law” (1993) 10 N.Y.L. Sch. J. Hum. Rts. 513 at 548; Nancy D. Polikoff, “This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families” (1990) 78 Geo. L.J. 459 (Polikoff, “Two Mothers”). Note that the focus on caregiving has been recently criticized by Millbank, “Functional Family”, supra note 36. She suggests that functional family arguments have not been successful in the lesbian family context. Millbank argues that a focus on caregiving implies that non-biological lesbian mothers must “earn” their parental status, while the caregiving practices of non-biological heterosexual fathers are not scrutinized in the same way. She also suggests that when it comes to intra-lesbian disputes or disputes with donors, caregiving is often usurped by the rhetoric of biology. Millbank prefers a wholly intention-based model that produces “automatic, universal and stable” legal recognition for non-biological lesbian mothers.

39. For a discussion of the power differentials that often exist within lesbian parenting relationships due to the legal and social advantage bestowed upon the biological mother see Deirdre M. Bowen, “The Parent Trap: Differential Familial Power in Same-Sex Families” (2008) 15 Wm. & Mary J. Women & L. 1.
The various mechanisms used to “tie in” non-biological mothers were both legal (completing a second parent adoption or giving the child the non-biological mother’s surname) and social (non-biological mothers participating in the pre-conception process and ultimately as equal caregivers). Thus, becoming a parent was understood by the mothers as “a social process, or rather, the result of social practice.” In coming to this conclusion, the mothers did as much to expose the legally and socially constructed nature of biological parenting as they did to validate social parenting. Because parents were understood to be the people who intended to parent and subsequently did the actual work of parenting, both non-biological and biological mothers were accorded parental status on the basis of their pre-conception intention and post-birth involvement in the daily care of their children. As Sylvie, the non-biological mother of two daughters conceived with a known donor, explained:

> I like to use a term here which, I call myself the front line parent. A parent is a front line parent, is the parent who commits, who is available from the get-go to provide everything that is needed in the healthy raising of a child. I’m a front line parent. That means that I’m the parent who’s there 24 hours. I’m there for the emergencies. I’m there for the heartache and the emotional, whatever. You know, to bear it all. I’m the one who has committed to doing that work and that has little to do with biology. Really little.

For Sylvie, her status as a mother derived not from any biological connection to her children, but rather from her commitment from the “get-go” to the practice of front line caregiving.

Some of the mothers drew on their own childhood experiences to further explain why they were so comfortable understanding parenting through a combination of intention and caregiving practice, rather than biology. Callie and Sam, a Vancouver couple who had each given birth to a child, were both raised by non-biological fathers and enjoyed close relationships with them. Neither woman had a relationship with her biological father. Callie could not even remember how to spell her biological father’s name. In both instances, the women considered their non-biological fathers to be their “real” fathers because they were the ones who had cared for them. As Callie explained, “Put in the work you get the label. That’s about it.” Michaela, the biological mother of an infant son, also drew on her childhood abandonment by her biological father to explain why she understood the title “parent” as

40. See Maureen Sullivan, *The Family of Woman: Lesbian Mothers, Their Children, and the Undoing of Gender* (Berkeley: University of California Press, 2004) at 59–61. The notion of “tying in” the non-biological mother comes from Maureen Sullivan’s study of lesbian mothers in San Francisco. The mechanisms that some of the mothers used to “tie in” the non-biological mother were giving the child the non-biological mother’s surname, securing a second-parent adoption, putting both mother’s names on the birth certificate, and providing for the total and equal involvement of non-biological mothers from the very beginning.

something that needed to be earned through “work”: “My biological father took off, so it’s like, you know, when he came back into our lives we were much older. And we’re like well, you know you’re like biological Bob. Like you’re not really, you got a lot of work to do before you’re gonna be called Dad.” Like Callie and Sam, Michaela felt that her father’s biological relationship was meaningless unless it was accompanied by the work of parenting.

In the same way that the non-biological mother was constructed through the social practice of caregiving, some of the mothers felt, or were surprised to find, that parenting by the biological mother was similarly constructed. Mary Jane and Shannon came to this conclusion only after Mary Jane, the biological mother, discovered that efforts to “tie in” non-biological mother Shannon had been so successful that Mary Jane did not feel like a mother herself. When their daughter was born, Mary Jane and Shannon were so conscious of ensuring that Shannon built a relationship with the child that Shannon was assigned almost all of the daily tasks of parenting. At one point Mary Jane was doing little beyond breast feeding. This situation left Mary Jane feeling that her “obvious” biological tie to her daughter lost its meaning when it was no longer accompanied by a caregiving relationship. As she explained: “It never occurred to me that I would feel insecure about my own mothering relationship to the baby. It never occurred to me that would happen and it did. Which was a total shock to me. You know, because I, I do, I guess sometimes in my head think, well, I have this biological connection to her, that’s so [pause] obvious.”

For Veronique, the biological mother of a 10-year-old boy, the constructed nature of biological parenting was something she had recognized from the outset. Although she was a biological mother, she understood her status as a parent entirely through the activity of care. As she conceived it, the biological relationship she had with her son was only given meaning because she also had a social relationship with him. As she explained: “For me, the biological tie between Nathan and I is obviously important. But that said, I mean I really do think parenting is social. I mean there is a significance that I am Nathan’s social parent as well. I think those two things have to come together.”

Thus, while the tie between biological mothers and their children was recognized by the mothers as conferring social privilege, failure to activate an existing biological tie may result in the individual losing, or failing to acquire, the title of parent. At the same time, a practical commitment to parenting, evidenced through initial intention and ultimately the performance of care, meant that an individual without a biological connection to a child could still be designated a parent. That care should play such a significant role in the assignment of parentage within lesbian families is perhaps not surprising. In contrast to their heterosexual counterparts, lesbian mothers are much more likely to share care evenly between them. For example, non-biological mothers are much more likely to take time off work, engage in part-time work, and share equally in the household and childcare labour.
than fathers are. Thus, while many of the mothers focused on the role of intentionality in the assignment of legal parentage, their commitment to care as the performative element of that intention remained a key component of their analysis.

When it came to the question of how sperm donors might be understood within the lesbian family, a new range of issues emerged. However, the commitment by the mothers to both intention and caregiving as central features of parenting was consistently maintained.

B. Sperm Donors and Parental Status

The meaning to be attributed to the donor relationship in the context of the lesbian family is perhaps the most difficult issue lesbian mothers face, both because of the absence of any legal or social guidance on the issue, as well as the strong societal pressure to provide one’s child with a “father.” When lesbian women decide to have a child, a decision must first be made about whether they will choose an anonymous donor, an anonymous donor with identity release (if available), or a known donor. If a known donor is chosen, the mothers must also determine what meaning he will have and what role he will play, if any, in the child’s life. Will he be a symbolic father, an uncle-like figure, or “Dad”? How donors are understood also presents a number of legal conundrums for lesbian mothers. Mothers must decide whether they will make a legal contract with the donor, whether any provision for access will be included within it, whether the donor’s name will appear on the child’s birth certificate, and whether the donor will be asked to consent to a second-parent adoption by the non-biological mother.

While the mothers obviously play a significant role in determining the meaning attributed to the donor relationship within their family, the donor’s role must also be understood in the context of the current and widespread moral panic about the prospect of “fatherless families.” In fact, debates about lesbian use of donor insemination are part of a much larger debate about the meaning of fatherhood in contemporary society. Father absence has in recent years been constructed, especially by


43. Identity release, or “open,” donors agree to have identifying information revealed to any child conceived via their donations once the child reaches the age of eighteen. Identity release donors are available in Canada, though they were fairly rare during the time period within which most of the mothers I interviewed conceived.

44. For an overview of the literature on “fatherless families” see generally David Blankenhorn, Fatherless America: Confronting Our Most Urgent Social Problem (New York: BasicBooks, 1995); David Popenoe, Life Without Father: Compelling new evidence that fatherhood and marriage are indispensable for the good of children and society (New York: Martin Kessler Books, 1996); Robert Endelman, No Father (New York: Psyche Press, 1997).
fathers’ rights activists, as unacceptable because of the perceived unique contributions fathers make to children’s lives as gendered caregivers, disciplinarians and economic providers. Drawing a connection between these “unique” contributions and outcomes for children, fathers’ rights activists have linked the lack of a father figure with lax discipline, criminal behaviour, teenage pregnancy, delinquency, youth suicide, poverty and unemployment. The solution, as the fathers’ rights movement sees it, is to re-instate the father in his rightful place as head of the (preferably married) family. In fact, fathers have come to occupy an almost mythical status in society, capable of alleviating even the most complex social problems.

The “father-as-antidote” rhetoric has, not surprisingly, been absorbed into family law, creating an environment in which it has become very difficult for a mother to preclude father/child access except in the most egregious circumstances. In fact, research has found that maximum father/child contact is increasingly understood by judges, lawyers and politicians to be in a child’s best interests. This position will sometimes prevail even in situations of domestic violence or child abuse. Given the enormous social value judges and lawyers attach to the father/child relationship, a mother

45. While much of the literature relating to the connection between father absence and social problems comes from the United States, it is frequently cited by Canadian fathers’ rights groups to support their views on post-separation parenting. For example, Heidi Nabert of the National Shared Parenting Association stated in the Association’s submission to Canada’s Special Joint Committee on Child Custody and Access that "Ifstatistical information backs up the high cost of fatherlessness or father absence. For girls, never feeling worthy of love from a man, it's teenage pregnancies.... For boys, it's not knowing how to be a man or how to interact with women. Often violence masks their anger in their father’s absence" (Canada, Special Joint Committee on Child Custody and Access, Proceedings of the Special Joint Committee on Child Custody and Access (Ottawa: Public Works and Government Services, 1998), online: Parliamentary Joint Committee


48. It is often assumed that continued father/child access will not only benefit the child psychologically, but that it will also increase the father’s willingness to provide economic support. Research from the U.S. suggests that the latter assumption is not in fact correct. See Judith S. Wallerstein, “Children of Divorce: A Society in Search of Policy” in Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman, eds., All Our Families: New Policies for a New Century (New York: Oxford University Press, 2003) 66 at 68.

who frustrates access or suggests that it might be damaging to a child is easily demo-
nized. 50 In fact, with the exception of situations where there is clear evidence of a fa-
ther's abusive behaviour towards the child, mothers who limit access are invariably
described as putting their own needs ahead of those of their children. 51

The increasing emphasis on the importance of (biological) fathers in children's
lives has arguably created an environment hostile to women who choose to parent in
the absence of men. While most legal and social condemnation of these women has
fallen on the shoulders of single heterosexual mothers, lesbian mothers are also sub-
ject to these trends. For example, while courts have, in certain circumstances,
extended legal recognition to lesbian families with children, they have flatly refused
to exclude a known donor from a lesbian family if it means the child will not have a
"father." 52 Children's rights arguments have also been drawn upon to justify intrusion
into the lesbian family. Often presented as a child's "right to know" his or her biolog-
ical origins, children's rights rhetoric is typically used by the courts to "find fathers"
for the children of lesbian mothers. 53 Heterosexual couples, on the other hand, are
rarely confronted with such claims. Because heterosexuals rarely use known donors
and are typically able to provide a "father" to their donor-conceived children, chil-
dren's rights arguments are rarely used to justify legal intrusion upon heterosexual
family autonomy.

Given the current political discourse around fatherhood, the mothers I inter-
viewed felt quite vulnerable to the unplanned participation of known donors in their
families. While they rarely rejected the idea of a "father," whether active, symbolic, or
semitic, they feared that the symbolic weight attached to fatherhood would always
prevail over their own conceptions of what it meant to be a parent. In particular, they
suggested that neither legal decision-makers nor wider society were likely to agree
with them that parental status was something that should be conferred only in the
context of an intention to parent and a subsequent caregiving relationship.

Despite the legal vulnerability associated with having a known donor, 12 of the
36 families I interviewed chose to pursue that option. In all of the 12 families, the
nature of the relationship between the donor and child was determined by the par-
ties prior to conception, pointing again to the significance of intention. In all but one
case, a written agreement was signed.

51. Rhoades, "No-Contact Mother", supra note 47.
52. See Re Patrick, 2002] Fam CA 193, 28 Fam R 579 at 653 (Fam. Ct. Austl.) [Re Patrick]; Thomas S. v. RobinY,
599 N.Y.S.2d 177 (Fam. Ct. 1993) [Thomas S.] For a discussion of these cases see: Fiona Kelly, "Nuclear
Norms or Fluid Families? Incorporating Lesbian and Gay Parents and their Children into Canadian Family
Law" (2004) 21 Can. J. Fam. L. 133; Katherine Arrup & Susan Boyd, "Familial Disputes? Sperm Donors,
Lesbian Mothers, and Legal Parenthood" in Didi Herman & Carl Stychin, eds., Legal Inversions: Lesbians, Gay
53. See Re Patrick, ibid. at 653; Thomas S., ibid.
In the 12 families who chose to use known donors the mothers understood the identity of their donors in one of three ways. 54 Seven of the families saw their donor as a “flexibly defined male figure” with whom their child(ren) had a relationship, but to whom no parental status was imputed. While some of these men were referred to as the child’s “father,” others were known by their first name. In this first category, the men were regular visitors in the child’s life, though some were far more involved than others. The second category was made up of two families who saw their donors as “symbolic fathers.” A symbolic father is “someone the family can hang the label ‘dad’ on—an embodied human referent that the child may identify as his or her progenitor.” 55 In other words, it is “a purely sign-driven, semiotic arrangement. . . .” 56 Though their identities were known to their biological children, donors who fell into this category had almost no relationship with their progeny. The final category was made up of two families whose donors were active, practicing parents with all of the rights and responsibilities implied by that status, though without legal custody. However, in both of these families the mothers were still considered to be the primary parents.

The two families with donors who were considered to be “parents” understood the men in this way because of the significant caregiving roles they played in their children’s lives, which was agreed upon prior to conception. In both instances, the men and their male partners provided overnight care for the children on a weekly basis, took part in at least some of the day-to-day caregiving and were considered by the children to be their fathers. Thus, in these families, the biological and social elements of parenting came together to make these men “parents.” The only aspect of parental status the men were missing was legal custody, which remained the sole domain of the mothers. In both of these families, no legal arrangements were made, either between the mothers and donor or between the mothers themselves, leaving the donor’s ability to claim custody unrestricted.

The remaining families—those who saw their donors as “symbolic fathers” or significant male figures in their children’s lives—were faced with a complex definitional process, primarily because such a variety of degrees of donor involvement were available. Those who saw their donors as “symbolic fathers” had perhaps the easiest decision-making process. These mothers never intended their donors to be anything more than peripheral figures in their children’s lives, available for consultation only in the event that a child asked. It is thus not surprising that these men were referred to as the child’s “donor” and had little to no involvement in the child’s life.

54. These three categories mirrored those identified by Maureen Sullivan in her study of lesbian mothers living in the San Francisco Bay Area (Sullivan, supra note 40 at 49–50).
55. Ibid. at 50.
56. Ibid.
Mothers who saw their donors as significant figures in their children's lives had a more complex set of issues to address. The most common concern of the mothers in this group was whether they would choose a "donor," "father" or "uncle-like" identity for their donor and how this might work in practice. This decision was far more complex than it might sound, particularly given what the mothers often described as the "utter failure" of language to capture the identities created.

The one belief all of these mothers shared was that a biological connection alone did not make a donor a parent. Thus, no donor could simply by virtue of his genetic contribution claim the identity "parent." Such a title required an additional, previously agreed upon caregiving relationship—something that a number of the mothers explained succinctly. As Rochelle noted, "Genetics is genetics and parenting is parenting. They're different. Genetics does not make one a parent." Michaela argued in a similar fashion that "an eighth of a teaspoon of biological matter is not a parent."

While none of the donors who were seen as "significant figures" in their children's lives were understood as parents, many of them were given the title "father." In fact, one of the concepts the mothers took great pains to explain to me was that a donor could be a father without being a parent. Antonia, whose donor lived with his male partner and visited his two sons once or twice a year from another province, was understood to be a father (as was his partner), but neither man did enough caregiving to be considered a parent. As Antonia explained:

I think you can be a dad but not a parent. I think that's maybe kind of the area where it's a bit grey. I mean one of their [her sons'] dads came out for spring break and he and I and the kids went skiing together. And the whole time he was there he was a dad and a parent, but that was a week out of the whole year. You know he's not there at three in the morning when they're sick and I think it brings up that whole question of, you know, who's really doing the parenting? Can you parent one week a year? Or two weeks a year?

In a slightly different category were those mothers who acknowledged the biological tie between donor and child, but did not consider their donors to be either fathers or parents. In trying to describe their identities, they sometimes referred to them as "like uncles" or "somewhere between a donor and a father." Without the language to truly describe the relationships these men had to the children, some of the mothers fell back on the term "father." However, the terminology they chose was seen to have important ramifications, particularly outside of the home, causing many of the mothers to switch terms depending on the situation. Carey, for example, struggled with what to call her donor, who saw his son once a fortnight, as none of "donor," "father" or "parent" really captured his role. She also wanted to avoid people outside of the family thinking that he had more caregiving responsibility than he actually had. Ultimately, she chose her terminology on the basis of the situation she was in, though it is clear from the pauses and stuttering in the following discussion that she found this a difficult issue to resolve. As she explained:

CAREY: It [the term she uses] depends on who I'm talking to. [sigh] I always define Nora and I as [his] parents and sometimes um, I will include Roger [donor], depending on who
I'm talking to. [pause] But, I don't consider, he's not a hundred percent parent. He's very much a part-time parent. And I don't think he even completely gets what it is like to be a full-time parent. [pause] So a lot of times, I don't consider him to be a parent.

INTERVIEWER: [pause] You said that in some circumstances you would refer to him as a "parent." Which people would you be talking to when you make that distinction?

CAREY: Um, [pause] I guess people who are kind of already familiar with the situation. I'll talk about [my son's] "dad." Whereas other times I'll say [my son's] "donor." Just, [pause] it's, [pause] it is, [pause] 'cause neither is completely accurate. He's really in between.

INTERVIEWER: When you said you would use "donor" when you're speaking to people who maybe don't understand the situation, is that out of a fear that Nora will somehow be negated?

CAREY: No, no, no. Not at all. Uh, because I don't [pause] I don't want them to think that [my son] has three full-time caregivers when really it's Nora and I, we're really doing it. To professionals Nora and I are the parents. I don't, I don't bring his dad into it at all. Because I don't want people to start thinking that he has responsibilities that he doesn't have.

Carey's reference to the inability of language to fully capture the nature of the donor's relationship to the child was a common concern. In many instances, the mothers complained that language simply could not grasp the complexity of the relationship between donor and child. Paternal terminology was often perceived by the mothers as carrying a great deal of "social power," especially in light of the fathers' rights movement and the ongoing legal vulnerability of non-biological mothers. For example, in describing the role of her donor in the life of her seven year-old son, Jasmine noted how difficult it was to assert their lesbian family in the face of the enormous symbolic meaning that attached to the designation "father." As she explained:

JASMINE: Chris [her son] and [his donor] do see each other and Chris knows him as his father. Um, but we don't define him as part of our family. Chris is starting to think maybe he might be sort of part of the family, but in a distant sort of uncle-like way or something. But not immediate family. We'll see, we maintain to both of them that whatever relationship they develop we'll support. Um, it hasn't been easy.

INTERVIEWER: What's been difficult?

JASMINE: Um, [pause] the words are wrong. Like to call him "father," and yet he hasn't been there at all, in any way. And he can show up and take Chris out to McDonalds and be a wonderful hero once every few weeks. Uh, I guess it is sort of the plight of a lot of single moms. That's been difficult, especially in the beginning where Bianca doesn't have the biology and it was really important to make sure that she's the one acknowledged and not him. We had, we were really cautious to not include him. Today there's no more issues around who's the parents, but [pause] you know it's more in public. As far as Chris goes I mean he knows that Bianca and I are his parents. But if Neil [the donor] comes to something like one of his performances or something and he introduces him as "father," um, they will defer to him. And that kind of stuff. 'Cause we don't have the right words for it. Yes, he's the biological father and yes he may be important in Chris' life, but [sigh] don't defer to him.
In this discussion, Jasmine captures the difficulties of negotiating donor identity in the public sphere. Despite it being clear to Jasmine's son who his parents are, in public the mere presence of her son's "father" results in outsiders deferring to him. This phenomenon says as much about the patriarchal role fathers continue to play within the heterosexual family structure as it does about society's inability to acknowledge alternative families. Working within a heterosexual paradigm in which the contribution of sperm equals "father" and being a father means having authority, outsiders defer to Jasmine’s donor without thought. This scenario highlights an issue that a number of the mothers mentioned: the ease with which men are awarded the title "father" in the heterosexual domain. For example, Helen commented that "for many heterosexual fathers [sperm donation] is the largest part of their contribution. Um, they’ve never had to think about whether that means they’re really fathers or not.” Helen seems to be suggesting that because the semiotic and biological aspects of fatherhood are fused (and the social aspect largely ignored) in the heterosexual context, there is a profound lack of thought about what makes a man a “father” beyond the contribution of sperm. This is perhaps at the heart of the problem lesbian mothers have in asserting their own definitions. Lesbian mothers do not necessarily extend fatherhood to men who might traditionally be understood as fathers in the heterosexual context because they do think about what makes a man a father or a parent—and they have largely come to the conclusion that the two most important features are intention and participation in caregiving.

C. Should Parenting Be Limited to Two People?

Given their generally broad definition of parenthood, it is not surprising that only a small number of lesbian mothers felt that parenting should be limited to two individuals. This position was frequently taken even when the mother’s own family resembled the nuclear model and despite the vulnerability some mothers experienced with regard to donor intervention. In fact, over three quarters of the mothers supported the idea of a child having three or more parents if that was what the various parties had agreed to prior to conception. The mothers’ support for the recognition of multiple parents tended to derive from the fact that for some families this was already the reality of their lives. Multiple parent recognition was therefore the only model “truly descriptive of [their] circumstances.” In most instances the mothers were referring to families that included two mothers and an actively involved “donor dad” (and maybe his partner), though a number of them also mentioned blended families, Aboriginal families and the extended family networks of certain immigrant groups within Canada.

In advocating for the recognition of three or four-parent families, Sylvie focused on the importance of giving recognition to all of the individuals who were “taking responsibility” for a child, however many or few. Drawing on her earlier discussion of the concept of the “front line parent,” Sylvie explained her commitment to multiple (as well as single) parent recognition.
I think that again, if we come back to my definition of the front, who the front line parent is. That could be one, two, three, it depends. There are circumstances where the front line parents are a handful of people and that works very well for everybody. And in that context full legal rights should be accorded to each and every one of those people. The definition of the nuclear family right now does not serve anyone and within that definition it is very well ingrained that it can only be two. Even one is considered quite outlandish. You know, so I think we need to scrap that altogether.

Sylvie, who had a largely uninvolved known donor, went on to express some frustration with not being able to invite her donor to play a more significant parenting role. If the law was open to a multiple parent configuration that did not undermine her role as a non-biological mother, Sylvie and her partner may have chosen such an arrangement. However, Sylvie’s legal vulnerability as a non-biological mother, coupled with the legal and social power she and her partner felt the donor had as the biological father, forced them to be exclusionary in their parenting. As she explained:

We’ve organized ourselves in this way mostly because the way the law currently is and because we feel that we have to do this to protect ourselves and our children. To be exclusionary. Otherwise we would be quite open to, to the idea of having the sperm donor thought of as a “parent.” It’s just not wise legally for us. It’s a big mistake to ever use that word.

Sylvie’s comments help explain the apparent contradiction between many of the mothers’ reluctance to share parenting with a third parent and their overwhelming support for multiple parent families. Sylvie seems to suggest that if the law gave them more security, lesbian mothers might be more open to donor involvement.

A second reason for extending parentage beyond the dyadic model came from Lisa, who suggested that recognizing multiple parents might be beneficial because it would make “more visible the invisible work of parenting.” Lisa argued that if more than two parents could be recognized it would challenge the assumption that two parents should be able to provide everything that is necessary to raise a child. It might also highlight how many parents actually find it difficult to achieve this “norm” and how isolating it can be. By recognizing that a three or four-parent family might offer a more balanced family life, multiple parent recognition would make “visible the real work of raising a child.” Lisa also suggested that the recognition of multiple parents might shift what she saw as the patriarchal nature of the nuclear family. As she explained:

It seems to me that recognizing that third person could just shift the, the patriarchal duality of it. Like there’s one head and one not, a subordinate. So that might work in a

57. The possibility of extending legal recognition to a single mother family as a complete family unit (that is, to the exclusion of a donor) will be addressed in the law reform section, below.
kind of subversive way. And I think it would be good for the kids as well, just teaching
them about different possibilities. And then that's a valid option and it just kind of
expands what's possible. Takes us out of a kind of stereotypical expectation.

Not all of the mothers had such a nuanced political stance towards non-dyadic par-
enting as Sylvie and Lisa, but the vast majority believed that the two-parent model
lacked sufficient flexibility. As a result, they favoured the possibility of multiple par-
ents, provided that their own role as mothers was legally protected.

While most of the mothers supported the abandonment of the two-parent
model, there was some concern about how a more fluid model might work in the
context of law. A number of the mothers regarded its legal application as “really
complicated.” Most frequently they noted the increased potential for conflict once
three or four adults were legally involved in a child’s life. As Delia, who preferred
the two-parent model, argued, “it’s hard enough to get two people to agree on par-
enting. You throw in a third person, oh!” Others noted the additional challenges of
day-to-day decision making when multiple parties had a legal right to have their
views taken into account. As Michaela put it, making sure everyone has an equal say
in parenting decisions could “just get out of hand.” There was also some fear
amongst mothers, including several who supported abandoning the two-parent
model, that permitting the legal recognition of multiple parents might result in
donors being given rights in circumstances where they were not actually parenting.
Emily, for example, endorsed the application of the multiple-parent model in situ-
ations where all of the adults were actively involved in parenting. However, she
expressed considerable concern about the potential for donors who were not actu-
ally caring for a child to assert their rights to be recognized as legal parents on the
basis of biology alone. She feared that if such a situation were to arise, the donor
would succeed in his claim. As she explained:

I think it should be flexible but if it came to the court system and [the donor] says, “Hey,
I could be a parent. I’m here, why are you not letting me be?” That would set up a sys-
tem where he’d, that would be a very good fight in court. Where in fact he’d win. He’d
win, he’d get that guaranteed, hands down. So, yes I agree it should be flexible. Do I still
worry about that? Absolutely. [chuckle] ‘Cause I could see that being the avenue for our
justice system to allow for the donor to become a parent. A father. I have reservations
about that.

Emily was not alone in worrying about how a multiple-parent model might apply
with regard to a known donor who had only limited involvement in the child’s life.
As discussed above, a known donor was understood by the mothers to be a parent
only when he played a significant (and intended) caregiving role. Thus, while all of
the mothers who supported multiple parent recognition saw it as the perfect way by
which to recognize a three or four-parent family in which the donor (and possibly his
partner) were genuinely parenting, if such a model were to be implemented, various
safeguards would need to be included.

A possible solution to this dilemma was the creation of a secondary legal cat-
egory, less than a parent, which recognized the non-parental relationships some
known donors developed with their children. Creating such a category would potentially reduce the tendency to see these individuals as parents, and thus create more security for the lesbian family. Support for this concept was widespread amongst the mothers, many of whom treated the relationship an involved donor might develop with a child as non-parental but worthy of some kind of legal recognition. In fact, several of the mothers invoked the best interests of the child principle to explain their commitment to maintaining the relationships their children developed with their donors as well as with other significant adults. It was thus not surprising that in grappling with the issue of how the law might respond to an involved donor (while simultaneously protecting the lesbian family from unwarranted intrusions), almost all of the mothers indicated that they would support the creation of a new legal category to capture the familial contributions of secondary figures who might have regular access with the child, but who were not parenting. The mothers struggled with how to refer to these individuals. Some utilized already existing language by calling them “guardians” or individuals with “extended family status.” Others simply called them “secondary” figures in the child’s life.

A number of the mothers grappled directly with how these “secondary figures” might be understood. As Mischa explained:

Well if I were going to design a program, I think I would say that that you should be able to opt for whatever you choose. So I don’t think you should say there can only be two primary [parents], but maybe there could be categories. There could be primary caregivers, two or more, and there could be secondary or whatever you want to call them. Additional. And so for instance in our case maybe we could have two primary [parents], and then a secondary could be her biological father, who is in some form, a, a parental figure I guess. But he doesn’t really have much [responsibility]. But if I were to die I would want him to continue to have a right to see her. I would be very upset if I died and this wouldn’t happen. So it would be a lesser category. A right to access and maybe some minimal responsibility.

The struggle that Mischa experienced in explaining the nature of the secondary, non-parental category occupied by involved donors is indicative of the challenge of transforming a theoretical concept into a legal principle. While Mischa knew how these donor relationships worked in practice, it was difficult for her to imagine how the involved donor’s identity might be captured in law and what restrictions might be necessary to ensure that the lesbian family remained secure. In fact, because of the extent

58. While these secondary figures could also be dealt with through existing access laws, a separate legal category has several advantages. First, existing access laws are designed for separating heterosexual parents and apply most frequently to heterosexual fathers. This is exactly the kind of framework lesbians mothers are trying to avoid. Secondly, because the “secondary figure” category would come with clearly defined rights and responsibilities attached, it would provide a clarity that access law cannot. Finally, as will be discussed below, unlike existing access laws, the secondary figure category would only be realized with the consent of the primary parents.
to which the mothers’ perceptions of parentage differed from the existing legal approach, translating them into a law reform context was particularly challenging.

V. (Re)Forming Law’s Family

It is clear from the mothers’ definitions of parenthood that their ideas about (and practice of) family do not conform to traditional legal or social norms. Though few had abandoned all aspects of the traditional family, most had created new familial categories, unrestrained by biology, conjugality or nuclearity. While the mothers spoke confidently about the ways in which they had put their expansive familial definitions into practice within their own immediate families, they noted that their familial definitions were rarely reflected within the law. In fact, there was a strong sense amongst the mothers that non-nuclear, non-conjugal and non-biological families were not ones for which the current law was able to cater. A number of them also suggested that family law pays little attention to either intention or caregiving in making its legal determinations.

In an effort to move the theoretical discussion of parental definitions into a law reform framework, the mothers were invited to respond to three parental recognition models that, if introduced, would assign legal parentage at birth in situations where a child is conceived using some form of alternative insemination. Though they included some unique elements, the models derived from existing reform proposals identified within academic literature, law reform discussion papers and reports, and existing legislative frameworks in other jurisdictions. As a result, the discussions owe much to previous law reform work in the area. However, my intention was to build on and test the existing literature through the collection of empirical data on the topic, drawn from a Canadian constituency. My goal in presenting the models to the mothers was not to have them simply choose one proposal over the

59. That is, the favoured model would replace any existing legislation.
62. See arts. 538–542 C.C.Q.; Care of Children Act 2004 (N.Z.), 2004/90, s. 41 [Care of Children Act].
others. Rather, the models were designed to initiate a conversation about law reform from which an empirically grounded legislative proposal could be drafted.

A. The Models

The first model presented to the mothers was the “presumption model.” The presumption model essentially extended the current legal framework—where the parties to an intimate heterosexual relationship are presumed to be the parents of a child born into the relationship or within nine months of the relationship ending—to the same-sex context. Thus, if one member of a lesbian couple gave birth to a child, both partners would be deemed legal parents without any need on the part of the non-biological mother to adopt the child. In the case of a single mother who conceived through donor sperm, she alone would be the child’s legal parent. Parental status would therefore continue to be limited to one or two individuals, and donors would immediately and permanently be denied the status of legal parents. The presumption model would also involve making certain assumptions about lesbian couples themselves. If they were in a conjugal relationship, the presumption would be that both parties to the relationship intended to parent the child. Like women who conceive in a heterosexual context, the biological mother would, however, retain the ability to list the other parent as “unknown” or “unacknowledged.”

The second model was described as the “opt-in” model and was based largely on intention. Rather than relying on biology or adult relationship status as the current system tends to do, the opt-in model would require adults who intended to parent a child to register as the child’s parents. The one exception would be the child’s birth mother who would be presumed to be the child’s parent. Being permitted to register as an additional parent would not require a biological connection to the child or a conjugal relationship with the child’s biological mother, and would not be limited to one other individual. In other words, several individuals could opt-in as parents, creating a three or four-parent family. The opt-in model would also permit significant

63. See arts. 538–542 C.C.Q. where a similar approach is taken in Québec, though it is available only to married and civil union spouses and is utilized only in the absence of voluntary registration. A purely presumptive approach is taken in a number of Australian states. See e.g. Artificial Conception Act 1985 (W.A.), s. 6A; Parentage Act 2004 (A.C.T.), s. 11(4).

64. A donor may still be able to apply for access as a non-parent under provincial family law legislation in some provinces. See e.g. Children’s Law Reform Act, R.S.O. 1990, c. C-12, s. 21 which states, “A parent of a child or any other person may apply to a court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child” (emphasis added).

65. While the “unknown” and “unacknowledged” categories continue to be available on birth certificates, the decision in Trocuk v. British Columbia (A.G.), 2003 SCC 34, [2003] 1 S.C.R. 835, 225 D.L.R. (4th) 1, suggests that mothers who use these categories may now attract closer scrutiny.

66. This model has been proposed in Victoria, Australia (see VLRC, “Position Paper Two”, supra note 61 at paras. 4.31–4.36) as well as in New Zealand (see NZLC, “Legal Parenthood”, supra note 61).

67. The birth mother’s ability to “opt-out” of parenting would be limited to putting her child up for adoption.
non-parental figures, such as an involved donor, to opt-in to the legal family. The status that might extend to such an individual was not defined in the scenario presented to the mothers, but it was made clear that it was something other than parental. In addition, the issue of when individuals might be allowed to opt-in and whose consent would be required was left to the mothers to decide.

The final model combined the presumption and opt-in models to produce a framework that granted automatic parental status to the conjugal couple (or a single mother), while also allowing for additional parents and non-parental figures to “opt-in” to the legal family. This model was designed to provide security for the couple or single mother, while also creating space for a degree of intentionality in family formation. Furthermore, by including a parental presumption in favour of the couple (or single mother), the combination model gave the non-biological mother a level of security that was absent in the opt-in model. The question of when individuals might be allowed to opt-in and how consent might be dealt with were once again left to the discretion of the mothers.

The most popular model, with approximately two-thirds of the mothers favouring it, was the combination model. Presumptions alone were deemed insufficient because they limited the family to a dyadic model, while the most flexible model—the opt-in model—was believed to provide too much discretion. The mothers’ preference for the combination model suggests that they favour the security of parentage presumptions grounded in intention, but preferably when accompanied by an additional more fluid framework. The mothers’ discussions of the combination model reveal why it resonated with them, as well as how the general proposal I presented to them might be moulded to fit their specific needs.

B. Maximizing Certainty and Flexibility: The Combination Model

The mothers who favoured the combination model viewed it as capable of achieving the best of both worlds. While it granted the parties to a conjugal relationship (or a single mother) automatic and full legal protection as parents, it also allowed additional parents or non-parental figures to be legally recognized. This latter point both reflected the mothers’ strong commitment to multiple parent families and the limited legal recognition of significant non-parental figures in a child’s life. At the same time, their preference for a foundation of legal presumptions highlights their need for certainty within the primary parental unit at the time of birth. Paula’s simple com-

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68. No jurisdiction has adopted such a model, though a number have proposed an opt-in system. See VLRC, “Position Paper Two”, supra note 61; NZLC, “Legal Parenthood”, supra note 61.
69. The least favoured proposal was the presumption model which was considered to be the most limited of the three.
ments summed up the views of many of the mothers who favoured this model: "Um, I think, I think there is an importance of someone opting-in and saying that they’re committed [to] the process. But I think if you’re conceiving a child in a relationship that there should be some kind of presumption as well." Thus, there was a sense that the intention of the parties to couple as parents should be respected by the law, but not to the exclusion of other individuals who had been invited to play a role in the child’s life.

For mothers whose families actually resembled the combination model—a conjugal couple with an involved known donor—it was particularly attractive. They could see their own families reflected in the model and realized how it would have benefited them if it had been in place when their children were born. For example, Antonia, a non-biological mother who had to negotiate a joint custody arrangement with her ex-partner as well as an access agreement with the donor and his male partner, explained why she favoured the combination model:

Because I think for us it would have been nice to have just the automatic [presumption] when the kids [were] born. 'Cause we didn’t even have that. I mean I, you know, here we were going to the hospital to have our kids that we had planned and had conceived together. You know, really, I mean it’s interesting ’cause my partner says, or my ex-partner, that she and I really conceived the kids. We just didn’t do it biologically. Um, and so I would like when the kids are born that whoever conceives them in whatever way are the parents. And that didn’t happen. So we had to actually get that in place. Then we moved on to, so now the dads are, we want them to have some status and they haven’t had any. Other than, you know, [what] we’ve given them. But they haven’t had any legal status at all.

Antonia’s attraction to the combination model was based on the security it gave the couple (or a single mother), at the same time that it allowed the primary parent(s) to open up their family to other parental and non-parental figures. This arrangement was perfect for her family given the active, but only occasional involvement, of her sons’ “dads” who lived in another province.

While the majority of the mothers supported the combination model, they were willing to do so only if a number of issues were addressed. The most significant concern related to consent. Specifically, would consent be required before an additional party could opt-in?; and who would have the power to exercise it? This concern obviously related to opt-in provisions in general and was voiced by mothers who favoured both the combination and opt-in models. All of the mothers who raised the issue of consent argued that a consent provision was necessary, and that whether an additional individual could opt-in should depend on the consent of the couple (or single mother) protected by the parental presumption. If it did not, the presumption would become meaningless. The mothers’ need for a strong consent provision was based largely on their perceived vulnerability vis-à-vis donors. The following interaction with Jasmine, who ultimately favoured the combination model after the consent issue was resolved, captures the nature of the mothers’ concerns around consent:

JASMINE: Okay, so in my case Bianca and I decide we’re going to um, be the parents. Neil [the donor] wants some involvement. Um, [pause] he has a, he chooses to opt-in?
Or we chose to opt-in? And those are the parts, like, so I wouldn’t want to say. I wouldn’t think of a blanket, yeah, like lets have opt-ins. And I wouldn’t want to make it any more confusing in that now we have to get his permission to opt him out for instance. So, I would, I would, I would keep my final decision on that combination to see what the combination is.

INTERVIEWER: Okay, would you feel more comfortable if, in order to opt-in, you had to get the consent of the “primary parents”?

JASMINE: Yeah, um, they’re the ones that get to decide who else comes in. That makes me feel better.

Paula similarly noted the dangers of opting-in not being regulated by some form of consent. She argued that without a consent provision a donor who was not intended to be part of the family could opt-in at his own discretion. As she explained, “So the ability for other persons to opt-in... you’d need consent so that you don’t have a sperm donor who’s not, um, going to be acknowledged. Like if there’s a ‘contract’ that’s developed you don’t want someone in violation of that contract to just opt-in without the consent of the other parties.” Thus, building a consent provision into the combination model would permit those mothers who wanted to extend legal recognition to other parents or non-parental figures to do so, but would also protect those mothers who did not intend to make such a choice.

A number of other concerns related to the combination model were raised by individual mothers who wondered about its practical application. For example, some speculated about when opting-in might take place (when planning the child? at conception? at birth?), and how the rights and responsibilities of those who opted-in might be defined and recorded. Others wondered whether birth certificates would change to include the names of the additional parents or significant non-parental figures who had been invited to opt-in. Not enough of the mothers commented on these questions to gain any sense of what their shared perspective might have been, but these are issues that would need to be resolved if the model were to be transformed into legislation.

C. From Law Reform Proposals to a Legislative Model

Turning a law reform proposal into a practical legislative model is a difficult task, not least because of the challenge of translating complex concepts into precise and succinct legal statements. More often than not, proposals undergo several incarnations. I therefore approached my own attempt at legislative drafting as a starting point and catalyst for what will inevitably be an ongoing discussion. My goal in drafting the legislation was primarily to highlight the issues that need to be contemplated by the law, based on my interview data. On a number of occasions, I found that I could not incorporate some of the mothers’ key points into a legislative framework focused on the assignment of legal parentage at birth. For example, while it was easy to translate into a legislative context the commitment to the intention of parentage as a fundamental element of legal parentage in cases of assisted conception, giving legislative recogni-
tion to the belief that caregiving was also at the heart of what made someone a parent proved more difficult. Because the focus of the proposal is the assignment of legal parentage at birth, it was impossible to incorporate into it any consideration of post-birth caregiving patterns. However, I felt that in most planned lesbian families the mothers' pre-birth intentions are ultimately performed post-birth, so that intention and caregiving are inherently linked, rather than dichotomous ways in which to accord recognition. With these constraints in mind, what follows is a description of the legislative model followed by the proposal itself.

The proposed legislation includes two parts and applies to both heterosexual and same-sex couples, as well as to single women, who conceive a child through some form of alternative conception method. The proposal applies only in the assisted reproduction context and addresses specifically the need in such a situation to provide legislative (intention-based) presumptions contrary to those based in biology. Part I addresses the assignment of legal parentage at birth. The first three sections of Part I focus on establishing a parental presumption in favour of the intending parent(s) derived from their pre-birth behaviour. This is done through the concept of a “parental project,” which is introduced in section 1. Adapted from the Civil Code of Québec, the term “parental project” is used in the proposal to refer to a situation in which an individual or couple mutually consent to conceive a child via alternative conception. While somewhat clinical, I chose to adopt the term “parental project” specifically because it does not resemble any pre-existing family law terminology used in the common law in Canada. Therefore, it is clear that the legislation is not invoking an already existing concept.

70. Whether caregiving should play a role in the allocation of parental rights, such as the right of custody or access, has been widely debated within family law circles. While a primary caregiver presumption has been rejected both legislatively and in the Canadian courts, caregiving continues to carry significant weight amongst critics, particularly feminist critics, who argue that it should be a relevant factor in determining custody and access, and that the resort to biology prioritizes abstract links over the actual work of raising a child. In the lesbian context, caregiving may be particularly relevant given that lesbian couples are much more likely to share caregiving equally between them than heterosexual couples. On the caregiving debate within heterosexual families see Susan B. Boyd, Helen Rhoades & Kate Burns, “The Politics of the Primary Caregiver Presumption: A Conversation” (1999) 13 Austl. J. Fam. L. 233; Carol Smart, “Losing the Struggle for Another Voice: The Case of Family Law” (1995) 18(2) Dal. L.J. 1. On lesbian caregiving see Gillian Dunne, Lesbian Lifestyles: Women’s Work and the Politics of Sexuality (London: Macmillan Press Ltd., 1997); Millbank, “Maternity”, supra note 42; Sullivan, supra note 40.

71. It is assumed that if the parties had wanted a traditional parenting relationship they would have conceived via traditional means. Assisted conception is presumed to signify a desire to create family norms contrary to those dictated by biology.

72. A similar approach is taken by Millbank, “Functional Family”, supra note 36 in her most recent foray into law reform in the context of planned lesbian motherhood. As I have in this proposal, Millbank “centres the intention to form a family in the pre-birth context, marked by consent to the conception attempt taking place within the women’s relationship” at 163.

73. Arts. 538–542 C.C.Q.

74. Ibid., at art. 538. The focus on mutual consent in the Québec provision and in my proposal is key, as it ensures that the intention of the biological mother is not prioritized over that of the non-biological mother.
While the Québec legislation does not specifically define the term “parental project” (other than to state that such a project “exists from the moment a person alone decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project”75), I felt it would be helpful to provide some legislative guidance as to the meaning of the term.76 Legislative guidance would clarify the factors relevant to establishing the pre-birth intention, including caring work and conduct, and encourage judges to apply the legislation uniformly and in accordance with its purpose. Thus, in section 2 of the proposed legislation, decision makers are provided with a non-exhaustive list of criteria that might indicate participation in a “parental project,” beyond the requirement in section 1 that both parties have consented to the insemination. The list includes whether the non-biological parent consented to the insemination, participated in pre-conception planning (including but not confined to the choosing of a donor of genetic material), was present during inseminations, attended pre-natal appointments and was present at the child’s birth.

Once it has been established that a “parental project” exists, the parental presumption contained in section 3 applies. Thus, in circumstances where a couple has agreed to participate in a “parental project,” the partner of the woman who gives birth is presumed to be the child’s legal parent. In the case of a single mother, the presumption applies solely to her. The effect of these sections is two fold. First, they give automatic parental status to couples who mutually agree to parent, whether both individuals are biologically related to the child or not. Second, they allow single parents, as well as individuals who do not intend to parent with their conjugal partner, to achieve sole parental recognition in circumstances where they make it clear that the parental project is theirs alone. While sections 1–3 inevitably prioritize the conjugal couple (where one exists), the opt-in provisions in Part 2 ensure that a non-conjugal parent could also be granted legal recognition.

While sections 1–3 ensure that the intentions of non-biological parents are given legal force, section 4 permits the partner of a woman who gives birth to a child to contest the presumptive parentage of a child on the basis that the partner was not a party to a mutual parental project. This section is designed to protect those women

75. Ibid.
76. Such an approach is actually in contrast to the Québec legislation which focuses entirely on abstract, ex ante intention. Pre-conception conduct or care is irrelevant.
(or men) who are partnered to the birth mother, but who do not intend to parent. Finally, section 5 extinguishes the parental rights, as well as any non-parental right of access, of a donor in relation to a child born via his or her genetic contribution, except in the narrow circumstances described in Part 2. Section 5 makes it clear that a genetic link created via donor insemination does not make the donor a parent. At the same time, the exceptions described in Part 2 ensure that where there is a mutual intention to involve the gamete provider in the child's life, that intention can be given legal force.

The goal of Part 1 is to presumptively protect the intentional (lesbian) family as the child's central family unit. Rather than viewing such a family as lacking a father, it solidifies the two-mother lesbian family unit as complete. Part 2 addresses the opt-in procedures that enable the presumptive family to extend beyond the two-parent model in circumstances where the primary parents mutually consent to such an arrangement. The opt-in procedures enable known donors, or other non-biologically related parties, to be granted legal rights in circumstances where all of the parties intend the individual to play a role. Section 7 permits an additional party to apply to opt-in, with the consent of the legal parent(s) as established in Part 1, to the status of parent. Such an application must be made within one year.

77. Such a scenario arose recently in Doe v. Alberta, 2007 ABCA 50, 404 A.R. 153. While cohabiting with John Doe as a common-law partner, Jane Doe expressed a desire to have a child. John Doe did not wish to "father a child, to stand in the place of a parent, act as a guardian, or support a child" at 3. However, both parties wished to continue their relationship, so Jane Doe became pregnant through donor insemination using anonymous donor sperm. The parties agreed that they would enter into a written agreement, not yet executed at the time of the appeal, stipulating that John Doe is not the father of the child and that he has neither parental rights nor any obligations of support towards the child. After the child was born, the parties jointly sought a declaration from the court that such an agreement, once executed, would bind them and any third party, including any government authorities. Applying the provisions addressing assisted conception in Alberta's Family Law Act, the Court of Appeal conceded that John Doe was not a legal parent. However, the Court relied on the concept of "standing in the place of a parent" to ascribe to John Doe parental status. Focusing on the intimate relationship between John and Jane Doe and the assumption that John Doe could not live in the same house as the child without engaging in some parenting, the court concluded that "the 'settled intention' to remain in a close, albeit unmarried, relationship thrust John Doe, from a practical and realistic standpoint, into the role of parent to this child" at 22. Section 4 of the law reform proposal would enable John and Jane Doe to have arranged their affairs as they saw fit. Quebec is the only province in which such an arrangement is possible. Art. 538 C.C.Q. enables "a person alone" to engage in a parental project.

78. A similar provision, applicable to heterosexual couples only, already exists in a number of provinces. See e.g. Family Law Act, S.A. 2003, c. F-45, s. 13(3).

79. A similar approach is taken by Millbank, "Functional family", supra note 36 who argues that legislation addressing assisted reproduction should expressly state that biology is not determinative of parental status. As she explains, "While the significance of a genetic connection between a biological father and the child may have many possible meanings both for the man himself and the child, this is something that is to be determined by them through the course of their relationship (if any): a genetic link does not automatically accord parental status" [footnote omitted] at 167.
of the child's birth, and if granted, would extend all of the rights and responsibilities of parenthood to the second or third parent, without limiting the parental status of the intending parent(s). This section is designed to meet the needs of those families that include, from the outset, three or four actively involved parents. However, as the Victorian Law Reform Commission noted in its Report on Legal Parentage, in which it also recommended opt-in procedures, it is anticipated that only a small number of families would pursue this option. Section 8 permits an additional party to apply, with the consent of the legal parent(s), to opt-in to the status of "non-parental adult caregiver." Absent unfitness, a non-parental adult caregiver will have a right of access to the extent determined, in writing, by the child's legal parent(s). The written agreement will be registered alongside a successful opt-in application and will be enforced as if it were a parenting order. An application to be a non-parental adult caregiver must be made within one year of the child's birth.

The provisions in sections 7 and 8 are designed to protect the rights of the presumptive parents, while still allowing for a donor to be involved in a child's life, if the presumptive parents have consented to the arrangement. The existence of sections 7 and 8 will hopefully encourage women to choose donors carefully. The sections, and specifically the requirement that access arrangements be put in writing, will force parents and non-parental adult caregivers such as donors to discuss their intentions at the outset. If the donor wants to play a role in the child's life that exceeds what the presumptive parents are comfortable with, these provisions should encourage them to find another donor. Paragraph 8(e) makes it clear that granting non-parental adult caregivers additional rights, beyond those agreed to in writing, is presumed not to be in a child's best interests. This provision is designed to deter a judge from presuming that because an individual shares a biological link with a child, or because a child does not have a male or female parent, that it is in the child's best interests to have a relationship with that individual in excess of what had been originally agreed upon. The provisions in sections 7 and 8 are likely to be used by families that include a known donor who is involved in the child's life, but does not play the role of "parent," arguably the most common form of a known donor family.

80. The one year limit was recommended by the Victorian Law Reform Commission in its report on Legal Parentage. While an additional individual may become involved after the first year of the child's life and there may be some desire to have his/her role legally recognized, the VLRC felt that in the interest of certainty and finality, both for the primary parents and the child, a one-year window was appropriate (VLRC, "Position Paper Two", supra note 61 at para. 4.33).

81. Ibid, at para. 4.34.

82. This is the approach currently taken in New Zealand, which allows for an "agreement" between a donor and the parents to be filed with the court. While such agreements cannot be enforced, on an application by a party to the agreement, the Court may, with the consent of all parties to it, make an order of the Court that embodies some or all of the terms of the agreement (Care of Children Act, supra note 62).
As noted above, the draft legislation that follows is designed only to highlight the issues that need to be contemplated by any future legislative regime, and serve as a catalyst for further discussion.

Parentage of Children Born of Assisted Reproduction

PART 1: Parental presumptions

Section 1
A parental project involving assisted procreation exists from the moment a person alone decides, or spouses or common law partners by mutual consent decide, in order to have a child, to use for the purpose of conception the genetic material of a person who is not party to the parental project.

Section 2
(1) Subject to section 1, in determining whether a parental project exists between two parties, the court shall consider whether the spouse or common law partner of the woman who gave birth to the child:
   (a) participated in pre-conception planning, including but not confined to choosing the donor of genetic material;
   (b) was present during inseminations;
   (c) attended pre-natal appointments;
   (d) was present at the child’s birth.

(2) The failure of the partner of the woman who gave birth to the child to participate in any of the activities listed in sub-sections (a)-(d) is not conclusive evidence of the absence of a parental project.

Section 3
If a child is born of a parental project involving assisted procreation between two spouses during their marriage, or common law relationship, or within 300 days after its dissolution or annulment, the spouse or common law partner of the woman who gave birth to the child is presumed to be the child’s parent.

Section 4
No person may contest the parentage of a child solely on the grounds of the child being born of a parental project involving assisted procreation. However, the spouse or common law partner of the woman who gave birth to the child may contest parentage if there was no mutual parental project or if it is established that the child was not born of the assisted procreation.
Section 5
The contribution of genetic material for the purposes of a parental project does not create a parental relationship between the contributor and the child born of the parental project or entitle the contributor to access with a child, except in the circumstances described in Part 2.

Section 6
For the purpose of this Part, a woman's common law partner is the person who, not being married to the woman, is cohabiting with her in a conjugal relationship of some permanence.

PART 2: Opt-in procedures

Section 7
Upon the birth of a child and the consent of the legal parent or parents of that child, any person can apply to the court to opt-in to the status of legal parent.

(a) An application to opt-in as a legal parent must be made within one year following the birth of a child.

Section 8
Upon the birth of a child and the consent of the legal parent or parents, any person can apply to the court to opt-in to the status of non-parental adult caregiver.

(a) An application to opt-in as a non-parental adult caregiver must be made within one year of the child’s birth.

(b) Absent unfitness, a non-parental adult caregiver has a right of access at a level determined by the child’s parent or parents.

(c) Access agreements must be in writing and filed with the opt-in application.

(d) Access agreements will be enforced as if they were a parenting order relating to access.

(e) Absent unfitness, permitting a non-parental adult caregiver access at the level determined by the child’s parent or parents is presumed to be in the child’s best interests.

(f) Permitting a non-parental adult caregiver rights beyond those determined by the child’s parent or parents is not presumed to be in the child’s best interests.

(g) A non-parental adult caregiver shall have no child support liability unless otherwise agreed.

In addition to the provisions included above, subsequent amendments would need to be made to any legislation that addresses legal parentage, particularly laws which limit parental status to two legal parents. A number of other issues would also need to be clarified, such as whether and how opt-in parents or non-parental adult caregivers might appear on a child’s birth certificate. One possibility would be to add an additional section to the traditional birth certificate in which additional parents and
non-parental adult caregivers could be listed. An alternative would be to create a parental registry in which additional parents register their status when their opt-in application is accepted. The child could then have his or her birth certificate reissued with the additional parents being listed as “registered parents.” The same procedures could be applied to non-parental adult caregivers.

VI. Conclusion

Recognition of planned lesbian families requires creativity that has rarely been evident in parenting law reform efforts to date. The approach that has tended to prevail—tinkering with the pre-existing framework and then requiring lesbian families to mould themselves to it—has thus far provided an incomplete and inadequate legal framework. While lesbian mothers now enjoy some significant legal benefits, litigation-derived reforms have done little to challenge the traditional ideological assumptions underlying the legal family.

Recognizing planned lesbian families in all their diversity requires a significant rethinking of how we assign legal parentage, particularly in the context of assisted conception. The usual signifiers of parenthood—biology or adult relationship status—are simply insufficient in the lesbian context. In fact, many of the mothers I interviewed suggested that these rules are also increasingly problematic for heterosexuals who conceive via a method other than intercourse. What is needed is an alternative approach to the assignment of legal parentage in situations of assisted conception that recognizes that “parent” is an expanding concept, capable of taking on a multiplicity of new forms. Yet, lesbian families must not fall victim to a new fluidity in which the boundaries of their families are manipulated in an effort to “find fathers” for already complete family units. Rather, planned lesbian families are entitled to the same baseline of recognition as heterosexual couples who conceive via donor insemination. Therefore, what is needed is a model of parental recognition that provides a level playing field for lesbian mothers, while simultaneously expanding the field to encompass families that extend beyond the two-parent model. This empirical study indicates that the combination model—capable of protecting the intending parent(s) while at the same time opening the family to include multiple parents and non-parental adult figures—is the model most suited to this task.


84. I have argued elsewhere that the multiple-parent model of family, which is appealing because it is capable of recognizing non-normative family forms and necessarily de-centers the nuclear family, may be used by the courts to impose fathers on already complete lesbian family units. See Fiona Kelly, “Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and their Children into Canadian Family Law” (2004) 21 Can J. Fam. L. 133. See also Shelley A.M. Gavigan, “Equal Families, Equal Parents, Equal Spouses, Equal Marriage: The Case of the Missing Patriarch” (2006) 33 Sup. Ct. L. Rev. 317.
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