Osgoode Hall Law Journal

Volume 39, Number 4 (Winter 2001) Article 2

Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies

Roxanne Mykitiuk
Osgoode Hall Law School of York University, rmykitiuk@osgoode.yorku.ca

Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies

Abstract
This article argues that legal determinations of filiation are normative ideological constructions about how societal relations between parents and children should be ordered. They am based upon particular understandings of the relationship between biological and social facts and, as this article demonstrates, operate to create an asymmetrical relationship between the categories between paternity and maternity I suggest that fairly recent developments in reproductive and genetic filiation have been made and offer the potential for an expanded understanding of relatedness or kinship which does not take the two-parent-one of each sex-model of the family as its normative form. While the examples I draw on arise in the context of reproductive technologies, l suggest that the analysis has broader implications for the recognition of broader family forms and relationship.

BEYOND CONCEPTION: LEGAL DETERMINATIONS OF FILIATION IN THE CONTEXT OF ASSISTED REPRODUCTIVE TECHNOLOGIES©

BY ROXANNE MYKITIUK*

This article argues that legal determinations of filiation are normative ideological constructions about how societal relations between parents and children should be ordered. They are based upon particular understandings of the relationship between biological and social facts and, as this article demonstrates, operate to create an asymmetrical relationship between the categories between paternity and maternity. I suggest that fairly recent developments in reproductive and genetic filiation have been made and offer the potential for an expanded understanding of relatedness or kinship which does not take the two-parent—one of each sex—model of the family as its normative form. While the examples I draw on arise in the context of reproductive technologies, I suggest that the analysis has broader implications for the recognition of broader family forms and relationship.

Cet article avance que la caractérisation juridique de la filiation est une création idéologique normative qui dicte la façon dont les relations sociales entre parents et enfants doivent s'agencer. Cette caractérisation repose sur une compréhension particulière de la relation entre des faits biologiques et sociaux et cet article démontre que ces filiations créent une relation asymétrique entre les catégories de la paternité et de la maternité. L'auteure suggère que des développements récents en filiations génétiques et reproductives offrent le potentiel d'élargir le concept des liens de parenté et de consanguinité qui n'adhèrent pas au modèle familial biparental (dont un parent de chaque sexe) comme étant la forme normative. Malgré que les exemples utilisés par l'auteure se situent dans le cadre des technologies reproductives, elle suggère que l'analyse a des conséquences appréciables pour la reconnaissance des types et relations familiales plus libérales.

---

* Roxanne Mykitiuk, (B.A., University of Alberta, 1986; LL.B., University of Toronto, 1989; LL.M., Columbia University, 1994) is an Associate Professor at Osgoode Hall Law School. This article was written in partial fulfillment of the requirements of the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University. The author wishes to thank Bruce Ryder, Brenda Cossman, Isabel Karpin, Ruth Fletcher, and Jeremy Paltiel, for their encouragement and insightful comments on drafts of this article. The author is extremely indebted to Kerry Taylor for her unwavering assistance in bringing this article to completion. Dylan Yaeger and Leigh-Ann McGowan provided excellent revision assistance. Mary Liston was a superb editor.

I. INTRODUCTION

Disputes about filiation[1] have not figured prominently in modern family law. Changes over the past fifteen years, however, have compelled both courts and legislators to discard their previous assumptions that parental status is easily ascertained or that the rare disputes over parental status disqualify filiation as a key concern. New medical and scientific technologies have fragmented biological processes and have eroded the familiar social arrangements that rely on this biological order. Assisted reproductive technologies (ARTs) make possible the separation of the genetic, gestational, and rearing aspects of motherhood, and the genetic and rearing aspects of fatherhood, while DNA technology allows biological paternity to be established with almost complete certainty. In the midst of these technological changes, courts are called upon to resolve competing claims of maternity and paternity arising from their use.

ARTs hold out a promise of alternative family forms. They invite a reconception of filiation by opening a view on the relationship of law to the social and biological construction of parenthood and, more significantly, the asymmetric, gendered relationships between paternity and maternity in family law. While ARTs offer the possibility of alternative family forms, some are disturbed by the ruptures in social relations that have been precipitated by ARTs. For those who wish to challenge the conventional heterosexual procreative family, these ruptures and fragmentations should be embraced[2] as they forcefully reveal the gaps and deficiencies of existing

---

[1] Filiation was traditionally defined as the relationship of a son to his father and omitted the relationship of father and daughter. I extend the use of this term to include the legal determination of any parent-child relationship

[2] For a more extensive discussion of this point, see R. Mykitiuk, "Fragmenting the Body" (1994) 2 Austl. Feminist L.J. 63.

taxonomies.[3] They open up a space in which we can evaluate the limitations of old conceptual paradigms of maternity and paternity and the assumptions upon which we have ordered kinship relations. Recent case law illustrates however, that North American courts have not embraced this potential partly because they have been inhibited by the established legal categories of filiation. Indeed, these cases forcefully reveal the ways in which law resists revisioning the family by invoking the putative authority of biology. This article will demonstrate that the case law surrounding ARTs provides a way in which we can disentangle law and "natural facts" in order to arrive at possible reconstructions of family law and kinship relations.

The initial part of this article provides theoretical grounding for the analyses to follow by examining two separate, but related, concepts that underpin legal determinations of filiation: kinship and the legal ideology of the family. Next, the article discusses the historical legal treatment of determinations of maternity and paternity and the assymetrical gendered effects of the governance of filiation. The final section of the article explores the challenge that ARTs pose to the normative concepts of parenthood, maternity, paternity, and family inherent in family law through a detailed analysis of several key cases (primarily, but not exclusively, Canadian) involving ARTs. In this section, I demonstrate how law and conventional legal reasoning obstruct the affirmation of new and varied parent-child relations and expanded notions of kinship.

II. THEORETICAL UNDERPINNINGS

A. *Kinship As Social Construct*

In making determinations of filiation, law is influenced by two distinct, yet interrelated, forms of knowledge. The first is the system of kinship relations through which the social recognition of relatedness between and among persons is articulated. The second, legal ideology, draws upon normative constructions of family that govern the relationship between parents and children. When making legal determinations of filiation, law uses both bodies of knowledge to render pragmatic determinations of who is a *parent*, who is a *child*, and who is a parent of a *particular* child. Privileged legal relationships are granted to those who are

---

[3] See D.J. Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (London: Free Association, 1991) and M.H. Shapiro, "Fragmenting and Reassembling the World: Of Flying Squirrels, Augmented Persons, and Other Monsters" (1990) 51 Ohio St. L.J. 331.

assumed to share an intimate biological relationship with a child based on the understanding of the role biology plays in the creation of parenthood; this role, of course, differs for men and women. Kinship, then, can be seen to organize both natural or blood relations and more positive law or legal relations.

As modern anthropology has recognized, kinship is the "social construction of natural facts."[4] Cultural ideas about procreation provide the starting point for thinking about relatedness and the way in which the Euro-American institutionalized system of kinship privileges both biology and marriage when ordering and sanctioning relationships. Beliefs about procreation are themselves foundational to a range of cultural definitions concerning parenthood and kinship, gender and sexual difference, inheritance and descent.[5] This particular cultural understanding articulates relations of kin through procreation either by *consanguinity* (shared bodily substance) or *affinity* (marriage). According to this system, because procreation creates offspring *from the body*, this necessitates the inclusion of social relations of intercourse and the biological relations occurring throughout conception.[6] When procreation is accorded prime significance in this way, the circumstances of birth are believed to confer an identity upon a child as a result of a "fact of life."[7] By presuming that biological ties and the "facts of life" exist, we have created a strong rationale for foundational arguments which favour the "naturalness" of family and kinship relations.[8] What has been construed within our understanding of kinship as "natural," then, is a normatively essentialist position having direct bearing upon the way we understand gender and sexuality within the reproductive context. "Natural" procreation, in this sense, occurs only between two heterosexual individuals, without the assistance of technology.

Kinship is everywhere a part of the social and cultural management of reproduction and is intimately interlinked with "gender" as the survival of any given society relies upon successful reproduction. Because gender

---

[4] M. Strathern, *Reproducing the Future: Essays on Anthropology, Kinship and the New Reproductive Technologies* (New York: Routledge, 1992) at 17 [hereinafter *Reproducing*].

[5] S. Franklin, "Postmodern Procreation: A Cultural Account of Assisted Reproduction," in F.D. Ginsberg & R. Rapp, eds., *Conceiving the New World Order: The Global Politics of Reproduction* (Berkeley: University of California Press, 1995) 323 at 335.

[6] J. Edwards *et al.*, *Technologies of Procreation: Kinship in the Age of Assisted Conception* (Manchester: Manchester University Press, 1993) [hereinafter *Technologies of Procreation*].

[7] *Ibid.* at 14.

[8] *Ibid.*

not only encompasses biological categories of male and female, but also the "ways in which these understandings are interwoven with other dimensions of social and cultural life," a primary concern becomes how kinship affects the sexual and reproductive roles of women and men and, in turn, gender.[9]

Since kinship is also a fundamental source of social identity within a culture, it is central both to understanding expressions of morality embedded within social and legal ideas about relationships and perceiving how morality assists in solidifying certain notions as "truths." As a result, laws, norms and cultural ideologies use morality as one tool to define where, when, and in what context reproduction and the resultant relationships are sanctioned. When intercourse results in reproduction, and the allocation of children becomes a societal objective, many more norms, values and laws come into play. The various articulations of "marriage," "divorce," and "legitimacy" can illustrate how different human groups handle reproduction.[10] Lastly, those practices understood to be either unnatural or illegal are conceptualized as immoral within kinship's mode of governance.

B. *The Legal Ideology of the Family*

Highlighting the complex socially constructed nature of kinship, and the way understandings of it are incorporated into and built upon within law is pivotal to challenging determinations of filiation. Because one means of establishing relatedness has its origins in biology and the natural facts of life, kin relations have come to be seen as the *natural* processes in which people become connected to one another through the transmission of bodily materials. Conflating notions of biology, or relations of blood, with that of "nature," results in a powerful foundational statement about how reproduction occurs. Relationships derived from "blood ties" become a means of establishing *connections* and *disconnections* between persons.[11]

The relationship between the ideology of the family and the social construction of kinship is dynamic with each discourse feeding off of one another. It would be imprudent to grapple with issues of filiation within

---

[9] L. Stone, *Kinship and Gender: An Introduction* (Boulder, Colo.: Westview Press, 1997) at 1.

[10] *Ibid.*

[11] S. Franklin & M. Strathern, "Kinship and the New Genetic Technologies: An Assessment of Existing Anthropological Research" in *Ethical Social and Legal Aspects of Human Genome Analysis: A Report Complied for the Commission of European Communities Medical Research Division (DG-XII) Human Genome Analysis Programme* (January 1993) at para. 2.3.4.

family law without engaging both discourses. Likewise, failing to recognize distinctions between the two would disable any attempt to understand how law's treatment of paternity and maternity has been created.[12] The legal discourse which privileges certain "familial" relationships over others is constructed by its reliance on socially constructed understandings of kinship and pervasive ideologies of the family.

The social recognition of parenthood by law is understood to follow the biological fact of procreation.[13] Once relations of kin are translated by law into obligations, family formations take on additional social and cultural signification. The legal ideology of family, which privileges relations between adults and children based upon a married heterosexual and procreative union, severely restricts who may be recognized as a legal parent.[14] The law recognizes that blood can create legal ties, however, as a result of the operation of social convention and morality, not all blood relationships are given legal recognition. Law does not always mirror nature and often it is more representative of the societal values (i.e., social and cultural imperatives) it is employed to protect.[15] In utilizing kinship ideals to structure legal determinations, law acts as an informal kinship system.[16] By conflating the relationship between natural and social facts and construing them together as "natural," law reiterates and embeds these social constructions within the way we order our relations. In this respect, the family does not always reflect blood relationships, but can take on "a classificatory role that is profoundly social."[17]

Despite dramatic changes in the past twenty-five years in the ways people "choose to live and define themselves as family, and the possibility

---

[12] See S. Boyd for a thorough discussion of the relationship between ideology and discourse. "Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law" (1991) 10 Can. J. Fam. L. 79.

[13] *Technologies of Procreation*, *supra* note 6 at 22.

[14] S.A.M. Gavigan, "A Parent(ly) Knot: Can Heather Have Two Mommies?" in U. Narayan & J.J. Bartkowiak, eds., *Having and Raising Children: Unconventional Families, Hard Choices, and the Social Good* (Pennsylvania: Pennsylvania State University Press, 1999) 87 at 88.

[15] N. Rouland, "The Cultural Dimensions of Kinship" in J. Eekelaar & P. Sarcevic, eds., *Parenthood in Modern Society* (Boston: M. Nijhoff, 1993) at 6.

[16] Franklin & Strathern, *supra* note 11 at para. 2.5.1.

[17] Rouland, *supra* note 15 at 6.

of disjoining genetic and social family ties,"[18] only recently have these new relationships gained legal recognition and protection. Recognition of more diverse forms of family relationships and arrangements occurred first with respect to non-marital heterosexual cohabitation and more recently in the case of same-sex unions.[19] The focus of these legal challenges has been the legal interpretation of "spouse" so that the normative family has been decentred primarily in the context of determinations of spouse and the recognition of the relationship between the adult parties to a relationship. This article challenges the filiative aspect of the normative legal construction of the family: that is, that every child has two—and only two—parents of opposite sexes to whom the child is biologically related. This norm is, as Harvison Young suggests, exclusive because for the most part, the legal parental relationship is all or nothing and there is neither room made for the recognition of quasi-parental or limited parental relationships, nor questioning of the primary assumption that a child usually does not have more than two parents.[20] Legal norms have shifted to respond to changing social relations regarding the parent-child relationship and the existence of the legal recognition of adoption, *in loco parentis* status, and of parents of intention attest to this. These accommodations, however, do not disrupt the normative ideal of the family to the extent required by the consequences of ARTs.

In light of the development and use of ARTs, "facts of nature" are even more readily subject to dispute. ARTs clinically require the separation of intercourse from procreation, and reproductive activity from heterosexual activity. Consequently, it is now increasingly possible to see how the "naturalness" of heterosexuality, marriage and the nuclear family is socially constructed and perpetuated. Presently, not all biological relationships are activated as social ones. Paradoxically, there are also many instances where law does not recognize that persons are related to one another through ties of substance and physical bonding even where such

---

[18] M.L. Shanley, "Lesbian Families: Dilemmas in Grounding Legal Recognition of Parenthood" in J.E. Hanigsberg & S. Ruddick, eds., *Mother Troubles: Rethinking Contemporary Maternal Dilemmas* (Boston: Beacon, 1999) 178 at 178. As Shanley and others argue, family arrangements do not often conform to the normative ideal but involve a multiplicity of family forms and functions—a premise which obviously underpins this paper.

[19] Recent same-sex challenges to family legislation include: *Canada (A.-G.)* v. *Mossop*, [1993] 1 S.C.R. 554; *Egan* v. *Canada*, [1995] 2 S.C.R. 513; *Rosenberg* v. *Canada* (1998), 38 O.R. (3d) 577 (C.A.); and *M.* v. *H.*, [1999] 2 S.C.R. 3.

[20] A.H. Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family" (1998) 6 Am. U.J. Gender & L. 505 at 506.

ties are not instigated through procreation.[21] Legal determinations of parenthood in the context of ARTs are not simply

> ... discarding the old ... ideas about kinship but, on the contrary, are making every effort to preserve the cultural notions of "real" biological parenthood. Toward this end, they are reinterpreting NRTs and their tricky implications so as to reconcile them with these core cultural notions of biological parenthood and the resulting ... family ideal.[22]

The discrepancy between the recognition of social and biological relations within law is, in part, a result of the way that maternity has been constructed as both biological and unitary. For example, until recently fatherhood was not the subject of biological scrutiny. The law created a series of rules and presumptions attributing fatherhood on the basis of a host of social factors and relationships. Legal determinations of maternity, on the other hand, were historically unnecessary, it being assumed that the act of giving birth necessarily resulted in motherhood. Since maternity has traditionally been constructed purely as a biological "observation" and since a child's relation to its mother was historically determined by the act of birth, maternity was generally established on the basis of consanguinity. This natural "fact" led to the theoretical and practical association of women with the body within patriarchal systems of binary categorization. In law, then, this gendering of reproduction has been translated into an asymmetry between the social recognition of parenthood in the case of fatherhood and the purely biological basis for the recognition of motherhood.

ARTs present the possibility of not only a legal mother and a biological mother, but of the potential division between gestational and biological (conception) motherhood thereby creating a third relationship which was previously not possible. What was once considered natural and evident has been thrown into disarray by reproductive technology with the result that, in theory, motherhood is now as divisible a concept as fatherhood has historically been.[23]

As a result of the relationships arising out of the use of ARTs, the potential for restructuring our ideas of kinship and family, both in the courts and in our minds, is easier to articulate. This technology, "makes

---

[21] M. Strathern, "Displacing Knowledge: Technology and the Consequences for Kinship" in F.D. Ginsburg & R. Rapp, eds., *Conceiving the New World Order: The Global Politics of Reproduction* 346 at 359 [hereinafter *Displacing Knowledge*].

[22] Stone, *supra* note 9 at 273.

[23] For a detailed discussion of surrogacy in the context of kinship see H. Ragone, *Surrogate Motherhood: Conception in the Heart* (Boulder, Colo.: Westview Press, 1994).

visible the way two perspectives—biological and social—are connected to each other in relations of kinship. The point becomes doubly evident when new procedures introduce new procreative actors."[24] Law is caught up in determinations based on biology and "natural fact." In terms of maternity, it remains difficult to make legal arguments that challenge the unitary nature of maternity, or favour the recognition of the social mother(s). Arguments in favour of the recognition of social relationships in the context of motherhood have not been successful because they do not fall within the unquestioned rubric of kin relations, nor do they satisfy the category of "mother" within the normative legal construct of the heterosexual, married, procreative couple.[25]

III. FILIATION: HISTORICAL APPROACHES TO PATERNITY, LEGITIMACY, AND MATERNITY

The belief that biological relatedness is the essence of the parent-child relationship provides the justification for legal understandings of filiation. However, the role biology plays in the creation of parental status differs for men and women. As groundwork for the analysis of the potential of ARTs to challenge legal constructions of the parent-child relationship, the legal categories of paternity and maternity will be examined in order to illustrate the role played by biology within each, and to articulate how the categories have developed in an asymmetrical manner when viewed from the perspective of gender.

A. *Paternity:* Pater est quem nuptia demonstrant

The legal category of paternity provides the quintessential illustration of the relationship between natural facts, social construction, and legal ideology. The uncertainty of biological paternity combined with the social, moral, and legal approbation of the traditional family (two persons of the opposite sex reproducing), have created numerous means of establishing legal paternity, as well as a variety of legal tests to determine whether a man is the father of a child.

Prior to developments in genetic testing, the exact biological relationship between a father and his child was impossible to verify and

---

[24] *Technologies of Procreation*, *supra* note 6 at 14.

[25] D. Farquhar, *The Other Machine: Discourse and Reproductive Technologies* (New York: Routledge, 1996) at 35ff.

legal presumptions of paternity historically "reflect[ed] a need to compensate for the lack of certainty in the biological reality of paternity."[26] At common law, the legal connection with the child's mother rather than any direct biological connection with a child established paternity. According to the still-existent maxim *pater est quem nuptia demonstrant* (or, by marriage the father is demonstrated), if a woman was married at the time she gave birth, her husband was presumed to be the father of the child. No proof was necessary to *establish* the paternal relationship between a married man and a child born within that union. Precisely because the biological facts of paternity were unknowable, the legal presumption was based on a *social determination* about a man's relationship with the mother of a child thereby sanctioning the courts to assume a set of biological facts.[27]

The common law presumption did not operate in cases where evidence confirmed that the mother's husband could not have been the biological progenitor of his wife's child.[28] A man presumed to be the father of a child could bring an action to disavow paternity for a child who was not his genetic offspring. Historically, the evidence required to rebut the presumption was proof of no intercourse beyond a reasonable doubt.[29] Regardless of how difficult this possibility of disavowing paternity was in fact, its import lies in the overt primacy of the biological tie for determinations of paternity. Although the presumption could be disavowed by the husband of the child's mother, it could not be rebutted by any other man, even if he could prove he was the biological progenitor.[30] Thus the biological anchoring of legal paternity was more elusive and illusory—legal truths were not always consistent with biological facts.

The historical presumption of paternity within a marital relation was very difficult to overturn because of the vested interest society had in "ensuring that a child was born into a family and would have the benefit of

---

[26] T. Caulfield, "Paternity Testing in the Genetic Era" (1996) 17 Health L. Can. 19 at 21 [hereinafter "Paternity Testing"].

[27] R. Mykitiuk & E. Sloss, "The Challenge of the New Reproductive Technologies to Family Law" in Royal Commission on New Reproductive Technologies, *Legal and Ethical Issues in Reproductive Technologies: Pregnancy and Parenthood* (Ottawa: Supply & Services, 1993) 339 at 347.

[28] Sir W. Blackstone, *Commentaries on the Laws of England* (New York: Wildly and Sons, 1967) at 457.

[29] J. Teichman, *The Meaning of Illegitimacy* (Cambridge, U.K.: Englehardt Books, 1978) at 5.

[30] However, in several cases in the United States, the marital presumption was discarded when a dark-skinned child was born to a white woman married to a white man. See D.E. Roberts, "The Genetic Tie" (1995) 62 U. Chi. L. Rev. 209 at 259ff.

a legal mother and a legal father."[31] Paternity by presumption—aptly referred to as "the legal fiction of biological fatherhood in marriage"[32]—preserves normative claims about the nature of marriage and family by codifying notions of the "naturalness" of sexual relations those between husband and wife. Legal truths were not always consistent with biological facts such that:

> ... what purports to be an inference about biological fact may actually grow out of a normative aspiration and may readily be transformed into a prescriptive command about marriage and family, often without acknowledgment that such a transformation has taken place. The important issue becomes not who is, but who should be having sex with the mother: her husband. Thus, the social construct, in fact normative and mutable, draws substantial but disguised legitimacy from the representation that it simply expresses "givens" of nature.[33]

In both the context of paternity and maternity, the "idea of 'nature' has 'come to mean biology'; therefore, the idea of relatedness has, to a large extent, been 'biologized.'"[34] However, in order to construe the existence of the *paternal* biological tie, law has had to examine and attend to the *social* relationships among men, women, and children.

Examining the category of "the bastard," we can see how the law sought to uphold the norms of society against the facts of biology. The legal construct of illegitimacy illustrates the tenuousness of the biogenetic tie in determinations of paternity and the fact that paternity has always rested upon a selective construction of biological facts. While the legal status of illegitimacy has been eliminated in every Canadian province but Alberta, the concept remains important for an understanding of the social construction of paternity.

Historically, the law distinguished between legitimate, and illegitimate children as an illegitimate child was one who was "not only begotten, but born out of matrimony."[35] In other words, the bastard was a child resulting from unsanctioned sexual acts and was determined to be *filius nullius*, or the child of no one. Biologically, the notion that a child is

---

[31] Mykitiuk & Sloss, *supra* note 27 at 362.

[32] S. Sevenhuijsen, "The Gendered Juridification of Parenthood" (1992) 1 Soc. & L. Stud. 71 at 74.

[33] M.M. Shultz, "Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality" (1990) Wisconsin L. Rev. 297 at 317.

[34] "Paternity Testing," *supra* note 26 at 20.

[35] Blackstone, *supra* note 28 at 454.

the child of no one and has no kin relations is an obvious absurdity. Within law, however, the illegitimate child literally had no legal relations and the rights held by illegitimate children at common law were very few. The biological links connecting a man to a child were all but irrelevant at common law unless they were accompanied by the legal relationship of marriage between that man and the child's mother.[36] Because they did not belong to a lineage, they could not be affixed with a legal surname, although one could be attained by reputation or as a nickname.[37] An illegitimate person could not establish future biological lineage and, as a result of being "kin to nobody," had "no ancestors from whom any inheritable blood could be derived."[38] Furthermore, illegitimate children were not eligible to inherit from their parents.

Whether a child was granted legitimate or illegitimate status had a direct bearing upon the rights and obligations attributed to a parent. The objectives of the rules of marriage were to "ascertain and fix upon some certain person to whom the care, the protection, the maintenance, and the education of the children should belong."[39] Therefore at common law, the father of legitimate children had duties to maintain, protect and educate their children.[40] The duty of maintenance, however, was understood to arise as a result of natural law, and was a direct result of the natural process of reproduction. At common law the biological progenitor of illegitimate children—even if only putative—had a duty of maintenance, notwithstanding the fact that he was not the child's legal father. This historical obligation has influenced the current legal conception of paternity, and, more importantly, has become one of the accepted indicia of paternity.

The common law presumption of paternity and the construct of illegitimacy illustrate that paternity is social. Every aspect of the category of illegitimacy speaks of the primacy of legally sanctioned social norms over the alleged facts of biology and birth. Historically, law erased the body from paternity. Biology was presumed from the social relationship. However now, largely as a result of advances in DNA testing, the biological father asserts itself. When the paternal body is produced, we should examine the

---

[36] For a discussion of the status of illegitimacy in relation to maternity see below.

[37] Teichman, *supra* note 29 at 36; and Blackstone, *supra* note 28 at 459.

[38] Blackstone, *supra* note 28 at 459.

[39] *Ibid.* at 455.

[40] *Ibid.* at 446.

sites very closely. For the first time in the history of human reproduction, it is now possible to locate and "prove" biological fatherhood: that is, to situate with certainty the biological father within his body.[41] Recent advances in genetic testing have offered fathers a *double* element of choice. A man who is not married to the mother of his child can choose to recognize that child as his own, while married men can choose to deny paternity on the basis of genetic evidence.[42] As a result, the concept of legal paternity has become complex—it does not remain constant as the context in which it is rendered varies.

An analysis of the statutory provisions that determine the circumstances in which a man will be found a legal father, and of common law decisions in which legal paternity has been ascribed, demonstrates the complexity of the paternal relationship and of legal determinations of that status. Under Canadian provincial legislation there are several circumstances that result in a man being presumed to be the father of a child. These include: if the man was married to the mother of the child at the time of the birth of the child; if the man was married to the mother of the child and the marriage was terminated within 300 days of the birth; if the man married the mother of the child after the birth and acknowledged that he was the father of the child; if the man was cohabiting with the mother in a relationship of some permanence at the time of the birth of the child, or the child was born within 300 days after the person and the other ceased to cohabit; if the man has acknowledged paternity of the child and is so registered under the *Vital Statistics Act* or similar legislation; and finally, if the man has been found by a court of competent jurisdiction in Canada to be the father of the child.[43] In most jurisdictions, any interested person may seek a judicial declaration of paternity.[44] A man presumed to be the father of a child may bring an action to disavow paternity. Where the matter goes before the court, the birth registration (which may simply

---

[41] C. Mossman, "DNA and the Stakes in Embodying Paternity" in L. Spaas, ed., *Paternity and Fatherhood: Myths and Realities* (London: MacMillan Press, 1998) 40.

[42] The presumption of paternity is difficult to overturn. The onus rests on the man contesting paternity to provide proof that he is, or is not, the father of the child. Biological evidence obtained through a blood test or genetic fingerprinting is usually the most compelling form of proof but the court does not always order blood tests. See T. Caulfield, "Canadian Family Law and the Genetic Revolution: A Survey of Cases Involving Paternity Testing" (2000) 46 Queen's L.J. 67.

[43] For details of particular provincial schemes, see Sloss & Mykituk, *supra* note 27 at 352 and n. 56.

[44] *Ibid.* at 352 and n. 59.

reflect a presumption of paternity) may be used, in most jurisdictions, as *prima facie* proof of the facts recorded in it.[45]

Situations now arise where it is in the state's interest to emphasize biological relatedness such as with the enforcement of maintenance obligations.[46] In particular, determinations of paternity are highly contingent upon the social welfare policies of the state. As the importance of marriage has declined, the state has taken an interest in the economic well-being of children and sought to enforce paternal obligations of financial support, regardless of whether a marriage ever existed.[47] To achieve this objective biological evidence is invoked in order to establish legal paternity.

There have also been recent cases which appear to explicitly state that the biological father is not the legal father of a child. Within adoption legislation, consent to adoption is not required by the biological father of a child in cases where he factually has neither a relationship with the child, nor the mother of the child.[48] There have also been recent cases which appear to de-emphasize the paramountcy of biology over social connectedness.[49] In these contexts, the courts construe "parenthood" as an issue of relationship, nurturance, shared experience, interdependency, and responsibility rather than merely biology.

Another instance of the legal recognition of non-biological ties is the doctrine of *in loco parentis* which has been developed in order to recognize those who voluntarily provide support or assume custodial duties for a child or children who are not legally his or hers.[50] While the person

---

[45] *Ibid.* at 352 and n. 63.

[46] *Paternity Testing*, *supra* note 26 at 20.

[47] The increasing emphasis on this in Canada, the United States and the United Kingdom, masks a concern with the burdening of the public purse in the guise of concern with the welfare of children. For an analysis of this trend in the United States, see J.L. Dolgin, "Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family" (2000) 32 Conn. L. Rev. 523.

[48] See *e.g.* the consent provisions and the meaning of the term "parent" in Ontario's *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 137(1) [hereinafter *CFSA*]. For a detailed analysis of consent provisions within adoption statutes, see Mykitiuk & Sloss, *supra* note 27 at 356-57. See also *S.(C.E.)* v. *Children's Aid Society of Metropolitan Toronto* (1988), 64 O.R. (2d) 311 (Div. Ct.) [hereinafter *S.(C.E.)*].

[49] *Paternity Testing*, *supra* note 27 at 20. Caulfield makes this assertion in light of the following cases: *L.(T.D.)* v. *L.(L.R.)* (1994), 114 D.L.R. (4th) 709 (Ont. Gen. Div.); and *Zegota* v. *Zegota-Rzegocinski* (1995), 10 R.F.L. (4th) 384 (Ont. Gen. Div.).

[50] Mykitiuk & Sloss, *supra* note 28 at 395. The *Divorce Act*, R.S.C. 1985 (2ND Supp,) c. 3, s. 2(2)(b) refers to this type of parental status as one who "stands in the place of a parent."

standing *in loco parentis* is not accorded full parental rights and responsibilities, he or she is legally recognized on the basis of the relationship that has developed between her or him and the child. Predominantly, this issue has received judicial consideration in the context of the relationships between men and children upon the re-combination of families. This is largely due to the high incidences of custody remaining with the mother of a child or children upon divorce, the increasing existence of single mothers, and the prevailing political and economic conditions in which law acts as an arm of the state, and looks for private sources of support. The bases for this type of relationship were articulated in the 1999 Supreme Court of Canada case *Chartier* v. *Chartier*.[51] Financial support, emotional support, and the child's relationship with his or her absent biological parent are taken into consideration. The Court also examined the extent of the child's participation in the family unit, the level of interaction between the parent and child in terms of discipline and child responsibility to that parent, and the extent to which the child is represented by the adult "to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child."[52]

Notwithstanding examples of the legal means through which a man may become a father, these results cannot be categorized as indicating a particular judicial "trend" regarding determinations of paternity. Rather, the courts use the legal standard or indicia of paternity necessary in the circumstances of the case to reify the construction of family that law has traditionally favoured. In cases where a nuclear family appears to exist, law is willing to allow a man to be a father strictly on the basis of a social relationship. In cases where paternity is contested by two (or more) men, the law now often relies upon strict biological determinations in order to maintain the appearance of only one legal father. In circumstances where a child's biological father is known but neither supports nor cares for the child, law is willing to recognize the limited social contribution of another man or men. Within family law decisions regarding the father/child relationship, the courts are and always have been willing to bestow paternal status upon men on the basis of *either* biological *or* social relationships. As a result, more and differently situated men are legally recognized as fathers,

---

[51] [1999] 1 S.C.R. 242 [hereinafter *Chartier*]. Although the principle use of the doctrine of *in loco parentis* is meant for determinations of support obligations, the Court in *Chartier* discussed some of the relevant factors to be taken into account when assessing a parent-child relationship.

[52] *Ibid.* at 261. Similar factors are considered in the context of "settled intention." Although the financial aspects of a settled intention parent-child relationship are key considerations, courts also often consider the social, emotional, and psychological factors in the relationship.

or as having a significant relationship with a child deserving of legal recognition.

B. *Maternity:* Mater est quam gestation demonstrat

Until recently, courts have rarely been burdened with disputes about maternity. Women have been placed in a passive position in relation to their parental status resulting from the presumed biological inevitability of their reproductive role. Biology, including both genetics and the processes of gestation and birth, was historically paramount and decisive in the maternal context. This is reflected in the maxim *mater est quam gestation demonstrat* (or "by gestation the mother is demonstrated"). The notion that gestation is demonstrative of maternity has historically been applied, without qualification, to all births.[53] Because birth can be witnessed, the biological and social/legal aspects of maternity have been construed as inextricably linked.

In order to articulate the constitutive elements of the legal construction of maternity, the relationship between maternity and paternity within a patriarchal society must be addressed. Maternity, as a legal category, has been articulated in the contexts of heterosexual monogamous marriage, and the system of patrilineal descent. Maternity in a patriarchal society is what mothers and babies signify to men.[54] "Patriarchal kinship is the core of what is meant by patriarchy; the idea that paternity is the central social relationship."[55] In our society, the ideology of patriarchy provides us with an understanding not only of the relations between women and men, but also of the relations between women and their children.[56] Mothers arise out of the act of male impregnation and, although they play a biological role, it is seen as secondary to the male contribution. In a patriarchal system, when people talk about blood ties, they are referring to a genetic tie or a connection by "seed." This particular form of male domination does not attribute value to the maternal tie; rather, it focuses strictly on genetic linkages.

---

[53] M. Coleman, "Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction" (1996) 17 Cardozo L. Rev. 497.

[54] B.K. Rothman, "Motherhood Under Patriarchy," in *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (New York & London: W.W. Norton, 1989) 29 at 29-30.

[55] *Ibid.* at 29.

[56] *Ibid.* at 29-37.

Until women attained legal personalities, the definition of maternity was relevant to the legal status of a child only to the extent that law examined the relationship between the mother and father of a child. This situation of legal insignificance resulted in a jurisprudential void concerning the articulation of the ways in which a woman may legally become a mother. The *mater est* presumption rendered determinations of parental status problematic only in terms of a child's relation to her or his father, a status which depended on whether the relationship between parent and child came into being within the confines of legal marriage. Thus, at common law and before modification by statute, a child born to a single woman was *filius nullius,* the child of no one: " ... a bastard's mother, being a woman, was in fact that very *no-one*. In law, lineage, and in matters having to do with property, a woman, until modern times, was a kind of nullity."[57] The mother of an illegitimate child had a customary, if not legal, obligation to care for the child until which time she placed the child with an authority or the child was removed from her custody.[58]

If a woman was married at the time she gave birth, her husband was presumed to be the father of the child. This presumption is based on the assumption that a woman's husband was the only person who would have access to her reproductive capacities.

As a result, biological or genetic ties between parents and children have been accorded great legal significance. Since the relationship of caring and nurturing is not privileged within patriarchal conceptions of reproduction, legal maternity has been strictly in opposition and subordinate to paternity on the bases of both women's biological contribution and their role as the gestators of the male seed. Further, because of the primacy accorded to the male biological contribution, legal maternity has taken on a secondary role, an essential component of which is the social relationship of caring for children.

Adoption provides a good example of one circumstance in which a child's legal mother is not the biological mother. However, the operation of normative standards about heterosexual, monogamous marriage have resulted in the virtual elimination of the contribution of the biological birth mother in order to maintain the construct of the fertile nuclear family.[59] For

---

[57] Teichman, *supra* note 29 at 83.

[58] *Ibid.* at 41.

[59] According to Drucilla Cornell, "[i]t is only in the context of a system of duties that remain bound up with women's legal identity in the heterosexual family that we can even begin to understand the unequal treatment of birth mothers and adopted children." See D. Cornell, "Reimagining

the appearance of a nuclear family with biological children to exist, the actual biological parents of the child must be removed from the life of the child. To accomplish this, statutory provisions contain standard adoption procedures in which the adoptive parents are substituted for the biological parent(s).[60] All of the rights and responsibilities of the biological parent(s) are removed, and correspondingly attributed to the adoptive parents. This approach to adoption operates essentially as one of assimilation rather than one of acknowledged variation.[61]

Before a child can be adopted, his or her legal parents or guardians must give legal consent. The notion that every parent must consent operates within statute to automatically include the child's mother, but only to include the child's father depending on the factual nature of his relationship with the mother.[62] The requirement that a birth mother relinquish all rights and status as mother upon adoption is an illustration of the way in which the law perpetuates the woman/mother/motherhood construct as an indivisible category and role. In the context of adoption, legal determinations of the inability to act in accordance with societal definitions of motherhood have resulted in the denial and reassignment of legal maternal status. In addition, the types of behaviour acceptable for mothers have been at issue in many legal disputes both in adoption cases, and in other areas.[63]

Adoption and Family Law" in Hanigsberg & Ruddick, eds., *supra* note 18, 208 at 211.

[60] Step-parent adoptions are an exception, as the biological connection to one of the child's parents remains intact.

[61] Shultz, *supra* note 33 at 320. As Shultz notes: "...intention, rather than biology, is the basis for giving up or adopting a child, but an imagery of biology locked into conventional family forms has shaped the transaction. Neither the surrendering biological parents nor adoptive legal parents have had more than one choice about how to structure their relationship to each other or to the child." *Ibid.*

[62] S. Fodden, *Family Law* (Toronto: Irwin Law, 1999) at 97. For example, see the consent provisions and the term "parent" in *CFSA*, *supra* note 53.

[63] Cornell, *supra* note 59. See E.N. Glenn, "Social Constructions of Mothering: A Thematic Overview" in E.N. Glenn, G. Chang & L. Forcey, eds., *Mothering: Ideology, Experience and Agency* (New York: Routledge, 1994) 1 at 13. According to Glenn, the conflation of woman with mother appears an undifferentiated and unchanging monolith. This exists in sharp contrast to the historical specificity, and variance of roles and contexts, in which men are linked to parenthood. The conflation of "woman" and "mother" reflects a fusion of actor and activity and has historically been one in which only women, or birth-mothers, are recognized as nurturers and caregivers. Further, Slaughter illustrates how language is pivotal to this discussion. "Mother" is a term that refers to two functions: childbearing and childrearing. Since women are usually both the primary childrearers and childbearers, the two functions are usually collapsed under this term. However, there is nothing in nature that requires women to "mother," nor that which prevents men from doing so too. See M.M. Slaughter, "The Legal Construction of Mother" in M.A. Fineman & I. Karpin, eds., *Mothers in Law: Feminist*

The issue of step-parent adoption in the context of lesbian partnerships is another example of a situation in which the traditional legal construction of maternity has been expanded. In step-parent adoptions, same-sex partners may now adopt the "natural" child of their partner.[64] Thus, two women may have a legal parental relationship with the same child. While in fact, a child may now have two legal parents of the same sex, the effect of a step-parent adoption continues to be the legal erasure of the third parent. The result is the continued legal insistence upon the two-parent family.

The common law understanding of maternity is supplemented by two types of legislative provisions. The first is found within vital statistics legislation, which commonly define "birth as the complete expulsion or extraction of the fetus (or product of conception) from its 'mother.'"[65] Second, each province has provisions that allow "any interested party" to seek a declaration that a person is or is not the mother of a child. The provisions are seen as a potential avenue for challenging the assumption that the woman who gives birth to a child is the child's legal mother.[66] In addition, women may apply for limited determinations of parental "rights"

Theory and the Legal Regulation of Motherhood (New York: Columbia University Press) at 73.

[64] In Ontario, see *K. (Re)* (1995), 23 O.R. (3d) 679 and Amendments because of the Supreme Court of Canada decision in *M. v. H.*, S.O. 1999, c. 6. Same-sex partners now fall within the scope of persons who may apply to adopt a child under s. 146(4) of the *Child and Family Services Act*, R.S.O. 1990, c. C.11., as am. by *Consent and Capacity Statute Law Amendment Act*, S.O. 1992, c. 32, s. 3; *Revised Statutes Confirmation and Corrections Act, 1993*, S.O. 1993, c. 27, Sch.; *Statute Law Amendment Act (Government Management and Services), 1994*, S.O. 1994, c. 27, s. 43(2); and *Adversary, Consent and Substitute Decisions Statute Law Amendment Act, 1996*, S.O. 1996, c. 2, s. 62. In British Colombia, those who are permitted to apply to adopt a child are not restricted on the basis of sexual orientation in either applications made alone, jointly as a couple, or in the case of step-parent adoption where one applicant is the birth parent of the child. See *Adoption Act*, R.S.B.C. 1996, c. 5, ss. 29(1), (2).

[65] For statutory provisions, see Mykitiuk & Sloss, *supra* note 27 at 423, n. 44.

[66] *Ibid.* at 350. For statutory provisions, see Alberta's *Domestic Relations Act*, R.S.A. 1980, c. D-37, s. 64, which states that standing is limited to "a person claiming to be the father, mother or child of another person"; Manitoba's *Family Maintenance Act*, R.S.M. 1987, c. F-20, s. 19-20; Newfoundland's *Children's Law Act*, R.S.N 1990, c. C-13, s. 6; New Brunswick's *Child and Family Services Act*, R.S.N.B. 1980, c. C-2.1, s. 100; the Northwest Territories' *Child Welfare Act*, R.S.N.W.T 1988, c. C-6, s. 79; Ontario's *Children's Law Reform Act*, s. 4; Prince Edward Island's *Child Status Act*, R.S.P.E.I. 1988, c. C-6, s. 5; Saskatchewan's *Children's Law Act*, S.S. 1997, c. C-8.2, s. 43; Yukon's *Children's Act*, R.S.Y. 1986, c. 22, ss. 8-10. For a more detailed analysis of the Ontario provision, see Fodden, *supra* note 69 at 71-72. In a recent Ontario case, a woman relied unsuccessfully upon such a provision to apply for a declaration that she, in addition to her lesbian partner who gave birth to the child, was also the mother of that child. See also, *Buist v. Greaves*, [1997] O.J. No. 2646 (Gen. Div.) [hereinafter *Buist*] discussed below.

or have obligations imposed upon them by gender neutral statutes pertaining to the responsibilities accorded to "parents."

C. *Gender Neutrality, Asymmetry, and Legal Discourses of Filiation*

The tendency now in modern family legislation is to refer to "parents" rather than to mothers or fathers, maternity or paternity. One might think such language is a positive reform. However, gender neutrality treats parents as fungible and risks marginalizing the gendered aspects of legal norms that continue to influence legal reasoning. Within the context of filiation, the gender neutral language of parent must confront the fact that *biology* is itself asymmetrical with respect to the contributions of males and females to reproduction. But instead of acknowledging this difference in ideology, legal categories of filiation reflect differences of power between men and women, an asymmetry the legal categories of filiation transmit to the present despite reform to the statutory language and practice of family and marriage law.

The traditional uncertainty surrounding paternity and the presumptive knowledge about the "natural" mother underpin legal filiation. Historically, since paternity had to be constructed on a social relationship, fathers represented culture while mothers were equated with nature through the perceived biological certainty of maternity. Women are still accorded legal maternal status only if they are able to fulfil *both* the biological requirement and the normative behavioral requirements established within law. Law's absolute alignment of maternity with "nature" has rendered the construct both unitary and indivisible. Moreover, the ability to choose to "recognize" offspring reflects asymmetrical power, as choice is available only to men. While a man has the power to actively recognize his offspring, a woman has no choice in the matter and is passively assigned the status of motherhood through the "facts" of birth.[67]

While the concept of maternity fuses genetic, gestational, and caregiving roles in a unitary construction of "natural" motherhood, the failure to care for a child "denaturalizes" a woman and renders her "unfit" as a mother. Whereas paternity is a construction allowing fatherhood to be *established* in a variety of ways—including choice—maternity is a unitary construction where women can be *deprived* of the status if both the biological and social roles are not fulfilled. This naturalization of maternity

---

[67] *Reproducing, supra* note 4.

by law has precluded legal thinking about the *distribution* of maternity in a manner similar to determinations of paternity.[68]

IV. FILIATION REVISITED

ARTs have rendered obsolete the biological order constructing the categories of filiation. "Nature" or biology cannot be held to be determinative when it is deliberately manipulated, however, traditional ideological constructions of maternity and paternity continue to inform legal principles binding adults to children. The concept of biology, which once provided a solid platform for determinations of parental status, has been shaken by advances in ARTs. Paternity is now determined, depending on the context of the parental claim, either on the basis of biological or social relatedness. With respect to maternity, the courts continued reliance on notions of biological imperatives has led to unpredictable legal decision making. Nor have provincial legislatures developed responses to issues, such as surrogacy, that challenge a simple biological ideal of maternity.[69]

ARTs challenge the existing limited legal convention of maternity. They also challenge deeply held social norms:

> It is precisely the shifting realignment of maternity as closer to paternity that social conservatives all fear. When antiquated "natural" unified maternity confronts technology, the full range of maternal social relations can be reappropriated, rejected, or appreciated as the diverse historical and social phenomena they are.[70]

Maternity is now visibly divided into genetic/chromosomal, uterine/gestational, and social/legal aspects.[71] ARTs make it possible to separate the genetic, gestational, and rearing aspects of motherhood (and

---

[68] By using the term "similar" here, I do not mean to suggest that I favour a similarly situated conception of formal equality. Quite the contrary. As one insightful external reviewer of this article noted, I want to argue that formal equality will get us nowhere because biology never has been and never will be the exclusively relevant factor in determinations of filiation. First, because biology has always had a significant ideological component in legal discourse and second, because formal equality assumes human relations can be reduced to a simplistic male/female dyadic equation. What ARTs do is to clarify that the male/female dyad no longer has a purchase as a "biological truth" about procreation and expose what has always been its ideological content. Thus, substantive equality in determinations of filiation will require an analysis more reflective of complex social and material relations and of the asymmetrical and diverse connections of multiple persons to a particular child.

[69] Art. 541 of the Quebec *Civil Code* renders surrogacy contracts void.

[70] Farquhar, *supra* note 25 at 35.

[71] The process of ovum enucleation through which the nucleus of an ovum is replaced with the nucleus of another, expands the number of women who may be biologically related to a child.

the genetic and rearing aspects of fatherhood), resulting in a child with three women and two men with potential claims to the legal status of parent. A woman can either provide the genetic material (i.e., a gamete or ova) or carry the child or both. Furthermore, while it is true that the social and biological aspects of maternity are split in some circumstances (like gamete donations to a woman who intends to carry and raise the resulting child), it is also sometimes the case that the social and biological categories are blurred. This is especially true in the circumstances surrounding surrogacy arrangements. A woman who commissions a surrogate may have no genetic or bodily connection to the child produced, but views herself, in part, as responsible for initiating the child's existence.[72] Breaking down maternity into three categories also highlights the conflation of the activities of mothering and the status of being a mother. In the case of social and/or legal mothering, it can be argued that both men and women can nurture and rear infants so that, technically, either a man or woman could be this type of "mother" to a child.

Conversely, it is now possible to impart biological certainty into determinations of paternity,[73] an area once fraught with uncertainty for men. Genetic and reproductive technology has enabled scientific verification of paternity at the very moment it forces us to reconsider maternity. The separation of the genetic and rearing aspects of fatherhood is, perhaps, less unique within law in so far as legal rules and presumptions have, for a long time, ascribed paternity to men in relation to children to whom they are not genetically connected. In recent paternity cases involving custody and support, biological relations have been granted priority.[74] However, a line of jurisprudence also exists in which the courts have not privileged biology over the best interests of a child.[75]

---

[72] See J.L. Hill, "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 N.Y.U.L. Rev. 353; and J.A. Robertson, "Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction" (1986) 59 S. Calif. L. Rev. 939.

[73] Stone, *supra* note 9 at 80. Historically, paternity tests could only exclude individuals from a group of potential fathers but could not determine which particular individual was the actual father. DNA fingerprinting techniques have changed this situation and can now determine paternity with a very high degree of certainty—up to 99.99 per cent or better.

[74] See *S.* v. *M.* (1994), 113 D.L.R. (4th) 443 (B.C.S.C.); *D.H.* v. *D.W.* [1992] O.J. No. 1737 (QL); *Saul* v. *Himmel* (1994), 120 D.L.R. (4th) 432; *S.(R.)* v. *H.(C.)* (1989), 20 R.F.L. (3d) 456 (N.B.C.A.); and *D.(J.S.)* v. *V.(W.L.)* (1995), 11 R.F.L. (4th) 409.

[75] See *Zegota* v. *Zegota-Rzegocinski* (1995), 10 R.F.L. (4th) 384 (Ont. Gen. Div.); *L.(T.D.)* v. *L.(L.R.)* (1994), 114 D.L.R. (4th) 709 (Ont. Gen. Div.); and *King* v. *Low*, [1985] 1 S.C.R. 87.

The advent of ARTs places the asymmetry of filiation law in sharp relief. Maternity is now indeterminate, while paternity appears certain. More than one woman can now be biologically or "naturally" related to a child and other women may provide a caregiving role. DNA testing can now provide absolute certainty of the identity of the genetic father. But the new indeterminacy of maternity comes about only in the unprecedented circumstances of having to select *one* mother among contributors to the heretofore fused indicia of maternity, while the certainty of DNA testing has not eroded the social underpinnings of paternal status. In the cases discussed below, courts have resisted defining paternity purely on a genetic basis. In contrast, since the social relationships between women and children were never accorded legal significance in the absence of biological ties, legal claims to maternity on the basis of social ties are still silenced. Norms have not developed to address the fragmentation of the female biological contribution among several women. Conditioned by the fused status of maternity, the legal process seeks to elevate a single claimant to the status of mother. The result is the restriction of the legal category of maternity to its historical content, and the virtual erasure of the claims to maternity of differently situated women within the assisted reproductive process. Evidence offered by nature is always selectively deployed in order to fulfil ideological ends.

A. *The Paternity Cases*

The cases of *Low* v. *Low*[76] and *Zegota* v. Zegota-Rzegocinski[77] involve men whose wives were impregnated through anonymous donor insemination with their consent and who later sought declarations of paternity under the Ontario *Children's Law Reform Act* (*CLRA*).[78] Low is the first case in Canada in which a declaration of paternity was sought in these circumstances. After consenting to artificial insemination with donor sperm and participating enthusiastically throughout his wife's pregnancy, Mr. Low was certified as the child's father under the *Vital Statistics Act*.[79] Upon the breakdown of their marriage only days after the child was born, the Lows sought a divorce. While they lived separately and apart since the birth of

---

[76] (1994) 4 R.F.L. 4th 103 (Ont. Ct. J.) [hereinafter *Low*].

[77] [1995] O.J. No. 204, online: QL (OJ) [hereinafter *Zegota*].

[78] R.S.O. 1990, c. C-12.

[79] R.S.O. 1990, c. V-4.

the child, Mr. Low periodically visited the child, visits facilitated by several orders granting access. At the time Mr. Low brought an application for a declaration of paternity under the *CLRA*, he also sought an order for custody or, in the alternative, access pursuant to the *Divorce Act*. Despite the fact that Mrs. Low had agreed that Mr. Low stood "in the place of a parent" under the *Divorce Act*,[80] she argued that an order for custody or access ought be denied. The trial court held that granting liberal access rights to Mr. Low was in the best interest of the child.

Mrs. Low also contested the declaration of paternity. She argued that artificial insemination with donor sperm rebuts the presumption of paternity under the *CLRA* as Mr. Low is not the child's biological father.[81] To support her claim, Mrs. Low relied on the language of section 1(1),[82] which specifies that all persons are the children of their "*natural* parents," and section 8(1)(3), which extends the presumption of paternity to "a person who marries the mother of the child after the birth of the child and acknowledges that he is the *natural* father." These provisions suggest that Mr. Low *must* have a biological tie to the child in order to fulfil the statutory requirements of paternity. However, to clarify and interpret the intended meaning of declarations of paternity in the wording of sections 4(1) and 5, the Ontario Court of Justice interpreted the provisions as follows:

> [T]he words "natural," "natural parent," "parent," "father," and "natural father," appearing in these sections, are not defined in the legislation. In s. 1(1), the word "natural" appears before the word "parents." In s. 8(1)(3), the word "natural" appears before the word "father." The omission of the word "natural" as an adjective in describing "father" in other

---

[80] *Divorce Act*, *supra* note 50. Under s. 16, an application (i.e., an application for custody or access in relation to a child of the marriage) can be made by either or both spouses or by any other person. Pursuant to *ibid.*, s. 2(2)(b), a "child of the marriage" includes "any child of whom one is the parent and for whom the other stands in the place of a parent." Therefore, one can acquire quasi-parental rights and obligations under the legislation without being the legal parent of a child.

[81] *CLRA*, *supra* note 78. Pursuant to the *CLRA*, there are two means by which a declaration of paternity can be granted. Section 4(1) permits "any male person having an interest" to apply for a declaration that he is "recognized in law" to be a father. Section 4(2) links the presumption of paternity under s. 8 to the legal declaration of paternity in this section. Where the court finds that a presumption of paternity exists under s. 8, and this presumption *is not* rebutted on the balance of probabilities, a declaratory order of paternity pursuant to s. 4 in favour of the presumed father shall be granted. A declaration of paternity can also be granted when a presumption of paternity *does not* arise. Section 5 allows any male person to apply for a declaration that he is the father of a child. When the court finds, on the balance of probabilities, that the "relationship between father and child" has been established, the court can make a declaratory order of paternity.

[82] *Ibid.* Section 1 establishes equal status for children by abolishing illegitimacy: children born within and outside of marriage are considered the children of their "natural" parents

> sections suggests the intention of a meaning broader than mere "biological" father, in those sections... the declaration authorized in s. 4(1) is *not* that a male person is the "natural father," rather that he is "recognized in law" to be the "father" of the child. This also suggests an intention of a meaning broader than merely the "biological" father... Nowhere in s. 5 is there any suggestion that the "relationship of father and child must have a biological and genetic character... I conclude that this expression must mean something broader than a mere biological relationship.[83]

The provisions of the *CLRA* were broadly construed in order to make the paternal relation more than a "natural" or biological relationship with a child.[84]

The court noted that while no Canadian jurisprudence exists that establishes the husband of a woman inseminated with donor sperm is the father of the child pursuant to section 5, a number of United States cases have come to this conclusion. The court stated that a declaration of paternity under section 5 would be issued. While, on the facts, the presumption of paternity under sections 8(1)(1) and 8(1)(5) was raised by both Mr. Low's marriage to Mrs. Low at the time of birth, and the certification of his paternity under the *Vital Statistics Act*, the court chose not to consider whether or not the presumption of paternity is rebutted by donor insemination. It would have had to consider this if it had followed a subsection 4(2) analysis. But it avoided this consideration by making a declaration of paternity pursuant to section 5.

In *Zegota*, the trial court also allowed the social, or intending, father to assert paternal status through a declaration of paternity. Like *Low*, the wife within a married couple conceived through artificial insemination with donor sperm. The parties, however, separated before the child was born and Ms. Wakeman[85] wanted to deny access to Mr. Zegota. Mr. Zegota sought a declaration of paternity and asserted a claim for access, while Ms. Wakeman sought a declaration that Mr. Zegota was not the father of her child, Robin.

By virtue of the fact that he was not Robin's "natural or biological father," Ms. Wakeman asserted that Mr. Zegota "[did] not qualify as a 'parent' at law."[86] The court not only declared that Robin was a child of the marriage pursuant to the *Divorce Act*, but also that Mr. Zegota was father

---

[83] *Low*, *supra* note 76 at 113.

[84] The court relied upon section 10 of the *Interpretation Act*, R.S.O. 1990, c. I-11, which authorizes the fair, large, and liberal interpretation of statutes for the public good.

[85] She was also known by her former married name, Zegota.

[86] *Zegota*, *supra* note 75 at 388.

of the child and should receive liberal access rights. Mr. Zegota's marriage to Ms. Wakeman at the time of Robin's birth raised the presumption of paternity under section 8(1)(1). However, the trial court declared Mr. Zegota to be the father pursuant to section 5, which pertains to circumstances where there is "no person recognized in law" to be the father of a child. The court adopted the reasoning of *Low* without providing any additional reasoning concerning how the relationship of father and child had been established on the facts of this case, as required under section 5 or why a declaration under section 4(2) was not granted when indeed, a presumption of paternity had been raised because the parties were legally married at the time of the birth.

The assertion that artificial insemination rebuts the presumption of paternity, made in both *Low* and *Zegota*, has yet to receive direct judicial comment. This is likely due to the desire of the courts in certain situations to apply the presumption of paternity even in light of the biological certainty of paternity. The courts appear reluctant to state unequivocally that paternity can be determined on a purely biological or genetic basis even though biological certainty in the realm of paternity can now be established beyond question. In both *Low* and *Zegota*, although the presumption of paternity was raised, rather than examining whether in fact Messrs. Low and Zegota were the "fathers" of the children on the balance of probabilities, the courts opted to forego the section 4(2) analysis in order to engage directly with the section 5, declaratory provision. This may also have occurred because of the absence of a biological "father" in the lives of these particular children. These cases demonstrate that even in light of technological developments in the area of reproduction, many situations exist where it is desirable for the court to preserve the socially-based paternal relations established within law. However, in order to keep these provisions operative in cases where the courts do want to find the biological father the legal father of the child, the courts have had to avoid ruling on whether the presumption of paternity is rebutted in cases of donor insemination.

Johnson-Steeves v. Lee[87] illustrates court recognition of the biological progenitor as the father of a child regardless of the existence of an accompanying legally-recognized social relationship between the man,

---

[87] [1997] A.J. No. 512, online: QL (AJ) [hereinafter *Johnson-Steeves Trial*]. The Alberta Court of Appeal upheld the decision of the trial court, making only limited comment on the issues raised at trial. See *Johnson-Steeves* v. *Lee* [1997] A.J. No. 1057 (Alta. C.A.), online: QL (AJ) [hereinafter *Johnson-Steeves C.A.*]. This case also raises an interesting contracts discussion around the nature of legally binding paternity agreements which is outside the scope of this paper.

woman and child.[88] Ms. Johnson-Steeves and Dr. Lee had a longstanding, platonic friendship before they agreed to conceive a child through sexual intercourse. Ms. Johnson-Steeves intended the arrangement to be analogous to that of a donor insemination where she maintained custody and primary decision-making powers; both parties understood that Dr. Lee would provide financially for the child and not be the primary decision-maker. After the birth of Nigel, disagreement arose about whether Dr. Lee should have access as he desired. Ms. Johnson-Steeves sought an order of permanent custody, an order that Dr. Lee be denied access to Nigel, and an order for child support pursuant to Alberta's *Domestic Relations Act* (*DRA*).[89] Under section 56(1) of the *DRA*, a mother or father may apply to the court for an order for a right of access. The court may make, "any order it sees fit" regarding the custody of a child and the right of access of either parent. Dr. Lee contested the no access claim on the grounds that it was not in Nigel's best interest.

To determine whether Dr. Lee had the right to assert a claim for access to Nigel, the trial court turned first to the definition of "father" in the *Parentage and Maintenance Act* (*PMA*)[90] and found Lee was the biological father of the child as defined under section 1(g). After determining that Dr. Lee was indeed the "father" for the purpose of maintenance, the court then held that he may apply for a right of access pursuant to the *DRA*.[91] In so doing, Dr. Lee was also recognized by the court as Nigel's "parent." This distinction seems to arise from the interpretation of section 56(1)(a) of the *DRA* which refers to the mother and father of the child as well as its "parents." The court characterizes Dr. Lee's relationship in response to Ms. Johnson-Steeves argument that it is essential to maintain the difference between biological and social fathers.[92] Biological fathers, in

---

[88] Legally recognized relationships are marriage or cohabitation within a relationship of "some permanence."

[89] R.S.A. 2000, c. D-14.

[90] R.S.A. 2000, c. P-1.

[91] Surprisingly, the trial court judgment did not discuss or analyze the relevant provisions of the *DRA* as applied to the facts of this case. The court of appeal only clarified this omission to the extent that it located the decision as resting upon Part 9 of the *DRA*, *supra* note 89, entitled "Establishing Parentage," which sets out the circumstances in which declarations of parentage can be made. It is uncertain, however, whether the court actually declares Dr. Lee to be Nigel's legal father pursuant to what was then s. 64(1) (now s. 79(1)). Since the issue at hand was access, and not a determination of full legal paternity, both courts appear to have skirted the issue.

[92] The court of appeal declined to consider whether such a distinction should be adopted in Alberta. *Johnson-Steeves C.A.*, *supra* note 87 at para. 20.

her view, do not act as a "parent" to the child and should therefore not have an entitlement to access: " ... where there is not a relationship between the parties and no intended relationship between the parties then it is not in the child's best interest to *create* a social father from a biological father."[93]

Using the doctrine of equitable estoppel, Ms. Johnson-Steeves argued Dr. Lee's access rights should not be recognized because he had no social relationship with Nigel. Both courts held Dr. Lee was not estopped from seeing the child. Rather, both courts found it was Ms. Johnson-Steeves' active and express denial of his constant requests to visit Nigel that resulted in the tenuous relationship. The court of appeal acknowledged the most glaring inconsistency with the simple sperm donation argument was Dr. Lee's agreement to financially support the child and found it was "incomprehensible" that anyone would want to financially support a child without intending to develop a relationship.[94]

Ms. Johnson-Steeves, on the other hand, sought to deny access to Nigel on the basis of her belief that, if the courts were to confer a right of access upon Dr. Lee, her chosen "family" form would be threatened. The notion that a woman should be able to choose to have a child who does not have, in law, a father is entirely valid for this author but the court was of the view that "society and biology have not yet reached the point where we have dispensed with fathers or mothers completely. They form an integral part of each child's life whether or not they reside with their children."[95] It would seem that in situations characterized by the absence of a man who has developed a socially based paternal relationship with a child, when the courts are able to identify a biological father they are most likely to do so. It is also obvious that the court did not want to change the "nature" or structure of the legal family or recognize its continuing social transformation. However, the existence of familial relationships between lesbian or gay partners and their children, those of single parent families, and families created through the use of ARTs provide ample evidence to the contrary.

The claim by Ms. Johnson-Steeves that she had created a family without a legal father was problematic on the facts of her case because Dr. Lee did not seek legal recognition as the child's father, but only the limited parental right of access. The fact that the courts recognized Dr. Lee as

---

[93] *Johnson-Steeves Trial*, *supra* note 87 at para. 48 (emphasis added).

[94] *Johnson-Steeves C.A..*, *supra* note 87 at para. 16.

[95] *Johnson-Steeves Trial*, *supra* note 87 at para. 53.

Nigel's "father" as a result of the operation of the statutes involved in the claims regarding access, in combination with Ms. Johnson-Steeves' desire to have a maintenance obligation affixed upon the man she considered to be "a sperm donor," resulted in a decision that awarded access on the basis of a finding of legal paternity, a standard not required for the determination of limited parental rights or responsibilities.[96] When determinations of legal paternity are not at issue, the relationship between the man's responsibility of providing maintenance for a child, and the issue of whether he should then be afforded access on that basis, is not complicated. Financial maintenance for a child by a man *should not* automatically vest in him a right of access, contrary to the court of appeal in *Johnson-Steeves*.[97] Both the man's relations with the child, and the mother need to be assessed by the courts because men often use the right of access to assail a functioning, non-traditional family.

Johnson-Steeves will likely serve to continue to limit the ability of women to create families without legal fathers. Women who try to create "fatherless families" are faced with inconsistent legal results depending on whether the source of the sperm used for conception is known. In cases of known donors, law operates to thwart attempts by women to create non-traditional families in circumstances even where the parties have agreed that the man will not play a role in the child's life. The current construction of family legislation, and the interpretive approach used by the courts always leaves open the possibility of finding fathers, or at least conferring parental rights and responsibilities on a male figure. Women, in the case of anonymous donation, can opt to have a fatherless family precisely because the man has expressly chosen not to be recognized as the father. Moreover, single and lesbian women are often denied access to anonymous donor sperm, resulting in certain rights being accorded to a known donor whether these women want this or not.

---

[96] See *Goudie* v. *Goudie*, [1993] B.C.J. No. 1049. See also, *Keeping* v. *Pacey*, [1996] O.J. No. 2274 (C.A.). Both cases demonstrate that a biological tie is not required for a man to acquire certain parental rights to, and responsibilities for a child such as maintenance and access. In these cases, actual paternity was not at issue, rather the courts had to determine whether the men had a sufficient social relationship with the children to establish legal rights and duties.

[97] This assertion has to be made in light of the understanding that the financial support obligations for children do not establish the type of relationship that should fall upon individual men in the absence of a relationship with the child; this should be a responsibility of the state. Where a man is compelled to pay maintenance, in order for him to assert a right of access (or another parental right), he must have a social relationship with the child. This view conforms with the ruling in *S.(C.E.)*, *supra* note 48, and several American cases. See *e.g. Lehr* v. *Robertson*, 463 U.S. 248 (1983); and *Matter of Robert O.* v. *Russell K.*, 604 N.E. 2d 99 (N.Y. 1992).

Low, Zegota, and *Johnson-Steeves* illustrate the various ways a man may legally become a father while presenting maternity as absolute and verifiable. Statutes, presumptions of paternity and declarations of paternity all incorporate notions of social and biological relatedness and appear to be flexible in their application of standards depending on the operative relationships within a particular case. At present, statutes preclude the creation of alternative family forms, and alternative versions of relatedness by preserving men's choice whether or not they desire legal recognition. Law needs to better account for the motivations of the parties to the conception of a child in order to determine the *significance* of the relationships created.

B. *The Maternity Cases*

In *Buist* v. *Greaves*,[98] the lesbian co-mother of a child asked the court for a declaration under section 4 of the *Children's Law Reform Act* (*CLRA*) that she was a mother of a child conceived by artificial insemination and gestated by her former partner. Buist also asked the court to grant an order for sole or joint custody of the child and an order that he not be removed from Ontario by his biological co-mother who sought to relocate to British Columbia. Ms. Buist was not asking the court to recognize her as Simon's sole mother. Instead, she asked the court to recognize that Simon had two legal mothers based on her active and involved caring for Simon.

To support this position, Buist pointed to the "precedent for a child having two mothers in the case of same-sex adoption."[99] In refusing to declare Ms. Buist a co-mother, the Ontario Court of Justice stated that the language of section 4, and specifically the use of the definite article "the" before "mother," indicates that the drafters of the legislation intended that

---

[98] *Buist* v. *Greaves* [1997] O.J. No. 2646 (Gen Div.), online: QL (OJ)[hereinafter *Buist*].

[99] *Ibid.* at para. 34. For a discussion of the legal recognition of same sex step-parent adoption see below. Note the court does not explicitly state that the children in question in *Re K* have two legally recognized mothers. Whether intentionally or not, they state only that the definition of spouse in the *Human Rights Code*, which is incorporated into the *Child and Family Services Act*, violates s. 15(1) of the *Charter of Rights and Freedoms* by denying to gay or lesbian people the right to apply for adoption as a couple. The legal concept under dispute in the step-parent cases and legislation is that of spouse, not maternity, paternity or filiation. Technically, there is no jurisprudence which states that a child has two legal mothers. Of course, the effect of an adoption order (including an adoption order in the context of a step-parent adoption) is to confer all of the rights and responsibilities of legal parenthood on the individual adopting the child(ren), and the birth of certificate of the child is altered to reflect this but courts and legislatures have avoided express alternation of the underlying basis of the construction of maternity and filiation.

only one person could be the mother of a child. Moreover, even if it was possible for the courts to make such a declaration, Ms. Buist had not satisfied the court on a balance of probabilities that the relationship of mother and child has been established as required by section 4(3).[100] To make this conclusion, Justice Benotto was particularly persuaded by what he referred to as "Simon's perspective": the fact that Simon called Ms. Greaves "mama" but called Ms. Buist "gaga," which is short for Peggy, and that when he was with Ms. Buist for extended periods of time without Ms. Greaves, he became distraught. Of additional significance to the court was the finding that Ms. Buist did not refer to Simon as her son until after the separation of the parties and that during the relationship when Simon was sixteen months old, Ms. Buist, a lawyer, drafted and commissioned a Statutory Declaration sworn by Ms. Greaves which included the following sentence: "There is no other parent of [Simon] who is known to me or who has any legal claim for parental rights including custody." The court held that while the relationship between Simon and Ms. Buist was very close, Simon considered Ms. Greaves his mother.[101] Moreover, even if the court had the jurisdiction to declare that a child could have two mothers under section 4, it would not have exercised its discretion to do so in these circumstances.

The case of co-mothering in *Buist* highlights the court's inability to extend legal motherhood to more than one woman, and, in comparison with the paternity cases discussed earlier, demonstrates the limited way(s) in which a woman may acquire parental status. If Ms. Buist had been a man, she would have been favourably situated to claim legal status as a co-parent, and the legal avenues available to her in which to do this would have been much greater.

In the United States, the courts have considered legal determinations of maternity in a greater number of cases. *Johnson* v. Calvert[102] involved gestational surrogacy and the claim for legal parenthood

---

[100] *Ibid.* at para. 35. This provision states that "[w]here the court finds on the balance of probabilities that the relationship of mother and child has been established, the court may make a declaratory order to that effect." Section 4(2) provides that "[w]here the court finds that a presumption of paternity exists under section 8 and unless it is established, on the balance of probabilities, that the presumed father is not the father of the child, the court shall make a declaratory order confirming that the paternity is recognized in law."

[101] *Ibid.*

[102] *Johnson* v. *Calvert*, 19 Cal Rptr. 2d. 494 (Sup. Ct.) [hereinafter *Johnson Sup. Ct.*]; and *Johnson* v. *Calvert*, 286 Cal. Rptr. 369 (C.A.) [hereinafter *Johnson C.A.*]. For another view on this case, see J.L. Dolgin, *supra*, note 47 at 637.

status of the surrogate mother against the non-biological, or intending mother, and the father of the child. Anna Johnson was a woman of African American, Aboriginal and Irish heritage. She worked as a vocational nurse at the same hospital as Crispina Calvert, a registered nurse of Filipino heritage. Johnson contracted to gestate and give birth to an embryo formed by the sperm of Mark Calvert, who is white, and the ovum of his wife Crispina. There was a falling out during the course of the pregnancy and both parties filed suit approximately one month before the child was born, each seeking a declaration of legal parenthood in their favour. Johnson based her claim to maternity on the fact that she gave birth to the child. The Calverts claimed that Crispina's genetic relationship to the child established that she was the mother. In California, a child can have only one "natural" mother under law.

The case illuminates two key concerns. The first is that restrictive legal definitions of "mother" can intensify oppression for women who are poor and who face racial discrimination. The second is the alacrity with which the courts relied on genetic evidence to establish filiation in this case. In a social climate where genetic explanations of individual characteristics and behaviour are given increasing prominence, courts may tend to rely on genetic evidence to establish filiation.

The trial court ruled in favour of the Calverts, finding that they were the natural parents of the child irrespective of the gestational role played by Johnson because they had provided both the ovum and the sperm.[103] Despite recognizing the novelty of the circumstances, the California Court of Appeal affirmed the trial court decision. The decision was based upon the results of blood tests which, predictably, showed no genetic link between Johnson and the child. On this basis, the court held that Johnson could not be the "natural" mother of the child. For the first time, however, the court acknowledged that two women had legitimate claims to motherhood based on biological links to the child.[104]

The appeal court resolved Johnson's claim to maternity on the basis of section 895 of the *Evidence Code* which directs courts to determine paternity on the basis of credible expert evidence and verified blood tests. The court concluded that:

---

[103] *Anna J.* v. *Mark C.* No. X-633190, slip op. (Cal. App. Dep't Super. Ct. Oct. 22, 1990).

[104] In other cases in which the custody of children was contested in the context of a surrogacy arrangement, the principle that the woman who gives birth is the natural mother of the child was not questioned. See *e.g. Matter of Baby M.*, 537 A.2d 1227 (1988); and *Adoption of Matthew B.-M.*, 232 Cal. App. 3d 1239 (1991).

> We must "resolve" the question of Anna's claim to maternity as we would resolve the question of a man's claim to (or liability for) paternity when blood tests positively exclude him as a candidate ... section 895 determines who is the "*natural*" mother of the child. We *must* conclude it is not Anna.[105]

Relying upon gender neutrality provided for in the *Uniform Parentage Act* (*UPA*),[106] the court applied the same standards used to determine the natural father to determine the natural mother. In so doing, it refuted Johnson's claim that she was the "natural" mother on the basis of blood test evidence.

As has been noted in many other contexts, often the greatest inequalities result from treating unlike situations in a like manner. Even with the advent of ARTs, the biological contribution of men is limited to the provision of genetic material. However, a woman's biological contribution embraces both the provision of genetic material and gestation. Johnson argued that she was the child's mother as a result of gestation and giving birth. The court, however, erased her bodily contribution to the creation of the child by relying on section 7003 of the UPA[107] and, digging in its heels, concluded that "with the exception of this and the relatively few other 'gestational' surrogacy cases, the 'natural mother' is always the person who gives birth to the child. The statute does not say that the woman who gives birth to the child *is* the natural mother."[108]

The court refused to interpret this section to say that the woman who gives birth to a child is *automatically* the natural mother, preferring to hold that it only offers a woman whose maternity was disputed one way to establish a parent-child relationship.[109] Surprisingly, the court went on to recognize that, "[t]he fact that another person is, literally, developed from a part of oneself can furnish the basis for a profound psychological

---

[105] *Johnson, C.A., supra* note 102 at 376 [emphasis added].

[106] *Cal. Civ. Code*, Part 7, Division 4, (§§ 7000-7021), online: WL (CA CIVIL). The *UPA* bases parent and child rights on the existence of a parent and child relationship rather than on the marital status of the parents." See *Johnson C.A., supra* note 102 at 374, n. 14. According to § 7015: "any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this part applicable to the father and child relationship apply."

[107] *Ibid.*, § 7003 suggests that "[b]etween a child and the *natural* mother it may be established by proof of her giving birth to the child, or under this part." (emphasis added)

[108] *Johnson C.A., supra* note 102 at 377.

[109] *Ibid.* at 377.

bond."[110] This insight, however, was used to uphold the importance of genetics—not gestation—as a powerful factor in the creation of human relationships.

The court also devalued opinions which supported the position that genetics alone should not be the exclusive factor in determining parental rights.[111] Instead, they remarked on the uniqueness and importance of the genetic contribution, rendering the contribution of the surrogate literally without value. It appears, on this reasoning, that "any womb" will do.

The majority of the supreme court of California affirmed the decision of the court of appeal.[112] However, the supreme court disagreed with the court of appeal's reading of section 7003(1) of the *Civil Code*. It did not interpret the statute as requiring a woman to first demonstrate through blood test evidence that she is the "natural" mother of a child *before* her evidence of having given birth can establish that she is the child's natural mother.[113] The court held that it is *not true* that only a "natural" mother can attempt to establish a mother and child relationship by having given birth. Both giving birth and genetic connection as means of establishing a mother-child relationship, were found to exist as alternative methods of proof under the statute. On the issue of who the "natural" mother is according to the *UPA*, the California Supreme Court held:

> [I]n our view, the term "natural" as used in subdivision (1) of Civil Code section 7003 simply refers to a mother who is not an adoptive mother. Section 7003 does not purport to answer the question before us, i.e., who is to be deemed the *natural* mother when the biological functions essential to bringing a child into the world have been allocated between two women.[114]

---

[110] *Ibid.* at 380-81.

[111] The *amicus curiae* brief from the American Civil Liberties Union Foundation of Southern California argued that the "fundamental rights of intimate association and procreative choice ... exercised by *all* of the parties" require that genetics alone not be the "exclusive factor in determining parental rights." *Ibid.* at 378. As well, the court brusquely dismissed the opinion of the Committee on Ethics of the American College of Obstetricians and Gynecologists who argued that "the genetic link between the commissioning parent(s) and the resulting infant, while important, [are] less weighty than the link between surrogate mother and fetus ... ." Statutory interpretation, according to the court, did not encompass "what a group of doctors, however distinguished and learned in their field, think the law ought to be." *Ibid.*

[112] *Johnson, Sup. Ct., supra* note 102.

[113] *Ibid.* at 499.

[114] *Ibid.* (emphasis added).

Each woman had presented acceptable proof of maternity, the court reasoned, and it then inquired into the intention of each in order to resolve the dispute.[115] The court found that but for the intention of the Calverts to have a child who was genetically related to each of them, the child would not exist and the situation was therefore not one in which the Calverts donated a zygote to Johnson.[116] Although Johnson agreed to gestate the child, the court found that it was the parties intention to bring the child into the world for Mark and Crispina, and that Crispina intended to be, and was, the child's natural mother. Thus, on the matter of the splitting of the functions of maternity between two women, the supreme court argued that:

> ... although the *Act* recognizes both genetic consanguinity and giving birth as a means of establishing a mother and child relationship, when the two means do not coincide within one woman, she who *intended* to procreate the child—that is, she who intended to bring about the birth of the child that she intended to raise as her own—*is the natural mother* under California law.[117]

Declining to change the zero-sum results brought about by law, the supreme court concluded that:

> [A]ny parental rights Anna might successfully assert could come only at Crispina's expense. As we have seen, Anna has no parental rights... and she fails to persuade us that sufficiently strong policy reasons exist to accord her a protected liberty interest... when such an interest would necessarily detract from or impair the parental bond enjoyed by Mark and Crispina.[118]

In *Re Marriage of Moschetta*[119] involved a traditional surrogacy arrangement where the courts had to determine which woman—the "intending mother" or the surrogate—should be found the child's legal mother. In this case, the surrogate was factually understood to be the child's "natural" mother. The matter to be determined, however, was whether in the absence of a formal consent to adoption by the surrogate, the surrogacy

---

[115] Justice Kennard, in dissent, presented an excellent critique of an "intent-based" test and argued instead for a "best-interests" test for these kinds of cases. See *ibid.* at 506-519. One of the perverse results of the intention rule would be that in situations where the intended mother "withdraws" her intention to have or raise the child, the gestational mother might be viewed as a legal stranger to that child who would then be left without a legally recognized mother.

[116] *Ibid.* at 500.

[117] *Ibid.* (emphasis added).

[118] *Ibid.* at 504.

[119] 25 Cal. App. 4th 1218 [hereinafter *Moschetta*].

agreement between the parties could be enforced by the court which would effectively deprive the surrogate of her legal parental tie to the child.

In 1989, Elvira Jordan was artificially inseminated with the sperm of Robert Moschetta. Robert and Cynthia Moschetta, a married couple, desired a surrogacy arrangement because of Cynthia's infertility as well as their desire to have a "biologically related" child. In exchange for $10,000, Jordan promised to assist the Moschettas in adopting the child and give them sole custody.[120] During Jordan's pregnancy, however, the Moschettas experienced marital problems, a situation Jordan only learned of when she began labour. After the birth of the child, Marissa, Jordan initially refused Robert access to the child for two days while she reconsidered the surrogacy agreement but, upon the Moschettas' promise to remain together, Jordan allowed them to take the child home. Within seven months, Robert left the family residence with Marissa.

At trial, all parties agreed as to the unenforceability of the surrogacy contract. The trial court held that Robert Moschetta and Elvira Jordan were Marissa's legal parents and granted them joint legal and physical custody on that basis. On appeal, Robert challenged the determination of Jordan's legal parental status by alleging an abuse of discretion on the part of the trial court and by contending that the surrogacy contract should, in fact, be enforced. He argued, on the basis of the *Uniform Parentage Act* (*UPA*), that Cynthia Moschetta was the legal mother of the child.

In *Moschetta*, since both the gestational and the biological aspects of maternity were located within the same woman, the trial court held that parentage was easily resolved in favour of Jordan under the terms of the *UPA*. The court, following *Johnson*, looked to the presumption of paternity embedded in the *UPA* as extended to the mother: "insofar as practicable, provisions applicable to the father and child relationship apply in an action to determine the existence or nonexistence of a mother and child relationship."[121] Whereas in *Johnson*, both women could demonstrate a "natural" connection to the child and therefore no examination of presumptions was necessary, in *Moschetta*, the maternal claim made on behalf of Cynthia Moschetta was novel as it was based upon the existence of a purely social relationship.

Moschetta argued that although Cynthia and Elvira were equally the mother of Marissa, Cynthia actually intended to be the child's mother

---

[120] *Ibid.* at 1223.

[121] *Johnson, Sup Ct., supra* note 102 at 498.

and, according to the Supreme Court of California in *Johnson*, should be found so. But, according to the California Court of Appeal, Cynthia was not equally situated to Elvira because she was not biologically related to the child and was therefore not the mother "at all."[122] Relying next on section 7541 of the *UPA*,[123] Moschetta attempted to interpret the presumption as gender-neutral so that "husband" and "wife" could be interchanged with the result that the child of a husband cohabiting with his wife should be presumed a child of the marriage. The court rejected this interpretation because it was not absolutely conclusive and could be defeated by blood tests showing that the husband is not the genetic father of the child.[124] The trial court had, on its own motion, ordered blood tests establishing Elvira Jordan as Marissa's genetic mother which, in combination with the undisputed fact of Cynthia's infertility, led the court of appeal to conclude, "genetic parenthood established by blood tests trumps a presumption based on the cohabitation of a married couple."[125]

Robert also argued on the basis of section 7611(d) that Cynthia should be presumed the child's natural mother because she held the child out as her own.[126] The court of appeal found the argument wholly "unpersuasive." Cynthia's infertility entailed that she could never hold Marissa out as her "natural" child given the absence of biological, natural and genetic connections.[127] Moreover, the court held that a more fundamental reason the argument did not succeed was the statutory presumption of paternity does not "reasonably apply" to surrogacy cases because:

---

[122] *Moschetta, supra* note 119 at 1224.

[123] 12 *Cal. Fam. Code* § 7540, online: WL (CA FAM). The provision states that "the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."

[124] *Moschetta, supra* note 119 at 1222-26. The court also read in the exception to the presumption contained within 12 *Cal. Fam. Code* § 7541, online: WL (CA FAM) concerning the primacy of blood-test evidence in defeating a finding of paternity.

[125] *Moschetta, ibid.* at 1225. It is essential to note that the courts do not always order blood tests, especially in light of the existence of a marriage or marriage-like relationship between the parties who hold themselves out to be the parents of a child.

[126] 12 *Cal. Fam. Code* § 7611(d), online: WL (CA FAM) states that "a man is also presumed to be the natural father of a child if he 'receives the child into his home and openly holds out the child as his natural child.'"

[127] *Moschetta, supra* note 119 at 1226. In this brief, disturbing and close to tragic conclusion, the court failed to understand the nature of the presumption which is that it is not essential that the parent *actually* have a biological or genetic tie to the child; rather, the question is whether that parent has *behaved* in such a manner as to recognize the child as his or her own.

> of the absence of doubt as to the identity of the natural mother. There is no question of biological parenthood to settle. Unlike the context of illegitimacy from which the presumption arose, in surrogacy there is no need to resort to presumptions. All parties know who gave birth and who is genetically related to whom.[128]

The court interpreted the presumption in light of the history and legal status of legitimacy where legitimation occurred if a man "received" a child into his household. This interpretation becomes increasingly problematic when the court goes on to state that "[w]hile the legal status of illegitimacy has been abolished, the presumption has been retained because it continues to serve the function of *settling questions of biological parenthood.* In essence, it *removes the doubt* as to the identity of a child's *biological* father."[129]

The court appears to imply that it is *always* the biological father who "receives" the child into his family. However, when this presumption arises, the man who "holds out the child as his *natural* child" is not necessarily the child's biological father. Judicial determinations concerning "doubt as to the identity" of a child's father are based on an assessment of a man's behaviour toward a woman and her child and do not always depend on a finding of biological relatedness. This is the reason for continued existence of the presumption precisely because courts want to sanction social relationships between men and women and men and children that mimic that of the traditional family.

Within Robert's argument about the way in which Cynthia "held out the child as her natural child," the court read the presumption as only operating to legitimate a child born outside a legal marriage when recognized by its "natural" parent. However, Robert attempted to use the presumption to allow the recognition of a non-biological mother as a legal parent where she had an established *social* relationship with the child's father and the child—thus, the very notion of "*holding out*" the child as one's own. The court was not willing to interpret the presumption in this manner.

The court's notion of the appropriate application of the presumptions of paternity to a determination of maternity did not result in the achievement of substantive equality for Cynthia Moschetta. Rather than construing the presumption as one which also serves to sanction social relationships between adults and children, the court articulated its application to the facts in a narrow and asymmetrical manner. By retaining

---

[128] *Ibid.*

[129] *Ibid.* at 1226 [emphasis added].

the requirement of a "natural" (i.e., a genetic or gestational) connection for a *woman* to be legally recognized as the *mother* of a child, the court failed to recognize the uncertainty of maternity. This uncertainty is similar to the historically uncertainty of paternity, except the uncertainty of maternity entails distinctly social and biological components that are not necessarily situated within one woman.

In addition to the fragmentation of maternity along biological lines, new relationships are being created between women and their non-biological children. However, judicial recognition of different "kinds" of mothers with causally different—or apportioned—legal parental rights has not yet followed. As a result of the decision in *Moschetta*, courts in the United States are blatantly willing to accept inequality of result in cases involving "traditional" and gestational surrogacy. The court of appeal appeared to accept this result:

> ... we are not unmindful of the practical effect of our decision in light of *Johnson* v. *Calvert*. Infertile couples who can afford the high-tech solution of *in vitro* fertilization and embryo implantation in another woman's womb can be reasonably assured of being judged the legal parents of the child, even if the surrogate reneges on her agreement. Couples who cannot afford *in vitro* fertilization and embryo implantation, or who resort to traditional surrogacy because the female does not have eggs suitable for *in vitro* fertilization, have no assurance their intentions will be honoured in a court of law. For them and the child, biology is destiny.[130]

The court firmly held that the law, as it stands, "compelled" the affirmation of the judgment that Robert Moschetta and Elvira Jordan are Marissa's legal father and mother. I argue, however, that the court felt compelled because of a short-sighted interpretation of the current statutory presumptions of paternity and an ideological predisposition to limit the maternity presumption to one that is based on the notion of "naturalness."

McDonald v. McDonald[131] is a divorce case where the wife sought a judicial declaration that she was the natural mother of the two children of the marriage for the purposes of resolving the issue of custody. Because she conceived through *in vitro* fertilization, she was considered the gestational, not the genetic, mother. The husband sought sole custody of the children on the grounds that he was the "only genetic and natural parent available to the children."[132] He asserted that his wife was not the

---

[130] *Ibid.* at 1234-35.

[131] 196 A.D. 2d 7., online WL (AD) [hereinafter *McDonald*].

[132] *Ibid.* at para. 7.

"natural" mother of the children since she had used donor eggs to become pregnant. On this basis, he also sought a declaration that the children were "illegitimate... or, in the alternative, should such children be found to be... [his], that custody be granted to [him]."[133] The Supreme Court of Queen's County held that Mrs. McDonald was undisputably the children's birth mother and granted her full custody pending trial. The Appellate Division of the supreme court perceived a *Johnson*-like factual scenario involving a "true egg donation situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own ... ".[134] This line of reasoning, originating from *Johnson* enabled the court to designate Mrs. McDonald the natural mother of the children. Needless to say, the fact that only one woman is asserting a claim in *McDonald* is determinative and provides a crucial contrast to *Johnson* and *Moschetta.*

The case of Jaycee Buzzanca presents a legal conundrum as it involves up to eight persons to whom parental rights and responsibilities could be affixed. Jaycee Buzzanca was conceived from the ova of Erin Davidson, fertilized with the sperm of Mr. X, implanted in the uterus of Pamela Snell in 1994, and born in 1995. A contract between Pamela Snell and her husband, and John and Luanne Buzzanca, stated that upon birth Jaycee was the Buzzancas' child. Four weeks before her birth, John Buzzanca initiated proceedings to terminate his marriage to Ms. Buzzanca alleging that the marriage had produced no children. In response, Luanne Buzzanca countered that the couple was expecting a child by way of a surrogacy contract and argued that Mr. Buzzanca, as the legal father of the child, should be responsible for child support. Given the factually complicated context, uncertainty abounds: Is the mother the woman who gestated the child and gave birth to her (the traditional answer)? What about the woman who contributed the ovum? Or the woman who wanted the child as her own? Is the father the person married to the woman who gave birth according to the common law? Is he the man who contributed the sperm? Or, is he the man who was married to the person who "commissioned" the child?

The trial court determined that Mrs. Buzzanca was not the legal mother of Jaycee because she had no genetic, gestational, or adoptive evidence of her status as such. Mr. Buzzanca could not be the legal father or owe any support also because of his lack of genetic relation to the child

---

[133] *Ibid.* at para. 6.

[134] *Ibid.*

and the unwillingness of the court to consider his intent to enter into a surrogacy arrangement as sufficient evidence of legal paternity. The court also accepted a stipulation that the surrogate and her husband were not the "biological parents" of the child. At trial, Mr. Buzzanca did not object to this stipulation.

In *Jaycee B.* v. *John B.*,[135] the California Court of Appeal heard arguments concerning Jaycee's parentage in order to make a ruling regarding child support.[136] The court of appeal likened the situation in this case to the "functional equivalent of a paternity action, where a mother who is the caretaker of a child seeks court ordered support from a man but for whose actions the child would never have come into existence."[137] The legal question for the court to resolve was whether the surrogacy contract constituted sufficient evidence for finding Mr. Buzzanca Jaycee's father. Rather than having to determine whether a man was or was not the father of a child, or whether a marriage had or had not taken place, the court was faced with the task of resolving the most basic facts of the case since the dispute did not concern the facts of an agreement, but its legal effect.

In order to determine whether the surrogacy contract was sufficient evidence of Mr. Buzzanca's paternity, the court referred to *Johnson* as both the cases involved gestational surrogacy. However, in *Johnson*, the "intended" parents were also the genetic parents and neither *Johnson* nor *Moschetta* established whether surrogacy agreements are enforceable *per se*. On the contrary, these cases found that these contracts constituted "a proper basis on which to ascertain the intent" of the parties.[138] The dilemma facing the court was that in order to find that Mr. Buzzanca could not be the father of the child, the courts would have to find the surrogate birth mother the "natural"mother or else Jaycee would have no legal parents. Looking again to *Johnson* for guidance, the court speculated that finding Pamela to be the natural mother was unlikely to be the ultimate result of the case given that the court would be loathe to "burden her with 'responsibilities' she never contemplated and is directly 'contrary to her

---

[135] 42 Cal. App. 4th 718 (1996)[hereinafter *Jaycee B*].

[136] After a complicated determination regarding jurisdictional competency, the court of appeal felt that its job was not to decide the actual paternity of Jaycee and it made a temporary order against Mr. Buzzanca for child support. A writ was then requested, directing the family law court to determine an appropriate child support order.

[137] *Jaycee B.*, *supra* note 135 at 721.

[138] *Ibid.* at 701.

expectations ...' ."[139] The court also felt that since Jaycee's genetic parents were anonymous, they too were unlikely to be deemed the "natural parents."

Therefore, and as dictated by *Johnson*, the court turned its attention to the intention of the parties in the hope that this type of surrogacy case would be unique and that they could ascertain a rule recognizing the intending parents as the child's legal, natural parents in compliance with the best interests of the child. Using the "intention test,"the court reasoned that Mr. Buzzanca's signing of the surrogacy agreement showed, "by a preponderance of the evidence," that he would likely be held to be Jaycee's father.[140] Based upon the urgency of Jaycee's need for financial support, and upon the parental responsibilities contemplated by the surrogacy contract, the court ruled that, at first blush, the fact that Mr. Buzzanca signed the surrogacy agreement was sufficient to give the family court jurisdiction to hear the order to show cause.

Re Marriage of Buzzanca[141] determined the actual parentage of Jaycee. The court of appeal held that the trial court erred in its decision that Jaycee had no lawful parents since "Jaycee never would have been born had not Luanne and John both agreed to have a fertilized egg implanted in a surrogate."[142] Justice Sills held that the trial judge erred in his conclusion that legal motherhood could only be established by giving birth or through the contribution of an egg. He cited the well established body of law in which fatherhood can be established irrespective of birth or genetic relation but based upon conduct, a rule which was consistent with *Johnson* and which the court thought should apply in this case:

> Just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband and wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. In each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents. The only difference is that in this case—unlike artificial insemination—there is no reason to distinguish between husband and wife.[143]

The court then reversed the decision of the trial court and declared Mr. and Mrs. Buzzanca the legal parents of Jaycee.

---

[139] *Ibid.*at 701 referring to *Johnson*.

[140] *Jaycee B, supra* note 135 at 702.

[141] 61 Cal. App. 4th 1410 (1998) [hereinafter *Buzzanca*].

[142] *Ibid.* at 1411.

[143] *Ibid.* at 1412.

On appeal, Mr. Buzzanca argued that the surrogate was, in fact, Jaycee's legal mother because, under the *UPA*, only two ways to establish legal maternity exist: giving birth and genetic contribution. The anonymity of the egg donor meant that the surrogate must be deemed the child's legal mother. However, the court held that the proper interpretation of the statute did not mandate such a determination. In addition to the two tests which apply in situations of maternity, the *UPA* also allows paternity to be established by presumption or as a result of artificial insemination.[144] The court held that artificial insemination by donor, and gestational surrogacy are analogous in that they both "contemplate the procreation of a child by the consent to a medical procedure of someone who intends to raise the child but who otherwise does not have any biological tie."[145]

Mrs. Buzzanca was found to be situated similarly to a husband in an artificial insemination case whose consent has triggered a medical procedure which results in a pregnancy and eventual birth of a child. By virtue of her consent to the procedure, the court affirmed her maternity claim and denied Mr. Buzzanca's claim that the surrogate should be declared the legal mother. By situating Mrs. Buzzanca according to both the statutory and common law positions regarding artificial insemination, the court analogized the Buzzancas' situation to that found in *Johnson*. Both Mrs. Buzzanca, and the surrogate had equal claims to maternity under the *UPA*, but, as per *Johnson*, the "tie" was broken by an examination of intention and Mrs. Buzzanca was clearly the intending mother. The court also affirmed that if the egg donor should assert a claim of maternity, Mrs. Buzzanca's maternity would remain established, again on the basis of her intention.

Regarding Mr. Buzzanca's paternity, the court held that "the same reasons which impel us to conclude that Luanne is Jaycee's lawful mother also require that John be declared Jaycee's lawful father."[146] Practically, and even notwithstanding the existence of the surrogacy contract, Mr. Buzzanca caused Jaycee's conception and he was therefore properly held to be her legal father. The court even went so far as to dismiss Mr. Buzzanca's future claim upon appeal that since Mrs. Buzzanca had promised to assume all responsibility for the child, he should not have been found the child's

---

[144] Note that the court states that it made sense not to apply the provisions containing paternity presumptions in *Moschetta* because they were *only* presumptions, thereby showing that they completely overlook the implications of the social and relational aspects of the maternity argument.

[145] *Buzzanca, supra* note 141 at 1415.

[146] *Ibid.* at 1419.

father. This promise, according to the court, makes no difference to his legal paternity because it is well established that parents cannot, by agreement limit or subrogate a child's right to support.[147] Regardless of whether Mrs. Buzzanca had actually become pregnant, Mr. Buzzanca had engaged in "procreative conduct."[148] Accordingly, the court of appeal reversed the declarations that Mrs. Buzzanca was not Jaycee's legal mother and that Mr. Buzzanca was not Jaycee's legal father.

The maternity cases examined in this section demonstrate the rigidity of the legal construction of maternity as "natural." They show how the legal construction of maternity requires the presence of a biological tie even in light of alternative constructions of the maternal relationship. Cases like *Moschetta* create an opportunity for the courts to expand the legal construction of maternity to encompass new relationships, but, thus far, the courts have largely declined to do so unless the result they can obtain mirrors a traditional family norm. *McDonald* shows how the determinations of maternity differ when there is only one woman asserting a claim and this suggests that the courts will rarely acknowledge that maternity is, or ought to be, divided; *Buzzanca* seems to confirm this conclusion. Finally, although the intentional theory of parenthood provided the just result in *Buzzanca*, this finding could create problems in future cases when a genetically unrelated surrogate does want to assert rights against intentional parents and fails to recognize and value the different contribution that gestation makes by placing all maternal rights and responsibilities in one woman.

V. CONCLUSION

Closeness of biogenetic identity has, for many years, symbolized degrees of closeness between kin.[149] However, kinship could always be separated from family as an institution based on conjugal relationships and the rearing of children. A child born between two people linked them as kin. Presently new actors associated with reproductive medicine create a new field of relationships that does not overlap with traditional family relationships. Kinship has become dispersed. The child produced does not necessarily link those who will be its parents and often it brings in other

---

[147] *Ibid.* at 1420.

[148] *Ibid.*

[149] "Displacing Knowledge," *supra* note 21 at 351.

people through the act of assisted procreation.[150] As a result, there is now a field of "procreators" whose relationship to one another is a result of *procreation* rather than *family*. Through assisted reproduction, procreation is separated from sexuality and from the body and "unrelated" others[151] are introduced to the procreative process by making it possible for women and men to have children without a heterosexual partner. An expansion of parenthood should necessarily follow as a result of the number of contributions to the conception; however, it has been shown that this is often not the case.

Parenthood is a hybrid of natural, social, and cultural factors. These factors, however, have been construed by law in a gendered manner. The modern movement to reform family law in accordance with the principles of freedom of contract and gender equality has changed the context of filiation, but has not changed many of its underlying power asymmetries. Formal gender and race equality exists between the claims of "paternity" and "maternity" but the same cultural asymmetries continue to operate with respect to the ways in which the legal categories are constructed. Thus, the results have been characterized by the visible reification of the normative heterosexual, two-parent family structure. Alternative family forms created with the aid of technology will achieve legal recognition only if the ideological underpinnings of the categories of filiation are reformed. At the same time, by revealing the asymmetries of legal filiation, the ARTs can help put to rest the gendered legal fictions constructed around the alleged facts of nature by providing an opportunity and a means for the courts to expand the concept of parenthood and extend legal recognition of the number of parents a child may have to more than two.

---

[150] This notion, referred to as, "dispersed kinship," includes those who "produce" the child with assistance as well as those who assist. *Ibid.* at 352.

[151] C. Calhoun, "Family's Outlaws: Rethinking the Connections Between Feminism, Lesbianism and the Family" in H.L. Nelson, ed., *Feminism and Families* (New York: Routledge, 1997) 131 at 143