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### Equality: An Uncomfortable Fit in Parenting Law

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## **Equality: An Uncomfortable Fit in Parenting Law**

**Susan B. Boyd**

Since the second wave of the women's movement and the emergence of the fathers' rights movement in the 1970s and 1980s, family law has moved towards formal legal equality and gender-neutral language. Early liberal feminists were optimistic about involving men as equal partners and parents and were keen to remove gender-based legal assumptions. Fathers' rights advocates lobbied for equal or joint custody norms and for mothers to have equal financial responsibilities, in order to redress what was and still is perceived as discrimination against men. In most modern family laws, male and female spouses now owe reciprocal duties of financial support and disputes over children are determined by a child's best interests, rather than by assumptions based on gender. More recently, this gender-neutral language has accommodated the reality of same-sex partnerships and same-sex parenting.

These gender-neutral legal norms, however, sit uncomfortably next to familial realities that remain stubbornly gendered and unequal in certain respects,

particularly because women still assume greater responsibility for domestic labour and childcare. Many feminists challenge calls for equal treatment of fathers and instead propose legal norms that recognize these unequal social relations. Even if the legal norms are gender-neutral on their face, they should include guidelines that direct attention to gendered patterns or they should be interpreted so as to take account of gendered social realities still supported by social and economic structures. For instance, spousal support law should take account of the patterns of domestic labour in the family at issue. As for child custody, norms should direct attention to whether one parent has taken primary care responsibility for a child and whether domestic abuse is a factor (e.g. Boyd 2002; Shaffer and Bala 2003).

This chapter uses laws on parenthood to study the contradiction between the trend towards formal equality and ongoing gendered patterns of care, as well as the growing phenomenon of parenting by lesbians and by gay men and by single mothers by choice, by which a woman plans to be a child's sole parent.

Specifically, it assesses the innovative potential of the new Family Law Act (FLA)<sup>1</sup> in the Canadian province of British Columbia, which redefines legal parenthood and alters the regulation of post-separation parenting. The new definitions of legal parenthood respond to calls for the recognition of same-sex parenting and reproductive technologies. The new norms on post-separation parenting respond to calls for equal treatment of fathers, but they also take

account of research on the troubling impact of shared parenting law reforms regulating post-separation disputes over children. As such, the FLA arguably eschews strict formal equality.

To assess whether it avoids the pitfalls of formal equality, the FLA is read against socio-legal literature on the normative dominance of the sexual family, by which significance is placed on the adult couple in a marriage or marriage-like relationship (Fineman 1995; McCandless and Sheldon 2010). Comparative reference to the legislation of other jurisdictions will be made, especially to recent legislation on parentage in the United Kingdom. The FLA's likely impact on women's autonomy is queried, given the gendered dynamics of care and the phenomenon of single mothers by choice. The chapter concludes by considering to what extent norms based on care (Herring, in this volume) can disrupt heteronormative assumptions about the sexual family and move beyond formal equality. A further question is whether law can take into account women's gendered inequality within heterosexual families while simultaneously recognizing the dynamics of same-sex parenting.

### **THE PITFALLS OF FORMAL EQUALITY: A RECAP**

The pitfalls of a formal equality approach in family law, which 'presumes the fundamental interchangeability of male and female parents as members of the

liberal community' (Lessard 2004: 171), have been revealed on both theoretical and empirical levels. A formal equality approach posits that, based on their bio-genetic ties, a child's birth mother and genetic father should both have parenting rights, thus asserting a 'sexual family' based on an implicit heteronormativity (Harding, in this volume). The distinction between parenthood based on bio-genetic ties and social parenting has been key to the debate about defining legal parenthood, with feminist scholars and activists tending to emphasize the latter and responsibility for care, as well as, to some degree, intention (Boyd 2007). Fathers' rights advocates, in contrast, often argue that paternal rights, for instance the right to be named on birth registrations, should be based on bio-genetic ties (Collier, in this volume; Lessard 2004). Legal interpretation too often adopts this approach. Even where legislation specifies that no man is to be treated as the father if two women are the legal parents, as it does in the United Kingdom's Human Fertilisation and Embryology Act 2008, some judges have sought to find a father for the child (Harding, in this volume).

Feminist legal scholars emphasize the material underpinnings of women's relationship to family and care in an effort to counter arguments for equal and gender-blind treatment of mothers and fathers in parenting laws (e.g. Boyd 2002; Boyd 2012; Fineman 2001). They challenge the ways in which the hasty embrace of norms of equal parenting in the name of children's best interests ignores

structurally embedded and deeply gendered patterns of care, as well as woman abuse. Paternal involvement has increased and fathers are constructed as crucial to children's identity, but their care responsibilities have not reached equality with those of mothers (Duxbury and Higgins 2012), in part due to structural impediments such as women's lower pay in the workforce and the lack of workplace accommodation of parental responsibilities and accessible daycare. These impediments are not likely to be removed under neo-liberal regimes (Jakobsen, in this volume). To give equal decision-making rights to both parents thus grants fathers equal rights without equal responsibilities and renders invisible women's care labour (Boyd 2002). At an ideological level, the equal parenting model reinforces the concept of the nuclear family with two opposite-sex parents and their children, a model that is premised on a (hetero)sexual paradigm (Fineman 1995; Herring, in this volume).

In addition, empirical research raises serious questions about the wisdom of equal or shared care. Shared parenting can work well for separated families who have the psychological and financial means to cooperate. But in circumstances involving conflict, power dynamics or abuse, these norms can generate very difficult scenarios for mothers and children (Fehlberg *et al.* 2009, 2011; Rhoades 2008; Trinder 2010). Moreover, the research does not reveal a linear relationship between the amount of parenting time with each parent and children's having

better outcomes (Shaffer 2007; Smyth 2009). Yet when legislation gestures towards shared parenting, fathers may be led to believe that they are entitled to equally shared time. It appears that any legal presumption in favour of shared care can deflect attention away from violence or inhibit a parent from raising concerns about violence (Trinder 2010: 493). Given the extent of violence in the separating and divorcing population and the fact that it tends mainly to be directed against women (Statistics Canada 2011; Brownridge 2006), this latter finding is troubling, not only for mothers but for children who are affected by its impact. When children's rights to relationships with fathers are prioritized within the legal system, protection from harm seems to take a back seat. As such, formal equality can cause damage.

Looking at this research, it seems hard to deny that shared parenting laws reflect a focus on equal rights for fathers, rather than children's interests. Children in the UK who have lived in an 'equal shares' arrangement were unhappy, even miserable, when an equal shares approach was taken by their parents without listening to and consulting with them, recognizing them as separate beings, and acknowledging their changing needs (Smart 2004). The move toward shared parenting rests on a political desire for fathers to be as engaged with children as mothers are. Yet there is little evidence that law can achieve this goal or that the amount or frequency of contact is either better or worse for children; instead, the

evidence indicates that the quality of parent-child relationships has a greater impact on children's wellbeing (Trinder 2010: 488). In turn, the quality of parent-child relationships is largely dependent on parental wellbeing.

While these studies suggest that a nuanced approach to children's best interests would be preferable (Rhoades 2010), the fathers' rights movement has persuaded many in the media, the lay public, and politics that fathers are discriminated against due to a privileging of maternal claims and that equal parenting norms would provide a key remedy (Collier, in this volume). Even in jurisdictions that stipulate that the best interests of the child should be the sole criteria for determining custody and access, a *de facto* presumption in favour of shared parenting has taken root (Boyd 2010b; Kelly 2012b; Kirouack 2007). Although the explanations for the dynamics of the fathers' rights movement are undoubtedly complex (Collier, in this volume), this discursive move ignores or underplays ongoing differences between maternal and paternal care patterns in relation to children and their material underpinnings. Women's advocacy that emphasizes women's social and economic realities and their relevance to parenting and norms to guide parenting disputes has often fallen on deaf ears, despite the care that advocates take to ground their arguments in a sophisticated equality analysis (Boyd 2008).



The next section asks whether the new law in British Columbia takes better account of these feminist voices, marking a departure from the formal equality of the sexual family and an effort to emphasize relations of care.

### **BRITISH COLUMBIA'S NEW FAMILY LAW ACT: MOVING BEYOND FORMAL EQUALITY?**

The FLA replaces the Family Relations Act of 1978 (FRA).<sup>2</sup> The FRA had been updated over the years to take account of unmarried and same-sex partnerships, but not of the challenges that reproductive technologies pose for definitions of parenthood. Its provisions on guardianship and custody assumed a father and a mother: 'whether or not married to each other and for so long as they live together, the mother and father of a child are joint guardians' (FRA, s 27). If they separated, though, the person who usually had care and control of the child was sole guardian. If the parents had not been married to each other, were living separate and apart, and did not share joint guardianship under the statute or an order, the mother was sole guardian (FRA, s 27(5)). These provisions represented a nod to the gendered nature of parenthood and care, increasingly rare in modern law, and protected the interests of single mothers wishing to parent alone. As for custody, the default position when the parents lived separate and apart was that the parent with whom the child usually resided could exercise custody, subject to orders or agreements. If conflicting claims were made, the person who usually

had day-to-day personal care of the child had the right to exercise custody (FRA, ss 34(1)(b), 34(2)(d)). These latter provisions gestured in a gender-neutral fashion to fact situations involving asymmetrical responsibilities, notably primary care of a child by one parent. Judges could order that one or more persons may exercise custody or access and the best interests of the child was the paramount consideration (FRA, ss 24, 34, 35).

In July 2010, British Columbia's Ministry of the Attorney-General released a White Paper proposing major changes to family law, including the (re)definition of parenthood and elimination of the language of 'custody' and 'access'. Unlike the UK's Human Fertilisation and Embryology Act 2008, which was an amending statute (McCandless and Sheldon 2010), the FLA was a brand-new statute that offered a fresh slate. It was the product of extensive background research and consultation with the community, including the legal profession, legal academics and NGOs such as fathers' rights advocates and those working with battered women. Feedback to discussion papers and proposals was given by feminist academics and women's groups concerned with legal parenthood and shared parenting norms. The final version of the FLA reflects some of this feedback.

## **DETERMINING PARENTAGE**

Part 3 on 'Parentage' is the most innovative part of the FLA and was unique internationally at its inception in allowing more than two legal parents. It defines parentage for all purposes of the law of British Columbia, changing the old law stating that a child is the 'child of his or her natural parents'.<sup>3</sup> Instead, 'a person is the child of his or her parents' and 'a child's parent is the person determined under this Part to be the child's parent' (FLA, s 23). In other words, parentage is a legally determined concept and the 'naturalness' of biological definitions of parenthood is disrupted, arguably moving beyond dyadic heteronormativity. Nevertheless, outside of the context of assisted reproduction,<sup>4</sup> on the birth of a child 'the child's parents are the birth mother and the child's biological father' (FLA, s 26(1)), thus reinforcing the sexual family. A male person is presumed to be a child's biological father in several circumstances, including marriage to the birth mother or marriage-like cohabitation with her within certain periods of the birth; or acknowledgement by him and the birth mother that he is the child's father. These presumptions of paternity do not apply if the contrary is proven or if more than one person may be presumed to be the biological father. Parentage tests can be ordered and inferences drawn if a person refuses to comply (FLA, s 33). As is explained below, the fact that a person is a child's birth parent does not alone mean that he or she has guardianship rights, severing parentage from legal entitlement (Bainham 1999).

When children are born via assisted reproduction, a donor who provides human reproductive material or an embryo is not, by reason only of that donation, the child's parent (FLA, s 24). A donor is the child's parent only if determined to be so under Part 3, which normally requires a contractual arrangement or a court order. A strict formal equality approach to legal parenthood based on bio-genetic ties has thus been rejected in cases involving assisted reproduction. Moreover, the FLA takes the birth mother as the starting point in its definitions of parentage, recognizing the still highly gendered facts of reproduction, gestation, and birth, as does the Human Fertilisation and Embryology Act 2008. To the extent that the birth mother typically takes care responsibility for the child, this approach somewhat echoes Fineman's (1995) proposal that the adult dyad be decentred in law in favour of the caretaker-dependant dyad, with other adults being able to opt in contractually.

If a child is conceived through assisted reproduction (apart from surrogacy), the child's birth mother is the child's parent. In addition, a person who was married to, or in a marriage-like relationship with, the birth mother when the child was conceived is also the parent barring proof that, before conception, the person did not consent to be the parent or withdrew consent (FLA, s 27). This section provides a mechanism for recognition of parentage of both same-sex partners who

agree to have a child together (as well as opposite-sex partners who agree to have a child using donated gametes, or via assisted reproduction), regardless of whether the non-birth parent provided genetic material. It also provides the opportunity for a partner to opt out, at least prior to conception, as does the Human Fertilisation and Embryology Act 2008. This provision departs from Fineman's proposal, because it assumes that an adult in a marriage or marriage-like relationship with the birth mother is a parent, absent evidence of intention to the contrary. Like the UK's legislation, the section remains premised on the sexual family (McCandless and Sheldon 2010). As we see below, it seems not to be intended that a single woman could agree with a sperm donor with whom she is not in a sexual relationship that he be a legal parent (FLA, s 30(1)). What McCandless and Sheldon call 'parental dimorphism', or a resistance to the notion that a child can have two 'mothers', can also be detected in the FLA's according of the term 'mother' only to the birth mother, thus emphasizing gestation. A lesbian co-mother, for instance, will be a 'parent', not a mother, even if she has donated genetic material.

With the FLA, British Columbia now legally regulates the parenthood aspects of surrogacy. If a written agreement made prior to conception between a potential surrogate and intended parent(s) provides that the surrogate will not be a parent and will surrender the child to the intended parent(s), then the intended parent(s)

will be the child's parent(s) (FLA, s 29(2)). Protection is, however, given to the surrogate mother after the child's birth, because she must consent in writing to surrender the child and the intended parent(s) must take the child into their care before the contractual arrangement takes effect (FLA, s 29(3)). Here gestation trumps intention.

The most innovative provisions in the FLA, unlike anything in the Human Fertilisation and Embryology Act 2008, create the possibility of more than two parents, albeit only when assisted reproduction is used. If prior to conception of the child a written agreement is made between intended parent(s) (likely in a surrogacy situation) and a potential birth mother who agrees to be a parent together with the intended parent(s), then they all are the child's parents (*FLA*, s 30(1)). In addition, a potential birth mother can make such an agreement with her partner and a donor who agrees to be a parent with them, in which case all three will be parents. In all cases contemplated, the parents will either be in the adult dyadic relationship or they will be donors of reproductive material. Even if this donor does not reside with the child, it appears they will be a guardian (*FLA*, s 39(3)(a)). This section consecrates the importance of genetic parenthood by contemplating that only donors may be additional parents; for example the donor's partner, if one exists, could apparently not be made a parent/guardian.

If a lesbian parent prefers a legalized scenario whereby a known sperm donor has a relationship with her child but is not a full-blown parent/guardian, an intermediate situation sometimes preferred by lesbian mothers (Kelly 2011), she can make an agreement with him respecting 'contact' (FLA, s 58). Presumably the donor's partner could also be granted contact.

The FLA also contains provisions empowering courts to declare whether a person is a child's parent if there is a dispute or uncertainty on that point (FLA, s 31). Although such orders are to give effect to the above rules respecting determination of parentage, there is a risk that judicial discretion may introduce variations contrary to statutory intention (Fielding 2011). For instance, heteronormative assumptions, notably that a child should have a father, might be made contrary to the pre-conception intention of lesbian parents (Harding, in this volume; Kelly 2011: 37–42; Millbank 2008). As Zanghellini has said, even if 'poly-parenting, when mutually chosen by the parties to a parenting project, is the model that has the greatest potential for offering truly innovative forms of relationality', it is quite another matter for a court to impose poly-parenting as a desirable outcome because of the supposed (and unsubstantiated) benefits of dual-gender, biological and genetic parenting (2012: 485). In the UK, some judges have imposed this model despite the legislation's stating that where a female parent is recognized as the legal parent, 'no man is to be treated as the father of

the child for any purpose' (ss 45(1), 48(2)). The FLA contains no such protective provision, which would run counter to the legislation's aim of opening the door to some degree of poly-parenting.

Other heteronormative assumptions are suggested by the fact that the FLA offers more options and protection to women who conceive via assisted insemination than to those who conceive via intercourse. First, as noted, when assisted conception is used, a third parent can be introduced via contract, but this option is not open when children are conceived 'naturally'. As such, a dyadic nuclear family model that conforms to the formal equality norm seems to be assumed, based on a notion that those who conceive 'naturally', who will more often be heterosexual, would not want anyone else involved in parenting. This affirmation of genetic ties and the dyadic opposite-sex family gives way in the FLA when assisted conception is used, as it often will by gay men and lesbians. Here the assumption seems to be that the legal system should permit gay men using surrogacy and lesbians using sperm donors to parent in threes (or more if there is more than one donor of reproductive material), so that children will have a parent of each sex and access to their genetic origins. Arguably, then, the aura of formal equality of genetic mothers and fathers hangs over the new regime, no matter whether "natural" and assisted reproduction are used.



Second, a sperm donor will not be defined as a parent unless further steps are taken by the birth mother to make an agreement with him. However, a child who is conceived via intercourse has both the birth mother and the biological father as her parents. While this section may make intuitive sense for most heterosexual couples, it poses a challenge to single mothers, whatever their sexual orientation, who wish to parent without the biological father and who, for reasons such as poverty or lack of access to sperm, choose not to use assisted reproduction. In this sense, the FLA betrays a heteronormative assumption that biological parenthood prevails when intercourse leads to conception, privileging a symmetrical, formal equality approach to birth mothers and birth fathers in situations where such symmetry may not be warranted. That being said, if the birth mother does not reside with the biological father after the child is born, he will not automatically have guardianship rights (FLA, s 39(1)). To that extent, the FLA moves beyond formal equality, but not entirely, as we see in the next part.

## **GUARDIANSHIP AND PARENTING ARRANGEMENTS**

The FLA replaces 'custody' and 'access' with a new concept of guardianship, which comes with parental responsibilities and parenting time (s 40). When parents who have lived together separate, each remains the child's guardian, creating a default of ongoing guardianship after separation (FLA, s 39(1)). An agreement or order can vary that default and provide that a parent is not the

child's guardian (FLA, s 39(2)). A parent who has never resided with the child is not a guardian unless an agreement has been made in an assisted reproduction scenario, or an agreement between the parent and all of the guardians makes this parent a guardian, or the parent regularly cares for the child (FLA, s 39(3)); 'care' is not defined. If a sperm donor makes an agreement with the birth mother and her partner but does not reside with the child, he will nevertheless be a guardian (FLA, s 39(3)(a)). Guardianship of a child is thus linked in most cases to the fact of having resided with a child (and another parent, as a rule) or having signed an agreement reflecting the intention of all adults involved in a child's life. A person who is not a guardian may obtain 'contact' with a child through an agreement or order (FLA, ss 58, 59). Contact could, accordingly, be given to parents who do not fall within the category of 'guardian' as well as to grandparents, and so on.

The list of a guardian's parental responsibilities is extensive and the default is that each guardian may exercise them in consultation with the other guardians, unless consultation would be unreasonable or inappropriate in the circumstances (FLA, s 40(1), 40(2)). Parental responsibilities include, to mention only some: making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child; making decisions respecting where the child will reside; making decisions respecting with whom the child will live and associate; and exercising any other responsibilities reasonably necessary to nurture the child's

development (FLA, s 41). Without an agreement or court order allocating parental responsibilities differently, each guardian has day-to-day care and decision-making power. While a mother who feels that consultation is inappropriate, for instance due to a pattern of abuse by the other parent, might be able to resist the need to consult with the other guardian(s), if challenged she will have to produce clear evidence to support her resistance to equal distribution and consultation, which could be difficult.

'Parenting time' is defined as 'the time that a child is with a guardian, as allocated under an agreement or order'. During parenting time, a guardian may exercise the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child. No default position as to parenting time is indicated, in contrast to parenting responsibilities (*FLA*, ss 42(1), 42(2)). However, the default for parental responsibilities grants each guardian 'day-to-day care, control and supervision of the child'.

Guardians are ostensibly free to adjust the parental responsibilities and parenting time and agreements are to be made considering only a child's best interests (*FLA*, s 37(1)) and not, say, parental rights. In theory, then, there is no bias towards shared parenting or formal equality and the government has stated repeatedly that there is no presumption in favour of equal parenting.<sup>5</sup> The *FLA*

stipulates that parental responsibilities may be allocated under an agreement or order so that they are exercised by (a) one or more guardians only, or (b) each guardian acting separately or all guardians acting together (FLA, s 40(3)). Crucially, and in contrast to Australia's Family Law Act 1975 (Cth) (Rhoades 2010), no particular arrangement is presumed to be in the best interests of the child, responding to concerns that shared parenting is too often erroneously assumed to be best for a child. Section 40(4) specifies that it must not be presumed that parental responsibilities should be allocated equally among guardians; that parenting time should be shared equally among guardians; or that decisions among guardians should be made separately or together. The ability of guardians to alter the default position of ongoing parental responsibilities is, however, premised on the assumption that these parents are able to negotiate an allocation that departs from an equality principle of continuing guardianship. This assumption in turn could be said to rest on an assumption that parents are equally situated, which often they are not.

The FLA default position marks a major change from that in the former legislation, which gave some power to the parent who usually has care and control of the child or with whom the child usually resides. The FRA did not prevent parents from agreeing to share parenting -- many did -- nor did it prevent orders for joint custody and guardianship (Boyd 2010b). But under the old system, any

parent arguing for a more shared arrangement had to ask for it, working against the default of sole custody to the parent with day-to-day personal care of the child. The new FLA default of ongoing guardianship on separation, regardless of the past history of parenting, places the burden on a parent resisting shared guardianship, posing a challenge given the normative climate in favour of shared parenting (Boyd 2010a).

By shifting the default for guardianship when parents separate, the FLA may generate serious problems for an unequally situated mother caregiver, for example, one who is dealing with a manipulative or abusive spouse or a spouse who has not demonstrated commitment to a child in the past. A mother attempting to leave an abusive relationship will be assumed to share ongoing guardianship with her ex-partner. She will have to try to negotiate another arrangement and, if the ex-partner resists (as can happen in a power and control scenario where children are used as a way to maintain power), she will have to apply to court. Both negotiation and court applications can pose problems. For instance, a mother who does not have permanent residence status or who lacks language skills will be disadvantaged in any negotiation and is also likely to encounter barriers in her invocation of assistance from the judiciary. Ironically, resorting to court is precisely what the law reforms are trying to preclude (Ministry of Attorney General 2010: 2–5; see also FLA, s 4).

Equally ironically, the new FLA definition of the best interests of the child emphasizes factors such as family violence and care. Under this excellent provision, an agreement or an order will not be in the child's best interests 'unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being' (FLA, s 37(3)). This provision will benefit the woman in the above scenario, but only if she is able to marshal the social and legal supports to go to court, or have an inappropriate agreement reviewed. Although a child's guardian must exercise his or her parental responsibilities in the best interests of the child and parties must consider only the best interests of the child when making an agreement (FLA, s 43, 37), how these duties will be supervised is unclear.

In determining a child's best interests, 'all of the child's needs and circumstances must be considered', including several factors listed that reflect concerns raised by feminist scholars and advocates for abused mothers during the consultation process (FLA, s 37(2)). Among these is 'the history of the child's care', reflecting attention to the significance of care labour. Important in counteracting the disproportionate impact that an emphasis on maximum contact and 'friendly parents' has had in Canadian law (Cohen and Gershbain 2001; Kelly 2012b) is the following factor: 'the appropriateness of an arrangement that would require the

child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members' (FLA, s 37(2)(i)). This factor, if taken seriously, should temper the extent to which parental responsibilities should be shared and exercised in consultation (FLA, s 40(2)).

Another factor is 'the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member' (FLA, s 37(2)(g)), signaling the risks that spousal abuse can pose to a child's safety, security or well-being (see also s 38(g)). In addition, in assessing family violence, a court must consider various factors including 'whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behavior directed at a family member' (FLA, s 38(d)). This provision reinforces the fact that family violence is defined as including not only physical and sexual abuse (and attempts) but also psychological or emotional abuse, including intimidation, harassment, coercion or threats, including to other persons, pets or property (FLA, s 1 'family violence'). Family violence is also explicitly defined to include 'in the case of a child, direct or indirect exposure to family violence' (FLA, s 1(e)). These detailed provisions, while entirely gender-neutral, reflect consultation with experts on the complex dynamics of family violence.

These important definitions of family violence may not, however, be properly taken into account, due to the equality default of ongoing guardianship. In addition to pointing parties towards desirable settlements from a policy perspective (Dewar 2000: 67–8), default rules apply if there is no agreement between the parties. One key question is which system best prevents abuses in conflict situations. The FLA default overlooks the extent of situations where serious conflict characterizes the relationship between separating parents and over-estimates the extent to which cooperation and negotiated departures from ongoing guardianship can happen on a non-level playing field.

## **RECONCILING NORMS IN HETEROSEXUAL AND SAME-SEX**

### **PARENTING: A FOCUS ON CARE**

As detailed above, the FLA introduces innovative concepts that depart from an approach rooted in strict equality of mothers and fathers. For example, it permits three people to be parents for children born of assisted conception and severs guardianship rights from parentage. These norms can be read not only as opening the possibility of legally recognizing non-normative families, but also as reflecting a healthy combination of (a) a focus on care and its significance to a child's well-being and to what defines parenthood and (b) a focus on intention.



Bio-genetic ties are relevant, but sometimes can be overridden in light of evidence on care and intention.

Much research on parenting law addressing the disputes between heterosexual partners has emphasized the significance of care to legal parenthood and to awards of custody. This emphasis has grown out of feminist research on the sexual division of labour (Boyd 2012; Herring, in this volume) but it also rests on a notion that the labour that an adult puts into parenting should be relevant to determining rights and resolving disputes. Nedelsky has written about the nexus between routine physical caretaking and the bonds of connection with children (1999: 320–2). The material element of care, still more often performed by mothers, also reflects and generates an emotional component. These insights echo work on conceptions of parenthood that emphasize the labour that is put into parenting, which creates ‘a deep relational attachment’ between an adult and a child, sometimes regardless of genetic or gestational ties (Austin 2007: 27). Moreover, recent research with fathers (notably, mostly fathers *not* involved in parenting disputes) shows that they have a greater appreciation for the significance of care labour to concepts of parenthood than may previously have been realized. The fathers, by and large, felt that a man can be a ‘good father’ only by being a ‘father-as-carer’, that is, by earning the right to be involved in a

child's life through care labour (Ives *et al.* 2008: 79; but see Kershaw *et al.* 2008: 199).

Arguably the FLA's emphasis on guardianship usually flowing from the fact that a parent has resided with a child is premised on a notion that this parent will more likely have engaged in a care relationship with the child than one who has not. As well, if a non-residential parent regularly cares for a child, he or she can be a guardian (FLA, s 39(3)(c)). The problem is, however, that in heterosexual families, fathers who reside with children may not in fact share the care responsibilities for the child. As a result, the default position of ongoing guardianship grants such fathers formal rights of authority without accompanying responsibilities, and may generate difficulties for mothers attempting to leave relationships, especially those characterized by abuse or manipulation. Although Herring (in this volume) suggests that parents might lose their parental rights through non-care, it is not clear that judges would be inclined to apply this model where parents have previously co-resided with a child. Another potential problem is that the word 'care' is not defined in the FLA, opening the possibility that evidence that a parent 'cares about' a child combined with some time spent will be interpreted as 'regularly cares for the child', opening a route to guardianship rights being ordered by a court (Smart 1991).

Applying this analysis rooted in care to same-sex parenting is more challenging because it reveals the limits of a gendered lens that positions women and men oppositionally (even if that opposition is theorized by reference to the gendered division of labour rather than essentialized gender roles: Boyd 2012). When disputes arise involving separating lesbian parents, the birth mother often is favoured over a social mother without a genetic tie to the child, premised on a biological definition of parenthood and ignoring the social mother's care relationship and intention to parent the child.<sup>6</sup> The FLA's assumption of ongoing guardianship upon separation arguably gives important recognition to the social mother in this scenario. To the extent that same-sex couples share domestic labour, including childcare, more often than do opposite sex couples, the assumption of ongoing guardianship may be more apt for lesbian co-parents than for heterosexual parents. That said, not all same-sex couples adopt less strict gender roles than straight couples, with an unequal division of labour often being observed (Barker 2012: 154–8; Carrington 1999). The external pressures to provide privatized caregiving within the family remain constant in capitalist societies such as the United States and Canada (Fineman 2004), meaning that many parents reach an arrangement where one spends more time on childcare. The studies differ on whether most lesbian mothers perceive both partners as the parents of the child, or whether a significant number depart from this perception of equality, with some prioritizing the birth mother (Leckey 2011: 593–4).

In considering parenthood within lesbian families, we might return to Gavigan's question, 'What makes a lesbian a mother?' (2000: 103). Interviews with lesbian mothers about the relative weight to be placed on care versus bio-genetic ties for the purposes of determining parenthood reveal that active involvement in daily care is key to being viewed as a parent (Kelly 2011: 90). As a result, the emphasis placed on care by scholars such as Herring (in this volume) may be apt even for same-sex parents: the adult who provides day-to-day care for the child is likely to know the child best and, therefore, to be able to make the best decisions for the child. If one lesbian co-mother engages more closely in the care relationship with the child than the other, might the FLA's default position of ongoing guardianship be as misguided as it would be for a straight couple, in its assumption of formal equality? As Leckey (2013: 13) cautions, '[n]ow that two women may become legal spouses and that a child may have two mothers, might judges too readily interpret facts from the diverse ecology of queer kinship through the script of two equal mothers?'

Finally, due to its embodiment of heteronormative assumptions that (at least) two parents exist, the FLA sits uncomfortably alongside the phenomenon of single mothers by choice (Kelly 2012a). Because single motherhood departs from the normative expectation that children should have two legal parents and, especially,

a father, it presents a clear challenge to formal equality. The FLA, however, is ambivalent about embracing this challenge to heteronormative parenthood. On the one hand, the legislation is clear that a sperm donor is not a parent without more evidence (FLA, s 24), affirming that, at least in assisted reproduction, a genetic connection per se is not sufficient to establish parenthood and emphasizing instead a combination of intention and caregiving (Boyd 2007; Zanghellini 2009). This provision ostensibly protects a single mother who has used assisted insemination from having another parent imposed on her family against her will. On the other hand, mothers who conceive via intercourse are not similarly protected, as it is stated that the child's parents are the birth mother and the biological father (FLA, s 26(1)). A single mother who intends to parent alone may be left insecure in the legal status of her family as a result.

## **CONCLUSION**

Family law generally, and laws on parenthood in particular, have moved over the past three decades towards enhancing the formal legal equality of mothers and fathers. This trend, whilst reflecting important initiatives to undermine the sexual division of labour and to encourage engaged fatherhood, has had unintended consequences for mothers who take primary responsibility for care of their children, for same sex partners who wish to co-parent, and for women who attempt to parent autonomously of a genetic father.

I have argued that a focus on care and, to some degree, intention has the capacity to undermine the excesses of this formal equality approach to parenting laws and to recognize gender differences. British Columbia's new FLA goes some distance towards displacing some assumptions related to formal equality and the sexual family, and moves tentatively towards a post-equality position on parenthood. It does so by moving away from rights based on "natural" parenthood based on biogenetics, while still placing emphasis on care and the gendered processes of conception and birth. In the case of assisted reproduction, it lays considerable emphasis on pre-conception intention to be a parent. Whether the FLA is interpreted in ways that are sensitive to the still gendered terrain of parenting and that resist heteronormative assumptions, however, remains to be seen. The legislation reproduces an assumption that there will normally be two parents (especially when "natural" reproduction is used) and it contains a default in favour of ongoing guardianship for separating parents. As such, this innovative legislation remains wedded to problematic aspects of the sexual family and 'parental dimorphism' (McCandless and Sheldon 2010), limiting its potential to recognize the less normative, and more hidden, stories of parenting (Monk, in this volume) that perhaps most challenge our conceptions of equality.

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## NOTES

<sup>1</sup> SBC 2011, c 25

<sup>2</sup> RSBC 1996, c 128

<sup>3</sup> Law and Equity Act, RSBC 1996, c 253, s 61(1)(a).

<sup>4</sup> 'Assisted reproduction' is defined as 'a method of conceiving a child other than by sexual intercourse': FLA, s 20(1).

<sup>5</sup> See e.g. British Columbia Debates, 21 November 2011, p 8946 (Hon. S. Bond).

<sup>6</sup> See e.g. *Buist v Greaves* (1997) 72 ACWS (3d) 301, [1997] OJ No 2646; *KGT v PD* 2005 BCSC 1659, 21 RFL (6th) 183.

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