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ASSISTED CONCEPTION AND EQUALITY OF FAMILIAL STATUS IN PARENTAGE LAW

Wanda Wieggers

Abstract: *This article provides an in-depth analysis of outcomes in parentage disputes involving assisted conception across Canada. Throughout this article, I draw on equality of status, familial security and equity in terms of gender and sexual orientation as norms or values that should underlie and guide the legal regulation of parenthood in the context of reproductive technologies. Throughout, I also compare and contrast the sources of and the implications for children and parents of resistance in law towards the abolition of illegitimacy and the regulation of assisted conception.*

INTRODUCTION

Parenthood has always been a complex and culturally variable legal construct. At common law, the husband of a mother of a child was presumed to be the father of that child. Rebuttable only by stringent proof that the husband could not possibly have fathered the child, this presumption in effect made marriage the most important marker of parental-child status at law. Outside of marriage, children born to unwed mothers had no legal relations and could not inherit status or property through their fathers. The implications of illegitimacy changed over time, first in relation to biological mothers and then fathers. The eradication of related disabilities marked a revolutionary step forward in parentage law but occurred in many parts of Canada only after a number of successful challenges under the *Canadian Charter of Rights and Freedoms*¹. In 1990, the Minister of Justice in Saskatchewan

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada*

described the abolition of illegitimacy as a reform that was “long overdue.”²

Over the last few decades, technological change has presented new and different challenges in parentage law. While paternity testing has made genetic or biological parentage more easily ascertainable and less dependent on marital or other presumptions, the advent of reproductive technologies has fragmented parenthood into separate social and biological components.³ Some legislatures have again, however, been slow to grapple with the legal status of parties who use assisted conception. Only a few provinces, namely Alberta, Quebec, and most recently British Columbia, have a comprehensive legal framework in place to establish parentage and identify the relative rights and responsibilities of all the involved parties. In others, legislative action has been piecemeal or minimal. To the extent that reform has taken place in provinces such as Saskatchewan, it has been limited largely to the registration of births. This legislative lacuna exists despite the fact that a *Uniform Child Status Act* was formulated in 2010 and proposed for implementation across Canada.⁴

Act 1982 (UK), 1982, c 11 [Charter].

- ² Saskatchewan, Legislative Assembly, *Official Report of Debates, Committee of the Whole* (12 June 1990), online: Legislative Assembly of Saskatchewan <<http://docs.legassembly.sk.ca/legdocs/Legislative%20Assembly/Hansard/21L4S/900612e.PDF>> See also *The Children’s Law Act, 1997*, SS 1997, c C-8.2, s 40(3) [*CLA, 1997*].
- ³ See Susan B Boyd, “Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility” (2007) 25 Windsor YB Access Just 63 [Boyd, “Gendering”]; Richard Collier & Sally Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Portland: Hart, 2008).
- ⁴ Civil Law Section of the Uniform Law Conference of Canada, A Joint Project of the Uniform Law Conference of Canada and the Federal/Provincial/Territorial Coordinating Committee of Senior

There is obviously a lot at stake in establishing the parentage of children. Recognition of the status of a parent provides an opportunity for adults to experience and enjoy a long-lasting relationship with a child. These emotional connections to children are seen as ever more important to adults in a world marked increasingly by conjugal and economic insecurity. The financial implications of parental status are also significant, as parents can be liable for child support in excess of 18 years. For children, of course, their identity is largely shaped by their parentage, which determines their names, relationships, nationality, financial status, and lineage.⁵ Parentage, for both parents and children, establishes affective ties, economic and emotional well-being, and to a great extent, one's life path and development. Many of the most meaningful rights, benefits and obligations flow through parentage. Uncertainty or conflict as to parental status at the outset of a child's life has the potential to critically undermine these benefits by increasing stress and instability throughout the lives of both caregivers and children.

Given the importance of familial security and equality of status to parents and children and its recognition in the context of illegitimacy, why do legislative gaps persist in the area of assisted conception in some jurisdictions? The novelty of reproductive technologies and uncertainty or ambivalence about the potential limits of technological intervention in the creation of human life may have initially stalled reform but can less adequately explain current inaction. As Marsha Garrison notes in the United States, many of these technologies are no longer novel and the legal issues emerging from their use are

Officials on Family Justice, "Uniform Child Status Act", Halifax, Nova Scotia, August 22-26, 2010.

⁵ British Columbia, Ministry of Attorney General, Justice Services Branch, Civil Policy and Legislation Office, *White Paper on Family Relations Act Reform: Proposals for a new Family Law Act*, (Victoria: Ministry of Justice, 2010) at 29.

fairly clear.⁶ As of 2012, there were at least 33 fertility clinics operating in Canada, assisting in thousands of pregnancies and births.⁷ Since 2002, usage rates appear to have increased as clinics have reported a greater number of cycles performed and higher pregnancy and birth rates.⁸ Garrison suggests that tens of thousands in the US have used or are using reproductive technologies⁹ and notes that most other developed nations have moved towards comprehensive reform.¹⁰

Is the failure to provide certainty and stability within families that rely on assisted conception the mark of a new or continuing illegitimacy?¹¹ Can it be said that these parents and children still face stigma and exclusion under the law, much like unmarried parents and their children did in many parts of Canada up to the 1990s? What can be learned from the successful struggle against illegitimacy that may assist in the struggle for reforms in the area of assisted conception? Notably, the status of illegitimacy was challenged at a time when increasing numbers of children were being born outside of marriage, many of them born to parents in common law

⁶ Marsha Garrison, “Law Making for Baby Making: An Interpretive approach to the Determination of Legal Parentage” (2000) 113 Harvard Law Review 837 at 852. I use “assisted conception” in this article to denote gestational motherhood or surrogacy and the use of sperm and ova from single donors.

⁷ Canadian Assisted Reproductive Technologies Register (CARTR), “2012 CARTR Results,” online: Canadian Fertility and Andrology Society <<http://www.cfas.ca>> at slide 2.

⁸ Joanne Gunby et al, “Assisted reproductive technologies (ART) in Canada: 2007 results from the Canadian ART Register” (2011) 95:2 Fertility and Sterility 542 at 546.

⁹ Garrison, *supra* note 6 at 852, n 80.

¹⁰ *Ibid* at 852-53.

¹¹ See text accompanying notes 44-46 below.

unions that were functionally similar to marital relationships. For many, the abolition of illegitimacy served to enhance the status of biological fathers by making it easier for mothers to seek support from them and easier for fathers to have continuing relationships with their biologically-related children.¹² By contrast, those seeking to use reproductive technologies include not only married and unmarried heterosexual couples who are experiencing infertility but also same sex couples and single men and women who want to parent alone. Relative to the struggles against illegitimacy, the potential diversity of family structures in the context of assisted reproduction poses a much greater challenge to dominant familial norms¹³ and to the intensification of privatized support since the 1990s.¹⁴ Arguably, it is precisely these value and policy choices that underlie and generate much of the stigma and negative stereotyping of families formed through assisted conception, particularly single mother families.

In Part II of this article, I begin by identifying alternative values that from a relational perspective should propel legal reform in the area of assisted conception. As

¹² Susan B Boyd et al, *Autonomous Motherhood? A Socio-Legal Study of Choice and Constraint* (forthcoming, 2014 Univ. of Toronto Press) ch 3 [Boyd et al, *Autonomous Motherhood?*].

¹³ See Alison Bird, “Legal Parenthood and the Recognition of Alternative Family Forms in Canada” (2009) 60 UNBLJ 264; Fiona Kelly, “Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family,” (2009) 21 CJWL 315 [Kelly, “Producing Paternity”]; Fiona Kelly, “Equal Parents, Equal Children: Reforming Canada’s Parentage Laws to Recognize the Completeness of Women-led Families” (2013) 64 UNBLJ 253 [Kelly, “Equal Parents”].

¹⁴ Judy Fudge & Brenda Cossman, “Introduction: Privatization, Law, and the Challenge to Feminism” in Judy Fudge & Brenda Cossman, eds, *Privatization, Law and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002); Susan Boyd, *Child Custody, Law and Women’s Work* (Don Mills: Oxford, 2003).

recognized by the Ontario Court of Appeal in *AA v BB*,¹⁵ the deep value underlying the move towards abolition of illegitimacy was equality of familial status between children. I argue that this value, along with that of equality in terms of gender and sexual orientation, should be applied to families that are formed by way of assisted conception in order to provide all members with familial security and to avoid stereotyping and punishing parents and their children for deviation from dominant familial norms. In Part III, I provide a detailed summary of legal outcomes in the area of assisted conception and identify the specific gaps that exist in some jurisdictions. I illustrate how these gaps lead to irrational and untenable outcomes, particularly in Saskatchewan, and highlight how outcomes differ across jurisdictions. Although some parents may be able to rely on step-parent adoptions or standing as a step-parent to maintain a relationship with a child, the outcomes overall reflect a failure to promote the values of equality of status, familial security and non-discrimination on the grounds of gender and sexual orientation. In Part IV, I argue that reliance on the *parens patriae* jurisdiction of superior courts, as has occurred in Ontario, cannot adequately fill the legislative gap because it relies exclusively on a child-centred norm and fails to promote in a consistent way the above-mentioned values. Although *Charter* challenges appeared to be significant in the elimination of discrimination against single mothers, fathers and children by reason of illegitimacy, I finally canvas the material differences and the potential pitfalls in relying on section 15 of the *Canadian Charter of Rights and Freedoms* to generate change in the area of assisted conception.¹⁶

¹⁵ *AA v BB*, [2007] ONCA 2, leave to appeal refused *Alliance for Marriage and Family v A(A)*, 2007 SCC 40, [2007] 3 SCR 124.

¹⁶ *Charter*, *supra* note 1.

GUIDING VALUES OR NORMS

Because parenthood connotes a relationship, a relational perspective will more adequately address the complex realities and the vital significance of the parent-child relationship to the lives of both parents and children.¹⁷ Unlike an individualistic perspective, a relational lens can more fully take account of the intense interdependence between parents and children and the multiple ways in which the well-being of one profoundly affects the other. As such, the values that guide parentage law in structuring the parent-child relationship should predominantly be those that can account for the interests of both parents and children without exclusively focusing on one or the other. Although parentage at one point in time conferred almost absolute authority over children, it is now readily acknowledged that children are not the property of parents but rather that parents owe duties and obligations towards them. Conversely, parentage in law has never been governed solely by the best interests of children but rather has largely been determined on the basis of biological maternity, marriage to the mother, and actual or presumed paternity. Thus, the law of parentage itself has reflected to some degree a convergence of the interests of both parents and children.

In this section, I argue that three values or social norms should have a significant role in shaping the contours of parentage law in the context of assisted conception. I draw on a fundamental value underlying the abolition of illegitimacy, that of equality of status, in addition to a concern for familial

¹⁷ See e.g. Susan B. Boyd, “Autonomy for Mothers? Relational Theory and Parenting Apart” (2010) 18(2) *Fem Legal Stud* 127; Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (Toronto: Oxford University Press, 2012); Helen Rhoades, “Revising Australia’s Parenting Laws: A Plea for a Relational Approach to Children’s Best Interests” (2010) 22 *Child and Family Law Quarterly* 172.

security and equality in terms of gender and sexual orientation. These values are not exhaustive of all relevant values, nor necessarily determinative of all outcomes.¹⁸ As well, there are interpretative contests as to what these values mean and will entail in their application to concrete fact situations. There is, in my view, no “bright-line test” that will generate easy resolutions given the diverse range of circumstances and technologies available.¹⁹ Arguably, however, the interpretations I defend have the potential to point toward determinate outcomes that are already reflected in legislation such as the recent *Family Law Act* in British Columbia²⁰ and to a large extent, the proposed *Uniform Child Status Act*²¹.

Since the abolition of illegitimacy, most parentage provisions now begin with a declaration that a person is the child of his or her parents and his or her status as their child is independent of whether he or she is born within or outside marriage.²² In *AA v BB*, the Ontario Court of Appeal identified equality of child status as the fundamental norm or objective underlying the abolition of illegitimacy.²³ Rosenberg JA stated:

¹⁸ See e.g. Lori Chambers, “Newborn Adoption: Birth Mothers, Genetic Fathers and Reproductive Autonomy” (2010) 26 Can J Fam L 339 (other values could be identified, such as reproductive autonomy); Katharine T Bartlett, “Re-Expressing Parenthood” (1988) 98 Yale LJ 293 (emphasis on responsible parenthood). I choose not to rely on notions of responsibility since they are heavily inflected with the individualism so dominant in neo-liberalism, see e.g. Linda C McClain, “‘Irresponsible’ Reproduction” (1996) 47 Hastings LJ 339.

¹⁹ But see Garrison, *supra* note 6 (who argues in favor of such a test at 868).

²⁰ *Family Law Act*, SBC 2011, c 25 [BC FLA].

²¹ *Supra* note 4.

²² See e.g. *CLA*, 1997, *supra* note 2, s 40; *Children’s Law Reform Act*, RSO 1990, c C.12, s 1(1) [Ontario CLRA].

²³ *Supra* note 15 at paras 20, 35.

The purpose of the legislation was to declare that all children should have equal status. At the time, equality of status meant recognizing the equality of children born inside and outside of marriage. The Legislature had in mind traditional unions between one mother and one father. It did not legislate in relation to other types of relationships because those relationships and the advent of reproductive technology were beyond the vision of the Law Reform Commission and the Legislature of the day.²⁴

The Ontario Court of Appeal recognized that the same underlying principle, i.e. that all children should have “equal status in law” regardless of their families of origin or the conditions of their birth, should apply in the context of assisted conception. “There is nothing in the legislative history of the *CLRA* to suggest that the Legislature made a deliberate policy choice to exclude the children of lesbian mothers from the advantages of equality of status accorded to other children under the *Act*.”²⁵ Lack of recognition meant that “children of these relationships are deprived of the equality of status that declarations of parentage provide.”²⁶ In the result, relying on the Court’s *parens patriae* jurisdiction, both the biological mother and the social mother were declared mothers in addition to the biological father. The recognition of three parents, including two mothers, was presented as a function of children’s equal status.

The meaning and parameters of ‘equal status’ in this context are contestable but the vision of equality relied on by

²⁴ *Ibid* at para 34.

²⁵ *Ibid* at para 38.

²⁶ *Ibid* at para 35.

the Court in *AA v BB* is not that of formal equality and its implications extend beyond the status of the child. Obviously, there are differences in the birth circumstances of children born to biological parents outside of marriage and children conceived through the use of assisted reproduction. In the particular case of *AA v BB*, there were two mothers, one of whom was a social mother, as well as a biological father. Notwithstanding these differences, the Court postulates that the families of the children in both situations should be supported and recognized as legally valid. In both, the family forms at issue were identified as departures from traditional norms. Interpreted contextually, against the backdrop of historically dominant social norms, equality of familial status challenges not only the marital form of family but also the biological, heterosexual dyad as the preferred site for the rearing of children. Non-biological heterosexual families contradict the assumed 'naturalness' of this ideal dyad, as evident in efforts throughout most of the twentieth century to seal adoption records, falsely amend birth certificates and mimic in other ways the biological family.²⁷ However, same sex and single parent families currently pose the greatest challenges to dominant familial norms and both have been the object of historical and continuing discrimination.

Historically, in the context of illegitimacy, both legal and religious norms contributed to the suffering and stigmatization of the 'fallen woman' and her child. However, unmarried women and children who depended on public provision through the parish relief system in England from the late sixteenth century onward suffered most, by way of confinement in the workhouse, the exploitation of child labour in apprenticeships and factories, and the whipping or

²⁷ See Naomi R Cahn & Joan Heifetz Hollinger, eds, *Families by Law: An Adoption Reader* (New York: New York University Press, 2004); Elizabeth Bartholet, *Family Bonds: Adoption and the Politics of Parenting* (Boston: Houghton Mifflin, 1993) at 164-86.

imprisonment of mothers themselves up to 1816.²⁸ The New Poor law of 1834 maintained this punitive orientation towards mothers: they were separated from their children upon birth, made primarily liable for support of their children but not allowed to directly obtain support from fathers (payments were made to the parish) and, like rape victims at common law, their testimony against putative fathers required corroboration before it could be believed.²⁹ In Canada, unmarried mothers who could claim public relief were not generally subject to the same range and severity of punishments but their claims for support in the twentieth century were subject to some of the same limitations, including the need for corroboration, and in many jurisdictions, payment could only be made to the state and not the mother directly. Until the abolition of illegitimacy in the late twentieth century, Susan B. Boyd and Lori Chambers document the same tendency for state agencies and lawmakers to view unmarried mothers as untrustworthy and degenerate, especially those who had never cohabited with fathers.³⁰ The animus behind these policies was not only a concern with protecting men from mendacious women but also a desire to discourage and inhibit single women from bearing children and relying on state support.

²⁸ Jenny Teichman, *Illegitimacy: An Examination of Bastardy* (Ithaca: Cornell University Press, 1982) at 62-3 (in 1760, 80% of the infants born in or placed in the workhouse died before the age of 12 months).

²⁹ *Ibid* at 65.

³⁰ In Ontario, only 6.7% of mothers who had never cohabited with the alleged fathers were successful in obtaining agreements or child support orders between 1921 and 1969, compared to 87.9% of mothers who had cohabited with fathers. Lori Chambers, *Misconceptions: Unmarried Motherhood and the Ontario Children of Unmarried Parents Act, 1921-1969* (Toronto: University of Toronto Press, 2007) at 150; Boyd et al, *Autonomous Motherhood?*, *supra* note 12.

It is significant that most of the shame and ignominy of illegitimacy was heaped upon mothers and their children.³¹ Although biological fathers lacked legal status and were commonly assumed to lack interest in their progeny, mothers were considered primarily responsible for pre- or extra-marital sexual conduct and its consequences.³² The “prototypical illegitimate social identity” was the “mother of the illegitimate child.”³³ Well into the twentieth century, unmarried mothers were considered sexually immoral or psychologically troubled, and their children were considered at risk and better off if placed for adoption outside of their mothers’ care.³⁴

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- ³¹ See e.g. Peter Ward, “Unwed motherhood in nineteenth-century English Canada” (1981) 16 *Historical Papers* 34; Constance B. Backhouse, “Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada” (1984) 34 *Univ of Toronto Law Jnl* 447 at 448; Andree Levesque, “Deviants Anonymous: Single Mothers at the Hopital de la Misericorde in Montreal, 1929-1939” in Katherine Arnup, Andree Levesque & Ruth Roach Pierson, eds, *Delivering Motherhood: Maternal Ideologies and Practices in the 19th and 20th Centuries* (New York: Routledge, 1990) 108; Margaret Jane Hillyard Little, ‘No Car, No Radio, No Liquor Permit’ *The Moral Regulation of Single Mothers in Ontario 1920 – 1997* (Toronto: Oxford University Press, 1998) at 12, 135-36 (mothers of illegitimate children were denied Mother’s allowance or subjected to more onerous conditions of eligibility up to 1966 in Ontario).
- ³² Lorene MG Clark & Debra J Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: The Women’s Press, 1977) at 155-56 (a double standard of sexual morality also played out in rape law); Rickie Solinger, *Wake Up Little Susie: Single Pregnancy and Race Before Roe v. Wade* (New York: Routledge, 1992) (according to Rickie Solinger, in post-war United States, “[t]he girl or woman who ‘got herself pregnant’ was the locus of blame, the target of treatment programs and punishments” at 36).
- ³³ Gail Reekie, *Measuring Immorality: Social Inquiry & the Problem of Illegitimacy* (Cambridge: Cambridge University Press, 1998) at 181.
- ³⁴ Veronica Strong-Boag, *Finding Families, Finding Ourselves: English Canada Encounters Adoption from the Nineteenth Century to the*

Illegitimacy, as such, had consequences beyond the legal exclusion of fathers. From the perspective of the unmarried mother and child, illegitimacy was a disciplinary practice aimed at preserving the primacy of legal marriage and limiting the reliance of single mothers upon state support.³⁵

Reforms of the last two to three decades have substantially changed the legal impact of parentage outside of marriage for mothers and their children, and for fathers. Statutes limiting rights to support through requirements such as corroboration were finally struck down as contrary to the *Charter* in the late 1980s.³⁶ Ontario was the first jurisdiction to abolish the status of illegitimacy in 1977, with most others following suit up to 1990.³⁷ Nova Scotia has abolished most of the disabilities associated with illegitimacy but still allows for

1990s (Toronto: OUP, 2006); Regina G. Kunzel, *Fallen Women, Problem Girls: Unmarried Mothers and the Professionalization of Social Work* (New Haven, 1993: Yale University Press) at 144-170; Solinger, *supra* note 32 (found that the US government and private agencies generally perceived white unwed mothers as mentally ill and black unwed mothers as sexually immoral).

³⁵ Chambers, *supra* note 30 at 14-32; Derek Gill, *Illegitimacy, Sexuality and the Status of Women* (Oxford: Basil Blackwell, 1977) 308; Little, *supra* note 31 at 128.

³⁶ See *infra*, note 248.

³⁷ See e.g. *Children's Law Reform Act*, SO 1977, c 41, ss 1-2; *Law and Equity Act*, RSBC 1979, c 224, s 56; *Charter of Rights Amendments Act 1985* SBC 1985, c. 68; *The Children's Law Act*, SS 1990-91, c C-8.1, ss 40-42; *An Act to Amend the Family Maintenance Act*, SM 1982-83-84, c 54, s 24; *Child and Family Services and Family Relations Act* SNB 1980, c C-2.1, s 96(1); *The Children's Law Act* SN 1988, c 61, s 89(1), *Child Status Act* SPEI 1987, c 8, s 1(1). Alberta, however, did not repeal its separate *Parentage and Maintenance Act* until 2003 (*Family Law Act* SA 2003, c F-4.5) and only repealed its *Legitimation Act* in 2011 (*Family Law Statutes Amendment Act*, 2010 SA 2010, c 16, s 1).

the legitimization of children through marriage subsequent to birth.³⁸ These changes overall reflected a growing consensus that it was morally indefensible to hold children responsible for parental ‘misdeeds’ and on that basis relegate them to an inferior status in relation to other children.³⁹ Abolition helped reduce the stigma of illegitimacy for children and their mothers while simultaneously responding to claims that unwed fathers should have equal parental rights. These developments were consistent with improved paternity testing, a declining birth rate, a growing acceptance of common law relationships, and an increasing emphasis on fatherhood in family law. As importantly, these developments aligned with a neoliberal trend favouring the privatization of dependency over the 1980s and 90s through an expansion of individual support obligations.⁴⁰

While reforms related to illegitimacy ultimately brought biological dads in and increased the range and amount of child support, assisted conception, by contrast, has the potential to leave some biological dads out, depending on the

³⁸ *Maintenance and Custody Act*, RSNS 1989, c 160, ss 49-50.

³⁹ Boyd et al, *Autonomous Motherhood?*, *supra* note 12.

⁴⁰ Fudge & Cossman, *supra* note 14. Neo-liberalism describes a restructuring process or policy orientation underway since at least the mid-1970s that has promoted greater reliance on private (rather than public) sources of economic support such as market income, family supports and the voluntary sector, see Wanda Wieggers, “Child-Centred Advocacy and the Invisibility of Women in Poverty Discourse and Social Policy” in Dorothy E Chunn, Susan B. Boyd & Hester Lessard, eds, *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007) 229 at 235-46. The expansion of private support obligations has included extended support for adult children and an enlarged role for step-parents through provincial legislation along with passage of the federal Child Support Guidelines (CSG) and more rigorous enforcement measures. Under the CSG, biological fathers are primarily liable for child support.

configuration of the family. In *AA v BB*, the Court increased the number of parents to three by recognizing the social mother but the applicants pursued this option because they wanted to maintain the parental status of the biological father.⁴¹ This outcome was, strictly speaking, a departure from a dominant two-parent heterosexual familial model but one which may have been viewed as palatable to the Court because it retained parental ties to the biological parents and expanded the sources of emotional and financial support for the child while not exposing him to instability or parental conflict. The Court did not have to contend with a motion by two lesbian mothers or a single mother to relinquish the parental status of a sperm donor.

Both same sex and single parenthood mark a radical departure from heterosexual reproduction and the “idea that there are natural sexual differences in parenting behavior.”⁴² Single parenthood also reduces the private sources of financial support for a child to less than two.⁴³ Here again, however, a refusal to recognize the validity of such families perpetuates stigma for children and their caregivers as a result of family structure, the number of parents or the circumstances of birth. It assumes that these families invariably provide inadequate settings for the rearing of children. Exclusion by law can thereby continue to play a substantial role in stigmatizing a father’s absence, not by virtue of a refusal to recognize some fathers, but rather, by a refusal to equally recognize children and families without fathers. This failure to fully recognize fatherless families is functionally similar to the disabilities and stigma formerly targeted at unwed mothers and children under the old illegitimacy laws.⁴⁴ As Gail Reekie suggests,

⁴¹ *Supra* note 15.

⁴² Reekie, *supra* note 33 at 182.

⁴³ Kelly, “Producing Paternity,” *supra* note 13 at 329.

⁴⁴ The comparison I am making here with illegitimacy should be

illegitimacy functions culturally “as a metaphor for socially undesirable reproduction”⁴⁵ and “covertly as support for its binary opposite – legitimacy”, a principle which has defined normative parenthood as having a father.⁴⁶

Marsha Garrison, however, has argued that equal status for children means that similar rules should govern cases involving both sexual and assisted conception.⁴⁷ She uses an “interpretative approach” to identify two dominant themes in American parentage law in the context of sexual conception and adoption: “children’s interests come first and two-parent care is generally preferable to that of one parent alone.”⁴⁸ In other words, Garrison starts from a potentially discriminatory premise to generate outcomes that are consistent with a two-parent, preferably marital outcome. Her analysis depends vitally on the assumption that two parents are a socially preferred family form and one that the law can legitimately encourage and support irrespective of individual circumstances.⁴⁹ Equally important is the assumption that differences between sexual and technological conception are or should be wholly irrelevant to parentage law. She argues that

distinguished from that of US authors who define the “new illegitimacy” as a refusal to recognize more than one parent, presumably to the child’s detriment, see e.g. Susan Frelich Appleton, “Illegitimacy and Sex, Old and New” (2012) 20 Am U J Gender Soc Pol’y & L 347 at 371. This usage relies predominantly on the father’s experience of illegitimacy as the reference point or norm for comparison.

⁴⁵ Reekie, *supra* note 33 at 178.

⁴⁶ *Ibid* at 181; see Kelly, “Producing Paternity,” *supra* note 13.

⁴⁷ *Supra* note 6.

⁴⁸ *Ibid* at 895.

⁴⁹ See below, Part V for discussion of the impact of section 15 of the *Charter*.

the circumstances surrounding a child's birth or the "mechanics of conception" are not relevant to the "relational interests that ultimately result."⁵⁰ As such, the legal standards governing heterosexual intercourse and assisted conception should be the same and children born through either process should have identical rights.

A number of consequences follow from Garrison's focus on the interests of children in isolation from those of parents, her reliance on a formal conception of equality, and her use of heterosexual procreation as the norm for the evaluation of alternative family forms. Since biological fathers are invariably held responsible for child support (regardless of representations regarding birth control, etc.)⁵¹ and can claim custody and access as a result of sexual conception, she argues that the same rights should be available to children born through assisted conception. More specifically, since children conceived in the ordinary course of conception have two parents, a mother and father, so should children conceived through assisted conception regardless of the arrangements made between the relevant parties. In Garrison's perspective, lesbian and single-mother households are both problematic because they deny a child a paternal relationship and in the latter case, a second legal parent.⁵² Susan Frelich Appleton in fact identifies a new "subset of 'illegitimate' children" as those children born of assisted conception who have no legally recognized father.⁵³ Both scholars appear to assume that children are inevitably disadvantaged by this treatment.

⁵⁰ Garrison, *supra* note 6 at 882.

⁵¹ See e.g. *Buschow v Jors* [1994] SJ No 136, 118 Sask R 306 (QB).

⁵² Garrison, *supra* note 6 at 903.

⁵³ *Supra* note 44 at 371, 384.

However, contrary to the assumption that a child needs an ongoing relationship with a father or father figure in order to thrive, empirical evidence suggests that children in female-led two parent families fare as well, if not better, than children in heterosexual two-parent households.⁵⁴ Studies also suggest that the absence of a genetic relationship with a caregiver does not in itself inhibit healthy child development.⁵⁵ Empirical studies do indicate that children in single parent households differ on average in terms of educational achievement, emotional health, and future occupational status.⁵⁶ However, these correlations may be largely, if not entirely, explained by lower levels of financial support, conflict that pre-dated separation or continues during or after separation, and inadequate social supports.⁵⁷ Because most studies conflate divorced, separated,

⁵⁴ Timothy J Biblarz & Judith Stacey, "How does the Gender of Parents Matter?" (2010) 72 *Journal of Marriage and Family* 3 at 13.

⁵⁵ See e.g. Susan Golombok et al, "Social vs. Biological Parenting: Family Functioning and the Socio-Emotional Development of Children Conceived by Egg or Sperm Donation" (1999) 40 *Journal of Child Psychology and Psychiatry* 519 at 525; Ava D Agar, Jan DD Cioe & Boris B Gorzalka, "Biology Matters? Intimate Relationships of Young Adults from Divorced and Intact Family Background as a Function of Biological Father and Male Model Involvement" (2010) 51 *International Journal of Divorce and Remarriage* 441.

⁵⁶ See e.g. Anne-Marie Ambert, *One Parent Families: Characteristics, Causes, Consequences and Issues* (Ottawa: Vanier Institute, 2006) at 15-16; Wendy Sigle-Rushton & Sara McLanahan, "Father Absence and Child Well-Being: A Critical Review" in Daniel P Moynihan, Timothy M Smeeding, & Lee Rainwater eds, *The Future of the Family* (New York: Russell Sage Foundation, 2004) 116 (in a review of numerous American studies find that children in one-parent families experience lower rates of academic achievement, a higher incidence of behavioral problems, earlier home leaving and child-bearing, poorer physical and psychological health and lower adult income and occupational status on average than children in two-parent homes, at 120-126).

⁵⁷ Ambert, *ibid* at 16. Sigle-Rushton & McLanahan, *ibid*, indicate that

or cohabiting households with never-married or never-cohabiting ones, some of these underlying factors would also arguably not come into play to the same extent in relation to single parents relying on assisted conception. The latter are not undergoing transitions or dissolution and their pregnancies are not unexpected; as such, they are likely to be relatively more stable than many of the households used to generate the average differentials.⁵⁸

income loss and economic insecurity upon separation explains at least half, possibly more, of the differential. When underlying differences in well-being prior to, during or after separation (e.g. by reason of inter-parental conflict) are taken into account, differences then become “smaller, sometimes statistically insignificant,” at 127-28. Evidence is mixed as to the impact of reduced ability to supervise and monitor children and outcomes may depend on the kind of relationship – whether close and authoritative – developed with a second parent. The emotional or psychological impact of family dissolution upon a custodial parent’s ability to provide “emotional support and moderate, consistent control” is consistently supported as a variable generating adverse effects, at 136. See Don Kerr & Roderic Beaujot, “Family Relations, Low Income and Child Outcomes: A Comparison of Canadian Children in Intact, Step and Lone Parent Families” (2004) 43 *International Journal of Comparative Sociology* 134 (identifying factors such as family functioning, number of children, education and age of parents as relevant to child outcomes in addition to low income); Lee Caragata & Sara J Cumming, “Lone Mother-led Families: Exemplifying the Structure of Social Inequality” (2011) 5:5 *Sociology Compass* 376 (suggesting income, housing tenure and maternal education may fully explain the association between lone motherhood and negative child outcomes).

⁵⁸ See e.g. Jennifer Lansford, Antonia Abbey, & Abigail Stewart, “Does Family Structure Matter? A Comparison of Adoptive, Two-Parent Biological, Single-Mother, Stepfather, and Stepmother Households” (2001) 63:3 *Journal of Marriage and Family* 840 (suggest that family processes are more important than family structure) and Susan Golombok and Shirlene Badger, “Children raised in mother-headed families from infancy: a follow-up of children of lesbian and single heterosexual mothers, at early adulthood” (2010) 25:1 *Human*

In any case, notwithstanding differences in risk between two-parent and single parent households on average, “the clear majority [of children in all lone-parent households] grow up healthy” and their outcomes are no different than those of children in two-parent households.⁵⁹ Many also have adequate financial incomes and extended familial support and many would no doubt fare better if more socialized supports were available.⁶⁰ Moreover, as indicated by divorce statistics, there is no guarantee that two heterosexual parents at the outset of a child’s life will comprise or remain a stable, harmonious family unit.⁶¹ Indeed, children in intact but highly conflicted

Reproduction 150 (children functioning well, with lower levels of anxiety and higher levels of self-esteem than the comparison group of children in traditional two-parent families: “This finding is in direct contrast to the more negative psychological outcomes associated with single-mother families following separation or divorce, and highlights the diversity among female-headed families and the importance of not treating them as the same” at 56); Elizabeth Nixon, Sheila Greene and Diane Hogan, “It’s What’s Normal for Me”: Children’s Experiences of Growing Up in a Continuously Single-Parent Household” (2013) *XX(X) Journal of Family Issues* 1 at 8.

⁵⁹ David P. Ross, Paul A. Roberts & Katherine Scott, “How Do Lone-Parent Children Differ from All Children” (Ottawa: Applied Research Branch, 1998).

⁶⁰ See Lee Rainwater & Timothy M Smeeding, “Single-Parent Poverty, Inequality, and the Welfare State” in Moynihan, Smeeding, & Rainwater, *supra* note 56 [Rainwater & Smeeding] (a cross-national comparison of income support policies that improve the economic well-being of children in single parent families); Nancy E. Dowd *In the Defence of Single-Parent Families* (New York: New York University Press, 1999) (argues that single parent families are blamed for structural failures in US family law, the workplace and social policy).

⁶¹ According to the 2011 General Social Survey (a voluntary population-based survey) 38% of divorced or separated parents, or 1.2 million Canadians, had a child together when they separated or divorced. Marire Sinha, *Parenting and Child Support After*

two-parent homes often fare worse than children in divorced families.⁶² The well-being of children thus depends on many interrelated factors that vary according to the individual circumstances of each household.

Ironically, while seeking to achieve equal status for children, Garrison chooses a norm that would not only deprive the child in *AA v BB* of more than two parents but would highly stigmatize children in lesbian and single parent families. The number of children raised in single parent households in particular is not insubstantial. According to the 2011 Census of Population in Canada, the number of lone-parent families increased 8 percent between 2006 and 2011 and represented 16.3 percent (1,527,840) of all families, with 19.3 percent of all children living with lone parents and 8 out of 10 of these families being headed by women.⁶³ These families include not only separated or divorced households in which contact is maintained with each parent but also families in which a single parent has adopted or where fathers are unknown, a parent has died or abandoned his or her children, or where access is contrary to the children's best interests.⁶⁴ With one in five

Separation or Divorce (Ottawa: Statistics Canada, 2014) at 5.

- ⁶² Sigle-Rushton & McLanahan, *supra* note 56 at 127, 140; Donna Ruane Morrison & Mary Jo Coro, "Parental Conflict and Marital Disruption: Do Children Benefit when High Conflict Marriages are Dissolved?" (1999) 61(3) *Journal of Marriage and Family* 626; Martha Shaffer, "Joint Custody, Parental Conflict and Children's Adjustment to Divorce: What the Social Science Literature Does and Does Not Tell Us" (2007) 26 *Can Fam LQ* 285 at 289-90.
- ⁶³ Statistics Canada, 2011 Census of Population, online: <<http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.cfm>> [accessed July 3, 2013].
- ⁶⁴ Cathryne L Schmitz, "Reframing the Dialogue on Female-Headed Single-Parent Families" (1995) 10 *Affilia* 426 at 437-38. Schmitz argues that "single-parent families are not the homogeneous group they are commonly portrayed to be" and that "the diversity of family

children being raised in a lone parent household, these families should not be stereotyped and socially stigmatized as inferior. Parents and children in these families should not be presumed to be defective simply due to the composition of their household.

The concern that single parents have fewer sources of financial support is, unfortunately, reflective of a political climate in which governments are choosing to diminish public resources for families and parents are forced to be increasingly reliant on private sources. Policies that promoted greater social responsibility for children, such as those adopted in northern European nations, would help to allay these concerns.⁶⁵ Even in the absence of such policies, however, there is evidence that parents who use assisted conception typically engage in a high level of planning and advance deliberation and many have made careful financial provision for their families in advance of conception.⁶⁶ Where households do face a higher risk of reliance on social assistance, lessons from the illegitimacy context suggest that single mothers and their children as a group should not be punished for not having engaged fathers or for reliance on social provision.

Equality of familial status is linked to the value of familial security, which is important to parents and children

styles by race, ethnicity, economic condition, and actual circumstances is frequently unknown or ignored.”

⁶⁵ See Rainwater & Smeeding, *supra* note 60 at 97-98. The percentage of children who lived in single-mother families in the 1990s in the US and UK was higher than the percentage in Sweden, Denmark, Finland and Norway. However, the latter countries had substantially lower single-mother child poverty rates both as a result of higher wages and higher levels of social support.

⁶⁶ *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993) at 471-72.

and society more generally. Familial security can be promoted by a vast range of initiatives, including the provision of socialized supports. Knowledge of one's parental identity and genealogical history at a certain age through the use of known or identity-release donors may also enhance a child's sense of familial security.⁶⁷ At its most basic level, however, familial security requires consistency and predictability in the regulation of parental rights and responsibilities. Uncertainty as to parental roles is a threat to the stability of these families, particularly in the case of mothers who lack a biological tie to a child as well as access to presumptions of parentage but also in the case of single parents who have planned to parent alone. Several writers have documented, for example, the fears held by lesbian mothers of excessive interference with their parenting and the sense that their families are vulnerable to attack and intrusion that will be destabilizing to their and their child's understanding of family. According to Fiona Kelly's findings, if the law protected lesbian mothers from these effects, or "gave them more security, lesbian mothers might be more open to [some level of] donor involvement," which may well benefit children.⁶⁸

My argument here should not be confused with a claim that relies simply on contractual rights as the basis for the resolution of issues surrounding assisted conception. Garrison contends that scholars who rely on intentionality and the reliance interests of the intended parents must demonstrate "why intention and reliance should count for so much more

⁶⁷ See Angela Cameron, Vanessa Gruben & Fiona Kelly, "De-Anonymizing Sperm Donors in Canada: Some Doubts and Directions" (2010) 26 Can J Fam L 95 at 109-110.

⁶⁸ "(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families" (2009) 40 Ottawa L Rev 185 at 208. See Fiona Kelly, *Transforming Law's Family: The Legal Recognition of Planned Lesbian Motherhood* (Vancouver, UBC Press, 2011).

here than they do elsewhere in the law of parentage, or how an approach focused on adult intentions can be reconciled with children's interests."⁶⁹ It is well established that agreements generally are not binding on courts insofar as they relate to children. As seen in the adoption context, parentage is not simply the product of the adoptive and biological parents' intentions. Although biological parentage can be relinquished by consent or agreement, the extensive degree of regulation and monitoring (the need for consent of biological parents after birth, the prohibition of consideration and advertisements, and the need for a home study and formal court order) reflect a refusal to treat a child simply as an object of exchange. Similarly, the intentions underlying the use of assisted conception should not be given effect simply because they are the product of an agreement. It is nonetheless important to recognize that the conduct of the parties prior to a child's birth can generate reliance that is instrumental in establishing particular family structures for the child. The reliance interests in this context, as they affect the lives and long-term responsibilities of intended parents in fundamental ways, are far weightier than those that arise in the vast majority of commercial contexts or for that matter, many other familial contexts.

Moreover, as indicated, parentage defines a relationship between a parent and child and should not be identified by a perception of children's interests in isolation from those of their parents. The expectation and reliance interests of intending parents are in fact relevant to children's best interests because they directly affect their experience of familial stability. The failure to respect agreements that are responsibly made and deliberately planned greatly increases the risk of conflict in families created by assisted conception. It is well established empirically that conflict between parents and

⁶⁹ Garrison, *supra* note 6 at 862-63. See also Appleton, *supra* note 44 at 373.

added stress in their lives is generally harmful for children.⁷⁰ It interrupts nurturance and undermines the quality of primary care, especially when disputes enter the legal arena. Rules that can provide guidelines for the secure recognition of parentage at and from a child's birth and the avoidance of ongoing conflict in their lives will generally be in the interests of both caregivers and children.

Finally, equality in terms of gender and sexual orientation is an important value that must be taken into account. Recognition of intending parentage that is limited to male heterosexuals constitutes a denial of gender equity as well as discrimination on the ground of sexual orientation.⁷¹ Singling out sole parenthood as problematic also has gender implications because more women are single parents than men.⁷² Thus, mothers and their children will be more adversely affected by negative stereotypes attaching to the status of single parenthood. Mothers, moreover, have by nature a more extensive role in the reproductive process than do men. Garrison's formal equality approach to the regulation of parenthood leads her to the counterintuitive outcome that sperm donors should be recognized (except, it seems, in the case of heterosexual intending parents) but gestational mothers should not.⁷³ A failure to recognize the salient differences between different modes of conception and the differential involvement and interests of affected parties fails to take account of both gender equity and significant differences in the relational ties of mothers and fathers with their children. Since women's experience of procreation differs from that of men, outcomes should not be determined simply through the

⁷⁰ Shaffer, *supra* note 62.

⁷¹ See text accompanying notes 224-227, 239, 254-265, below.

⁷² See *supra* note 63 and accompanying text.

⁷³ See text accompanying notes 159-187, below.

application of a male norm.⁷⁴ Gender neutrality in this sense amounts to a denial of gender equity and is analogous to the long discredited view that discrimination on the basis of pregnancy did not constitute sex discrimination, simply because men did not experience it.⁷⁵ By treating the manner of conception and circumstances of birth as totally irrelevant to the outcome, Garrison's analysis not only fails to provide mothers with gender equity but may also not fully realize children's best interests.

In the next section, I argue that existing parentage law in many Canadian jurisdictions is designed around sexual conception and leads to inappropriate outcomes in its application to technological conception. It both fails to reflect and promote the above values and generates irrational and untenable outcomes for children and their caregivers.

EXISTING STATUTORY PROVISIONS AND UNTENABLE OUTCOMES

Multiple Parents and a Heterosexist Lens

Defining parentage in terms of one mother and one father reflects conventional heterosexual procreation. It both limits parents to two and defines them biologically according to gender. In the reproductive context, however, parenthood is potentially fragmented between gamete donors, gestational mothers, and intending parents, who may be heterosexual or same sex. These variations have only been partially recognized in parentage law; there are both inconsistent provisions across statutes and between jurisdictions.

⁷⁴ See generally Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990).

⁷⁵ See cases cited *infra*, note 264.

Birth registration statutes have recognized the possibility of multiple parents and the standing of intending parents to a greater extent than legislation establishing parentage. Over the last decade,⁷⁶ vital statistics legislation in Saskatchewan and elsewhere was amended to provide for the registration of an intended or an “other parent.”⁷⁷ This parent is defined in the Saskatchewan *Vital Statistics Act* as a person “cohabiting with the mother or father of the child in a spousal relationship at the time of the child’s birth and who intends to participate as a parent in the upbringing of the child.”⁷⁸ In the absence of a contest, registration is presumed to reflect the truth of parentage and ordinarily provides the status to meet most of the practical functions associated with parenthood such as school registration and hospital care.

However, problems arise in some provinces if and when parentage is challenged under statutes that allow for the amendment of the particulars of registration in accordance with declarations of parentage.⁷⁹ A judicial declaration of parentage,

⁷⁶ In some jurisdictions, reform followed the decision of the Supreme Court in *Trociuk v British Columbia*, 2003 SCC 34, [2003] 1 SCR 835. See also *MDR v Ontario* (2006) 81 OR (3d) 81, 270 DLR (4th) 90; OJ No 2268 (Sup Ct); *Gill v Murray* [2001] BCHRTD No 34.

⁷⁷ See e.g. *The Vital Statistics Act, 2009* SS 2009, c V-7.21, s 2(1). See also *The Vital Statistics Act* CCSM, c V-60, ss 3(6), 3(6.2), 32(5); *Civil Code of Quebec*, LRQ c-C-1991, art 115; *Vital Statistics Act*, RSBC 1996, c 479, s 3(1.1); Birth Registration Regulations made under s 51 of the *Vital Statistics Act*, RSNS 1989, c 494, s 3(1), NS Reg 390/2007; *Vital Statistics Act, 2009*, SNL 2009, c V-6.01, s 5(5); *Consolidation of Vital Statistics Act* RSNWT 1988 c. V-3, s. 1, 2(2.1); *Vital Statistics Act*, SNWT 2011, c. 34, ss 1, 24(2); *An Act to Amend the Vital Statistics Act*, Bill 74, Yukon Legislative Assembly, ss 3-6, which comes into force on a day fixed by the Commissioner in Executive Council.

⁷⁸ *The Vital Statistics Act, 2009* SS 2009, c V-7.21, s 2(1).

⁷⁹ See e.g. *The Vital Statistics Act, 2009*, *ibid*, ss 4, 19, 20(1); *CLA*,

unlike the registration of a birth, confers lifelong immutable status as a parent along with all the rights and obligations of parenthood.⁸⁰ *The Children's Law Reform Act* in Saskatchewan, however, does not explicitly recognize different sources of parentage or the possibility of multiple parents, identifying the father and mother simply as "the mother" or "the father."⁸¹ Because change has been piecemeal, the explicit acknowledgment of a co-parent under *The Vital Statistics Act 2009*⁸² has been made subject to inconsistent provisions within the *CLA, 1997*.⁸³ The same inconsistency exists between Manitoba's statutes dealing with vital statistics and child status.⁸⁴ In Nova Scotia, a court is empowered under the *Vital Statistics Act* to issue a declaratory order "with respect to the paternity of the child" and amend the birth registration accordingly⁸⁵ but regulations pursuant to this Act permit the mother's spouse, male or female, to register as a legal parent where the child is conceived with an anonymous sperm donor.⁸⁶

The use of the definite article preceding the words "father" and "mother" has been held in some jurisdictions to imply, as a matter of statutory interpretation, that there can only be one declared father or one mother.⁸⁷ The Ontario Court

1997, supra note 2, s 29.

⁸⁰ See *AA v BB, supra note 15* at para 14.

⁸¹ *CLA, 1997, supra note 2, s 2(1).*

⁸² *Supra note 77.*

⁸³ *Supra note 2.*

⁸⁴ See *The Vital Statistics Act CCSM, c V-60, s 3* and *The Family Maintenance Act CCSM, c F-20, ss 19-23 [Manitoba FMA]*.

⁸⁵ *Vital Statistics Act, RSNS 1989, c 494, s 11A(2), (3).*

⁸⁶ *Supra note 77.*

⁸⁷ *AA v BB, supra note 15* at para 18. See also *PC v SL, 2005 SKQB*

of Appeal held in *AA v BB* that the court could not declare a third person a parent under the legislation itself although they could rely on an inherent *parens patriae* jurisdiction to do so when in the best interests of the child.⁸⁸ Quebec and Alberta have enacted detailed legislation that recognizes heterosexual or same sex partners in certain circumstances, but in both jurisdictions only two parents are contemplated.⁸⁹ Indeed, in *DWH v DJR*, the Court of Appeal surmised in *obiter* that this express limitation could have the effect of excluding an intending biological father from parentage in Alberta where an intending non-biological father and a gestational mother are recognized.⁹⁰

Only British Columbia has legislation that allows for more than two parents where all parties agree in writing to be parents before assisted conception occurs.⁹¹ Provided the consent of all parties is informed and voluntary, and thus the potential for conflict minimized, it is difficult to justify the denial of a parental role for a third party who can function as an additional source of financial and affective support for a

502, 262 DLR (4th) 157 (Wilkinson J accepted the Ontario Court of Appeal's interpretation of similar language in the *CLA, 1997*, at paras 8-9, 24); *Buist v Greaves* [1997] OJ No 2646 (Ont Gen Div).

⁸⁸ See below text accompanying notes 193-202.

⁸⁹ *Droit de la famille 07528*, 2007 QCCA 361, [2007] JQ No 1895, leave to appeal refused [2007] CSC No 270 at para 55. See *Family Law Act*, SA 2003 c. F-4.5, s 9(7)(b) [Alberta *FLA*].

⁹⁰ Where the gestational mother does not consent to an application by the intending biological father for a declaration, see *DWH v DJR*, 2013 ABCA 240, 34 RFL (7th) 27 at para 69; Fiona Kelly, "One of These Families is Not Like the Others: The Legal Response to Non-Normative Queer Parenting in Canada" (2013) 51 *Alta L Rev* 1 (Kelly describes this as "hardly a satisfactory outcome for non-normative queer families" at para 44).

⁹¹ BC *FLA*, s 27.

child.⁹² In these circumstances, recognition of three parents not only promotes equality of familial status but also familial security and the best interests of the child. In provinces such as Saskatchewan, however, parties would have to seek to rely on the court's *parens patriae* jurisdiction in order to recognize three parents; failing that, there may only be one father and mother.⁹³

Social Parenthood and a Biological Lens

Where only one mother and one father can be identified, which party will be defined as such is also unsettled in some jurisdictions. In *Low v Low*, a heterosexual couple planned a pregnancy together in which the wife was artificially inseminated by an anonymous donor.⁹⁴ After the birth of the child, the wife no longer desired the husband's involvement. Ferrier J found that the husband in this case could be declared the father since section 5(3) of the *Children's Law Reform Act* provided that a court could make a declaratory order "where [it] finds on the balance of probabilities that the relationship of father and child has been established."⁹⁵ Reference to the

⁹² Note that more than two individuals in the step-parent context are recognized as having support obligations and rights to claim custody and access even without regard to the possibility of conflict. See *Chartier v Chartier* [1999] 1 SCR 242; but see Fiona Kelly, "Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and their Children into Canadian Family Law" (2004) 21 CJFL 133 at 171 (the concern that a three parent model could be used to insert fathers in lesbian families).

⁹³ See Part IV, below, for discussion of *parens patriae*.

⁹⁴ *Low v Low* (1994) 114 DLR (4th) 709, 4 RFL (4th) 103 (OCJ), followed *Zegota v Zegota-Rzegocinski* [1995] 10 RFL (4th) 384, OJ No 204 (OCJ), varied on other grounds [1997] 31 RFL (4th) 446, OJ No 1360 (CA).

⁹⁵ Ontario *CLRA*, *supra* note 22, s 5(3).

“relationship of father and child” was broad enough to include a social father. Moreover, omission of the phrase “natural father” in section 5(3), used elsewhere in the statute, suggested that the relationship in question need not be biological. The judge refrained from finding that the husband was a presumed father by virtue of marriage to the mother, among other circumstances, as he would then have had to confront the question of whether such a presumption was rebutted in light of the acknowledged circumstances surrounding conception. Ferrier J also did not address the fact that the child might then have two fathers, perhaps because the sperm donor was anonymous and the biological father as such could never have become known. That the *CLRA* “favours” but does not define parentage solely on the basis of biology was affirmed by the Court of Appeal in *AA v BB*.⁹⁶

Subject to some variations, parentage legislation in Prince Edward Island,⁹⁷ Quebec,⁹⁸ Alberta,⁹⁹ Newfoundland and Labrador,¹⁰⁰ British Columbia,¹⁰¹ the Northwest Territories,¹⁰² Nunavut,¹⁰³ and the Yukon¹⁰⁴ now specifically

⁹⁶ *Supra* note 15 at para 32.

⁹⁷ *Child Status Act*, RSPEI 1988, c C-6, ss 9(5), 9(6).

⁹⁸ *Civil Code of Quebec*, LRQ c-C-1991, Arts 538-42 [hereafter *CCQ*] (creating a presumption for married and civil union spouses). See Robert Leckey, “The Practices of Lesbian Mothers and Quebec’s Reforms” (2011) 23 *CJWL* 579.

⁹⁹ Alberta *FLA*, *supra* note 89, s 8.1(5).

¹⁰⁰ *Children’s Law Act*, RSNL 1990, c C-13, ss 12(3)-12(5) [*CLA*, RSNL].

¹⁰¹ BC *FLA*, *supra* note 20, ss 27, 29.

¹⁰² *Children’s Law Act*, SNWT 1997, c 14, s 8.1.

¹⁰³ *Consolidation of Children’s Law Act*, SNWT 1997 c 14, s 8(01).

¹⁰⁴ *Child and Family Services Act*, RSY 2002, c 31, s 13.

provides either for recognition of a spouse in circumstances similar to *Low v Low* or a presumption of parentage in the spouse's favour. In Newfoundland and Labrador and the Yukon, however, the legislation recognizes only male spouses and as such, is liable to being challenged as discrimination on the grounds of both sex and sexual orientation under section 15 of the *Charter*.¹⁰⁵

As in Ontario, a court in New Brunswick may make a declaratory order where "the relationship of mother [or father] and child has been established."¹⁰⁶ However, in *Saunders v MacMichael*, Bastarache JA, as he then was, found that the "relationship of mother and child" referred to a biological and not a social relationship, and thereby disqualified a stepdaughter from an inheritance under the *Devolution of Estates Act*.¹⁰⁷ He noted that proof of such a maternal relationship would be required where "a child was taken from a mother at birth, where the mother is incapacitated and unable to testify, or where the mother is a refugee without parents or papers."¹⁰⁸ While 'the relationship of mother and child' is defined here exclusively in biological terms and not in terms of *de facto* care, the outcome could well differ where the mother-child relationship is intended to be established before or at

¹⁰⁵ *Ibid* s 13(2); *CLA*, RSNL, *supra* note 100. See *Fraese v Alberta*, 2005 ABQB 889, 278 DLR (4th) 187 (a similar provision in Alberta was found to discriminate on the grounds of sex and sexual orientation contrary to section 15 of the *Charter*); *MDR v Ontario*, *supra* note 76 (the birth registry provisions in Ontario were also found to discriminate against female same-sex parents).

¹⁰⁶ *Family Services Act*, SNB 1980, c F-2.2, s 100(2) [*Family Services Act*, SNB] ("notwithstanding that there is no person recognized in law under section 103 to be the father" at s 100(4)).

¹⁰⁷ *Saunders v MacMichael* (1996), 173 NBR (2d) 49, [1996] NBJ No. 39 (NBCA).

¹⁰⁸ *Ibid* NBJ at para 9. See also, *TTKO, SPO, GDK*, 2011 ONSC 6601.

birth. Involvement in the circumstances that bring about the very existence of the child may reasonably imply a corollary intention to benefit such a child through intestacy or inheritance and to undertake all of the incidents of parentage. As indicated in *AA v BB*, similar language has been interpreted broadly to include intending lesbian mothers in Ontario with a view to promoting equality of familial status.¹⁰⁹

In Saskatchewan and Manitoba, there is no provision similar to section 5(3) of the *CLRA* and none of the statutory provisions refers to a “relationship of father and child.”¹¹⁰ In Manitoba, a “parent” is explicitly defined to mean a “biological parent or adoptive parent of a child and includes a person declared to be the parent of a child.”¹¹¹ This language suggests that a declared parent must be either an actual or a likely (i.e. presumed) biological parent of a child. In both provinces, a declaration can only be made with respect to a finding that one is or is recognized to be “the father” or “the mother.”¹¹² Both statutes also identify a number of circumstances that will give rise to presumptions of paternity, including cohabitation with the mother at the time of conception or birth of the child, having signed the birth registration form or having acknowledged that one is the father subsequent to birth. These circumstances could in theory generate presumptions that would result in either an intended or biological father being declared or “recognized in law” as “the father.”¹¹³ While such an outcome might suggest that parentage is a social or juridical construct and not a biological one, “the ordinary meaning of parentage” was interpreted in *WJQM v AMA* as signifying a

¹⁰⁹ *Supra* note 15.

¹¹⁰ *Ibid.*

¹¹¹ Manitoba *FMA*, *supra* note 84, ss 1, 19, 20.

¹¹² *CLA*, 1997, *supra* note 2, s 43(2); *ibid*, ss 19(1), 20(1).

¹¹³ *CLA*, 1997, *supra* note 2, ss 43, 45(1).

biological relationship because it “relates to kindred (blood) ties.”¹¹⁴ In *PC v SL*, Wilkinson J acknowledged that the presumptions of paternity are not explicitly grounded in biological fact; however, she noted that the presumption “made certain assumptions about ordinary human behavior in circumstances where direct proof was difficult...[i]n the days before DNA testing it was simply a method of facilitating proof at a time before science and technology intervened with more reliable standards.”¹¹⁵ If “the factual question of progenitorship” is central,¹¹⁶ the presumptions reflect at most a likelihood of biological paternity based upon an opportunity to impregnate the mother or a subsequent acknowledgement of biological paternity, in the absence of proof to the contrary. According to these cases, the *CLA 1997* contemplates an actual or likely biological connection, at least as a necessary condition of paternity, rather than a paternal relationship that is purely socially based.

A man in the circumstances of Mr. Low could attempt to rely on a presumption of paternity in Saskatchewan if he had cohabited with the birth mother at the time of conception or birth of the child or had signed the birth registration form. Having no other provision to rely upon, however, he would face the possibility that any presumption in his favour would be rebutted by the circumstances of assisted conception itself, which would establish that he was not a biological father.¹¹⁷

¹¹⁴ *WJQM v AMA*, 2011 SKQB 317 at paras 13, 18, 24. However, while kindred relationships follow from a finding of parentage under the *CLA, 1997*, s 40(1), they do not define it exhaustively. Compare s 40(1), a “person is the child of his or her parents,” with s 40(3)(a) “kindred relationships are to be determined according to the relationships described in subsection (1).”

¹¹⁵ *Supra* note 87 at para 20.

¹¹⁶ *Ibid* at para 17.

¹¹⁷ Wilkinson J. suggests as much in *PC v SL*, *ibid*, where in dealing with

While rebuttal of the presumption would seem to logically follow, under section 43(5) of the *CLA 1997*, a presumption of paternity may only be rebutted by proof that “the presumed father is not the father *and* a finding that a man is *the father*.”¹¹⁸ In *NMS v EBCS*, Wilkinson J found that a presumed father could not simply rely on genetic tests excluding parentage but must also establish that someone else is in fact “the father.”¹¹⁹ According to Madam Justice Wilkinson, the use of the conjunctive “and” in section 43(5) suggested that, in the absence of a conflicting presumption,¹²⁰ the presumption of paternity on the part of the husband could not be displaced without identifying another man as the father. Unlike Ontario, or Manitoba for that matter, “a child cannot be declared fatherless in Saskatchewan.”¹²¹

the claim of a lesbian co-parent, she states, “if a male person cohabiting with the mother acknowledged that another man had impregnated her ... the male cohabitant would similarly be required to establish a parental relationship with the child by adoption, or to pursue other rights not conferring “status”, such as custody and access” at para 17. See *WJQM v AMA*, *supra* note 114, where a presumption in favour of a gestational mother under *The Vital Statistics Act*, *supra* note 77, s 4 (by virtue of her registration on the statement of live birth) was rebutted by the involvement of an anonymous egg donor.

¹¹⁸ *CLA, 1997*, *supra* note 2, s 43(5) [emphasis added]

¹¹⁹ *NMS v EBCS*, 2005 SKQB 299 at para 16, 2005 SJ No 434.

¹²⁰ A conflicting presumption would nullify the presumption. See e.g. *CLA, 1997*, *supra* note 2, s 57; Manitoba *FMA supra* note 84, s 20(5).

¹²¹ *Ibid* at para 22. In Ontario, there is no such provision and a negative declaration can be made under the *Courts of Justice Act*, s 97, which allows a superior court to “make binding declarations of right, whether or not any consequential relief is or could be claimed, see *Raft v Shortt* [1986] 54 OR (2d) 768, 2 RFL (3d) 343 (OHC); *JR v LH* [2002] OJ No 3998 at para 19, 117 ACWS (3d) 276 (SCJ). In Manitoba, where the court finds on a balance of probabilities that a

We are thus left in an untenable position: the Saskatchewan *Children's Law Act* has been interpreted as identifying actual or likely biological paternity but a presumed father cannot be displaced as the father unless another man is identified as such, even if there are means to establish that the presumed father is not the biological father. Such a constraint resembles the stringent standards required at common law to rebut a presumption of legitimacy¹²² and supports Fiona Kelly's thesis that parentage legislation is primarily concerned with "producing paternity", along with private sources of support for children, rather than identifying genetic accuracy.¹²³ In its application to cases similar to *Low v Low*, it also raises a question as to whether "a man", i.e. a person other than the presumed father, must be capable of being specifically identified. Where the donor is unknown, would a court in effect be declaring a child fatherless if it found the presumption was rebutted? But if so, why should recognition of parentage for intending fathers/husbands depend upon whether the donor is known or unknown? This construction would give intending parents a powerful incentive to use anonymous over known donors, even where they believe that use of a known or

man is or is not the father, or a mother is or is not the mother, it can make a declaratory order to that effect, Manitoba *FMA supra*, note 84, ss 20(3), 19(2).

¹²² This burden of proof, along with evidentiary rules that denied spouses a right to testify as to the illegitimacy of a child born during their marriage, was strongly indicative of a tendency to accept the most likely and available father. Roxanne Mykitiuk notes that "[b]y 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." Roxanne Mykitiuk, "Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies" (2001) 39 *Osgoode Hall Law Journal* 771 at 776, 781.

¹²³ Kelly, "Producing Paternity", *supra* note 13 at 317, 325, 329, 330.

identity-release donor to establish the child's genealogy might be in his or her best interests at some future point in time.

Lesbian couples relying on assisted conception would also encounter difficulties in Saskatchewan, Manitoba, and in those jurisdictions like the Yukon, Newfoundland and Labrador, where statutes specifically address assisted conception only in relation to male heterosexual partners.¹²⁴ First, as in *PC v SL*, the non-biological lesbian co-parent in Saskatchewan or Manitoba would face the argument that only one mother can be recognized under the *CLA, 1997*.¹²⁵ Secondly, the presumptions only apply on their face to paternity, not maternity. Even if these presumptions were found to offend the *Charter*,¹²⁶ the co-parent would face the same prospect of any presumption arising from his or her registration as a parent under vital statistics legislation being rebutted given the facts surrounding conception. Finally, if a child cannot be declared fatherless in Saskatchewan where a male applicant seeks to displace a presumption of paternity, would the same rationale be applied to preclude lesbian intending parents or single mothers from being declared the *exclusive* parents of a child?¹²⁷ In all of these instances, there are not only concerns with a violation of gender equity but also a denial of equality of familial status and familial security.

¹²⁴ See *supra* note 105.

¹²⁵ *Supra*, note 87. See *CLA, 1997*, *supra* note 2, ss 43(2)(b), 43(3) (both referencing “the mother”). See also *Buist v Greaves*, *supra* note 87 (holding that reference to “the mother” means there can only be one).

¹²⁶ See below text accompanying notes 261-62.

¹²⁷ If section 43(5) was restricted to presumptions of paternity, a court could rely on s 11 of *The Queen's Bench Act, 1998* (1998 SS c Q-1.01) which authorizes declarations in terms identical to s 97 of the *Ontario Courts of Justice Act*, (*supra* note 123).

This failure to address the relative claims of intending and genetic fathers or mothers, particularly where the donor was known, would also expose the child and all affected parties to instability where an intending parent changed his or her mind and decided to withdraw from the relationship during pregnancy or upon the birth of the child.¹²⁸ The remaining parent could potentially lack a valid claim to child support where there either was no factual basis for a presumption or where the presumption was rebutted. Such an outcome would frustrate the expectations and reliance interests of the remaining parent and deprive the child of a source of support without any corresponding benefit, unless a known donor could be found liable or unless the intending parent could be found at some future point to stand in the place of a parent.¹²⁹

The Status of Gamete Donors

Low v Low raised the question of the status of intending fathers, but what of the status of identifiable sperm or egg

¹²⁸ See e.g. *Jaycee B v John B* 42 Cal App 4th 718 (1996), 49 Cal (2d) 694. This case involved six contracting parties including the intending parents (both husband and wife were infertile), an egg and sperm donor and a gestational mother. While the gestational mother was pregnant, the intending parents separated and the intending father moved to a different state and refused to pay support after the child's birth. He disputed liability on the basis of lack of parentage and none of the other possible parents wanted the responsibility with the exception of the intending mother. While the court found the intending father liable on the basis of the agreement, how would such a case be decided in Saskatchewan?

¹²⁹ In *DWH v DJR*, *supra* note 90, the male partner of the biological father of the child had, in an earlier proceeding, been awarded reasonable access to the child on the grounds that he had parented the child for 3 years and was *in loco parentis* to the child. In subsequent proceedings, he was granted a declaration of parentage when the court invoked its *parens patriae* jurisdiction as part of a *Charter* remedy.

donors where they do not want or the intending parents do not want them to have parental status after the birth of the child? Should they have rights to access and custody or obligations to pay support?¹³⁰

Provincial jurisdictions, again, have addressed these issues to varying degrees and with inconsistent outcomes. Interestingly, not as many provinces have moved to clarify the status of sperm donors as have legislated to give social parents standing, which is consistent with efforts to enlarge the net of individual financial responsibility and privatized support.¹³¹ Those jurisdictions that have specifically legislated on the donation of sperm or ova through assisted conception, however, have allowed for the possibility that donors lack parental status. In Alberta, only the birth mother and the partner who consented to be a parent would be parents.¹³² In Quebec, a third party who contributes genetic material by way of assisted conception for a “parental project” (that is not his own) will not have the status of a parent.¹³³ In Newfoundland and Labrador, the sperm donor is not a father if not married to

¹³⁰ Two related questions are important but beyond the scope of this article, i.e. whether sperm donors should be treated differently than egg donors since egg donorship entails a more onerous and dangerous process that can have serious health risks (see Cameron, Gruben & Kelly, *supra* note 67 at 105) and what formalities, if any, should govern relinquishment of claims arising from a genetic tie in advance of birth (as opposed to after birth).

¹³¹ Only 5/10 as opposed to 7/10.

¹³² Alberta *FLA*, *supra* note 89, s 8.1(5).

¹³³ *CCQ*, *supra* note 98, Art 538.2. Three conditions must be met: “there must be a parental project formed by one or two persons, the sperm donor must not be a party to this project, and the donor must knowingly act as an assistant to the project that is not his own,” *Droit de la famille 07528*, *supra* note 89 at para 34; *Droit de la famille 111729 LB and EB v GN*, 2011 QCCA 1180, [2011] QJ No 7881, leave to appeal refused [2011] SCCA No 444.

or cohabiting with the mother at the time of artificial insemination¹³⁴ and in both Prince Edward Island and British Columbia, a donor of sperm or ovum is not a parent by reason of the donation alone.¹³⁵ In the latter three jurisdictions, the parental status of a donor is lost only if the child is conceived through assisted conception rather than sexual intercourse; in Quebec, a donor by way of sexual intercourse has twelve months after the birth of the child to establish filiation, in which case the parental status of the spouse of the birth mother may be extinguished.¹³⁶ In *Droit de la famille – 111729 LB and EB v GN*, Rochon J noted that the absence of formalities (such as a legal agreement and written consent) in Quebec poses “evidentiary difficulties, particularly when this juridical act is that of a woman alone and when the genetic material is provided by way of sexual intercourse.”¹³⁷

In jurisdictions that have not legislated in this regard, such as Saskatchewan, Ontario, Manitoba, and New Brunswick, either a sperm or egg donor could still be found to be a biological father or mother and declared as such over (or

¹³⁴ *CLA*, RSNL, *supra* note 100, s 12(6).

¹³⁵ *BC FLA*, *supra* note 20, s 24(1); *Child Status Act*, *supra* note 97, s 9(6).

¹³⁶ *CCQ*, *supra* note 98, Art 538.2, para 2. See Leckey, *supra* note 98 at 588. Some states, e.g. Kansas, require that assisted conception occur under clinical or medical supervision.

¹³⁷ *Supra* note 133 at para 6 and see para 64. In this case, the mother had died and her parents were unable to contradict the biological father’s claims. He was found not to have expressly agreed to limit his role to that of a genetic contributor. The fact that he had been paid a “reward” for his contribution and did not want to and had not supported the child financially did not prevent recognition of his paternity, at para 62. See also *SG c LC* [2004] RJQ 6915 (Sup Ct); *Droit de la famille 07527 2007 QCCA 362* (intending lesbian partners were denied parentage in favour of biological fathers).

along with) the intending or commissioning parties. Donorship could then give rise to significant rights and obligations. Donors could be liable for child support, a long lasting and substantial financial obligation. As a result of the Court of Appeal decision in *Schick v Woodrow*, joint legal custody in Saskatchewan is presumptively in a child's best interests when claimed by an interested and available non-cohabiting biological parent.¹³⁸ The impact of an agreement with a known donor on his claim to access to the child after birth has only been dealt with on an interim basis in Ontario.¹³⁹ In disputed cases, restricting parentage to only one mother and father could lead to the exclusion of the non-biological parent, absent reliance on *parens patriae* or a *Charter* claim.¹⁴⁰

On the face of the Saskatchewan *CLA, 1997*, it would seem that any agreement excluding parentage would be irrelevant to one's status as a parent. As indicated, agreements respecting children in the context of sexual conception have been held not to bind a court.¹⁴¹ However, the assumption that a known sperm donor has the status of a parent has been questioned in some cases. In *PC v SL*, Wilkinson J appeared to suggest that biological paternity is a necessary but not a sufficient condition of parentage.¹⁴² She noted that parental

¹³⁸ 2012 SKCA 1 at para 25, 385 Sask R 153, rev'g 2009 SKQB 167, [2009] SJ No 366.

¹³⁹ See *DeBlois v Lavigne*, 2012 ONSC 3949 (access by the donor was denied but the case was thereafter settled out of court).

¹⁴⁰ Bird, *supra* note 13 at 281 and Boyd, "Gendering," *supra* note 3 at 77.

¹⁴¹ *Wright v Zaver*, [2002] 59 OR (3d) 26, 211 DLR (4th) 260 (CA) at paras 27-28. See also *Doe v Alberta*, 2007 ABCA 50 at para 26, 404 AR 153, leave to appeal refused [2007] SCCA No 211 in the context of step-parent status.

¹⁴² *Supra* note 87. See also *Buschow v Jors*, *supra* note 51, acknowledging that sperm donorship may justify curtailment of child

status “is not simply an issue of biological connection” and cited with approval the US Supreme Court in *Lehr v Robertson*, which held that the “importance of the familial relationship to the individuals involved, and to the society, stems from the emotional attachments that derive from the intimacy of daily association...as well as from the fact of blood relationship.”¹⁴³ Based on this commentary, there is some scope within which to argue that a mere sperm or egg donor should not be assigned parentage.

In *Johnson-Steeves v Lee*, the Alberta Court of Appeal also gave substantial weight to the finding of the trial judge that the father had not agreed to be a mere sperm donor prior to birth in affirming his entitlement to an access order.¹⁴⁴ According to the Court, “[t]he respondent is not an anonymous faceless figure who has donated sperm by whatever means and shown no other interest in the child...the respondent did not agree that he would have no role to play in his child’s life.”¹⁴⁵ In finding the intended role of the biological father relevant to the issue of access (normally governed only by the best interests of the child), the appellate court’s position suggests that the existence of an agreement to exclude parental rights and obligations to donors before birth might also be relevant to a finding of parental status.¹⁴⁶ Kelly, however, notes that courts

support obligations, at para 7.

¹⁴³ 436 US 248 at 260, 103 Sup Ct 2985 at 2992, cited at para 21.

¹⁴⁴ [1997] AJ No 1057, 209 AR 292 (CA) at para 18.

¹⁴⁵ *Ibid* at para 16.

¹⁴⁶ But see *Stevenson v Egeland* [1995] AJ No 1296 (QB) where an agreement between the mother and a friend that he was to impregnate her but not pay child support did not prevent an action against him by the social welfare agency that provided social assistance to the mother. An analogy to a sperm bank was rejected because the donor lacked anonymity and there was no public policy in favour of non-support.

tend to be less willing to sever the rights of biological fathers where women have conceived outside of traditional heterosexual relationships. As well, she indicates that courts are more willing to allow sperm donors to renege on prior agreements and seek a role in parenting where the intending parents are lesbian as opposed to heterosexual or where the intending parent is single.¹⁴⁷ Resistance may be tempered, however, where discretion is highly restricted through statutory provisions and agreements to relinquish status are very explicit.¹⁴⁸

As previously discussed, Garrison argues that single women should not be able to parent autonomously of biological fathers by choice or agreement because women who conceive sexually have no such choice and “there is no obvious reason why paternity laws should mandate different results when women conceive using AID and when women conceive sexually.”¹⁴⁹ Contrary to Garrison’s assertions, however, the “mechanics of conception” may be highly relevant to “relational realities.”¹⁵⁰ Holding men responsible in instances of casual sex may, at least in theory, promote an equal sense of responsibility for the potential consequences of sexual

¹⁴⁷ Kelly, “Producing Paternity,” *supra* note 13, (regarding lesbian mothers at 340-49 and citing resistance to severance of a donor’s legal rights in the case of a single mother at 337). See *Caulfield v Wong* 2007 ABQB 732.

¹⁴⁸ Kelly, “Equal Families”, *supra* note 13, citing *Droit de la famille* 07528, *supra* note 133 as a successful lesbian case and noting that Quebec and BC are the only jurisdictions to recognize the possibility of a single parent family created through assisted conception, at para 46.

¹⁴⁹ *Supra* note 6 at 903 (there is “no logical basis for a one-parent policy applicable only to single AID users” at 910 where AID connotes artificial insemination donation).

¹⁵⁰ *Ibid* at 903.

intercourse.¹⁵¹ By contrast, assisted conception is typically highly planned and deliberate, especially when executed in a clinical setting, and usually indicative of a very high level of responsibility on the part of both donors and intended parents. Moreover, the frustration or upending of stable expectations and reliance interests can generate extreme stress and conflict which, given the intimate interdependence of parent and child, can harm all affected parties. Allowing heterosexual couples but not lesbian or single mothers to block paternity claims by sperm donors also reinforces a hierarchical ordering of family forms.¹⁵²

Lack of provision for the status of sperm or egg donors thus constitutes another gap that has problematic implications for parents and children in some jurisdictions. At present, the only sure way to protect against breach of a settled arrangement is to use anonymous donors. In this event, the child will have no knowledge of his or her biological father or mother and no ability to have any contact with him or her. Although disputed, in *Pratten v BC*, Adair J found some evidence that such an outcome could be harmful for some children.¹⁵³ There is also evidence that lesbian couples are

¹⁵¹ Alternatively, Sally Sheldon argues that biological fathers should not be held liable for child support in clear cases of misrepresentation by mothers of their use of birth control, “Unwilling Fathers and Abortion: Terminating Men’s Child Support Obligations?” (2003) 66 *Modern Law Rev* 175. Others might argue that sexual intercourse creates an inherent risk of conception.

¹⁵² See *supra*, text accompanying notes 42-66.

¹⁵³ 2011 BCSC 656 at paras 85-89, rev’d 2012 BCCA 480 on the question of *Charter* breach, leave to appeal refused [2013] SCCA No 36. But see Lori Chambers & Heather Hillsburg, “Desperately Seeking Daddy: A Critique of *Pratten v. BC (AG)*” (2013) 28 *Can J L Soc* 229 (argue that Adair J. failed to distinguish between harm caused by secrecy and anonymity, with only the former necessarily reinforcing stigma, and that evidence of harm as a result of

more likely than heterosexual couples to use known sperm donors, preferably gay men, or donors under identity-release conditions, so that children are able to access knowledge about their genetic father or allow for his involvement at some future point.¹⁵⁴ Cameron, Gruben & Kelly suggest that the failure to provide certainty through legislation could end up harming children by driving intended parents away from known donors.¹⁵⁵

Given the neoliberal emphasis on privatized support over the last few decades, it is interesting that judges and legislators have to such a significant extent excused gamete donors from liability. Appleton questions why “sperm donors need not pay the tax that sexually conceived unmarried fathers must pay” and suggests that this reveals the “limits of the privatization of dependency as family law’s theoretical foundation” in favor of the regulation of sex as a core value of contemporary family law in the United States.¹⁵⁶ But her analysis fails to address why governments are interested in regulating sexual conduct and what objectives or interests are thereby served. Kelly’s analysis suggests that the reluctance to hold sperm donors liable may be more pronounced in the context of more conventional two-parent heterosexual households.¹⁵⁷ The policy can also be indirectly linked to a

anonymity has been prone to self-selection bias at 136-37).

¹⁵⁴ See Leckey, *supra* note 98 at 590; Kelly, “(Re)forming Parenthood,” *supra* note 68 at 190; *Droit de la famille – 111729*, *supra* note 133 (where the Quebec appellate court considered the biological father’s access to the child a neutral fact since some involvement may have been desired short of recognition of paternity at para 60).

¹⁵⁵ *Supra* note 67 at 101, 107, 117-18, 118, 130, 148.

¹⁵⁶ *Supra* note 44 at 369 and 376.

¹⁵⁷ See *supra* text accompanying note 147.

privatization agenda given its emphasis on the allocation of individual responsibility through private ordering.¹⁵⁸

The Status of Gestational Mothers

Further difficulties arise in identifying mothers since motherhood can now be fragmented into genetic, gestational and intending motherhood. Even fewer jurisdictions have specifically addressed the implications of gestational arrangements than is the case with gamete donation. In Alberta and British Columbia, the gestational mother will be recognized as the mother unless she consents to loss of status after the birth of the child.¹⁵⁹ In both provinces, to have parental status as intending parents, the child must be conceived by assisted conception and in British Columbia, the intending parents must also have assumed care of the child after birth. In Prince Edward Island, by contrast, there is no provision for consent and a gestational mother is expressly deemed to be the mother whether or not she is the genetic mother.¹⁶⁰ Because the *Civil Code* also does not recognize surrogacy arrangements, the gestational mother is also invariably recognized as the mother in Quebec and the non-biological co-parent must seek status as an adoptive parent.¹⁶¹

All of these jurisdictions, as well as the proposed *Uniform Child Status Act*¹⁶², recognize the significance of the

¹⁵⁸ In other contexts, see Ronen Shamir, “The age of responsabilization: on market-embedded morality” (2008) 37 *Economy & Society* 1.

¹⁵⁹ Alberta *FLA*, *supra* note 89, s 8.2(6), 9(2); BC *FLA*, *supra* note 20, s 29(3).

¹⁶⁰ *Child Status Act*, *supra* note 97, s 9(7).

¹⁶¹ See *CCQ*, *supra* note 98, Art 541 and see *Adoption – 09184 In the Matter of: X Born [...] 2008, A, Applicant-Adopter and B and C, Mis en cause* 2009 QCCQ 9058, [2009] RJQ 2694 (CQ).

¹⁶² *Supra* note 4.

gestational mother's role and, in sharp contrast to the treatment of sperm donors, subject the removal of her status at the very least to her consent after birth. The differential treatment of sperm donors and gestational mothers responds to real differences in the experience of each in the process of procreation. It not only ensures that there is a legal parent who can provide consent for medical treatment for the child but also allows for the possibility that the gestational mother may have changed her mind through and as a result of gestation.¹⁶³ Where the gestational mother does not consent to either the parentage of the social parent or adoption, a social parent may presumably acquire the status of a step-parent with more limited rights and responsibilities.

In other provinces and the territories, surrogacy arrangements are not addressed by statute. Virtually all cases in these jurisdictions have proceeded by the consent of all the affected parties and declaratory orders have been issued. All such cases appear to recognize some degree of discretion in granting orders but factors influencing the exercise of discretion have varied and different approaches by the courts will raise concerns with gender equity and again generate familial instability and uncertainty in the event of conflict.

In a recent Saskatchewan case, *WJQM v AMA*, a child was conceived using the egg of an anonymous donor that was fertilized by one of the two intending fathers.¹⁶⁴ The fertilized egg was then implanted in the womb of another woman who delivered the child. *The Vital Statistics Act 2009* defines a father as a "person who acknowledges himself to be the

¹⁶³ On information deficiencies at the time of contracting, see e.g. Molly J Walker Wilson, "Precommitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity" (2005) 31 J Legis 329.

¹⁶⁴ *Supra* note 114.

biological father” and mother as the woman “from whom a child is delivered.”¹⁶⁵ Thus the child was registered under the names of the genetic father and gestational mother. Under section 29, however, the registration of live birth could be amended if a court made a determination of “parentage” with respect to a child.¹⁶⁶

Upon such an application, Ryan-Froslic J held that “parentage” in the *CLA, 1997* referred to lineage and that “the mother of a child” in provisions authorizing declarations as to parentage referred to:

...a child’s biological mother. Such an interpretation is consistent with the ordinary view of parentage which relates to kindred (blood) ties. It is also consistent with the provisions of Part VI of *The Children’s Law Act, 1997* relating to a declaration of parentage with respect to a child’s father for which the Court may order genetic testing. It would be inconsistent to view the biological father as a parent and not the biological mother.¹⁶⁷

Given the involvement of an anonymous egg donor, the presumption in favour of the gestational mother by virtue of her registration on the statement of live birth was rebutted. Ryan-Froslic J noted that she was “also satisfied neither the applicants nor Mary [the gestational mother] ever intended that

¹⁶⁵ *Supra* note 77, s 2(1).

¹⁶⁶ *Supra* note 77.

¹⁶⁷ *Supra* note 114 at para 18. See also Garrison, *supra* note 6 for a gender-blind approach: “To rely on gestation as the determinant of motherhood and genetics as the determinant of fatherhood would undesirably introduce a gender-specific element in the determination of parentage” at 917.

Mary would assume any parental rights or obligations with respect to Sarah [the child]. As such, a declaration that Mary is not Sarah's mother is warranted."¹⁶⁸

The finding that "mother" referred to a genetic mother rather than the birth or gestational mother not only departs from the definition under vital statistics legislation but also the conventional definition of a mother in the civil, if not the common law, traditions.¹⁶⁹ Where maternity is fragmented, both genetic and gestational mothers participate in the biological process of producing a child and the gestational mother, by any measure, is far more intimately involved in that process for a much longer period of time.¹⁷⁰ By basing her definition of motherhood on the experience of a biological father and using that as the norm for comparison, Ryan-Froslie J ignored obvious and salient differences between the reproductive experiences of mothers and fathers. Since only one mother can be identified by statute as "the mother",¹⁷¹ the identification of the genetic mother as such would appear to bar future claims by gestational mothers who do not consent to the loss of maternal status after birth.

Because the egg donor was anonymous, the Court did not have to deal with a potential claim between the egg donor and the intending non-biological (in this case, male) parent. An

¹⁶⁸ *Ibid* at para 25.

¹⁶⁹ For a discussion of legal concepts of maternity based on gestation and birth see Cindy Baldassi, *Babies or blastocysts, parents or progenitors: Embryo Donation and the concept of Adoption* (Vancouver: University of British Columbia, 2006) at 80-90.

¹⁷⁰ Marina S et al, "Sharing Motherhood: Biological Lesbian Co-Mothers, a New IVF Indication" (2010) 25 *Human Reproduction* 938 at 939 and see, Anne Donchin, "Toward a Gender-Sensitive Assisted Reproduction Policy" (2009) 23:1 *Bioethics* 28 at 36-38.

¹⁷¹ *CLA, 1997, supra* note 2, s 2.

exclusive statutory emphasis on biological definitions of parenthood, however, implies that a court could not identify a female social parent as the mother where the egg donor is known, whether or not there is a contest between the parties. Where the donor is unknown, *WJQM v AMA* also highlights a contradiction in the statutory treatment of mothers and fathers. The child in this case was effectively declared motherless on the basis that the judge had the authority under section 43(2)(b) of the *CLA, 1997* to find that “a woman is or is not in law the mother of the child.” When it comes to fathers, however, a child cannot be declared fatherless.¹⁷² Why it should be more important to recognize fathers than mothers was left unaddressed.

In *JAW v JEW*, a New Brunswick court declared a heterosexual couple who were the genetic parents to be the parents of a child born to a gestational mother, who was the sister of the female applicant and who had consented to the declaration.¹⁷³ As in *WJQM v AMA*, Walsh J defined biological in genetic terms and found that the provisions of the relevant *Family Services Act* “obviously contemplate declarations for biological (genetic) parents.”¹⁷⁴ There was “no good reason in law or public policy” not to issue a declaration, but rather “compelling reasons” to do so in light of the significant benefits that would flow from an immutable recognition of parental-child status.¹⁷⁵ Walsh J did note, however, that the extent to which the Court’s jurisdiction to make parentage declarations was “confined to biological (“genetic”) relationships” was not at issue.¹⁷⁶

¹⁷² See *NMS v EBCS*, *supra* note 119.

¹⁷³ *W (JA) v W (JE)*, 2010 NBQB 414, 373 NBR (2d) 211, [2010] NBJ No 390 (QB).

¹⁷⁴ *Ibid* at para 16.

¹⁷⁵ *Ibid* at para 22.

¹⁷⁶ *Ibid* at para 18. See also *Family Services Act*, SNB *supra* note 106, s

In Ontario and British Columbia, (prior to the recent enactment of the *Family Law Act*), courts relied on a general power to grant equitable declaratory relief as to legal status in dealing with surrogacy arrangements. In *Rypkema v BC*, a genetic mother was declared the mother where this was consistent with the best interests of the child and the intentions and consent of all parties.¹⁷⁷ In *BAN v JH*, Metzger J issued a declaratory order in favour of a genetic father and an intending mother with the consent of the gestational mother and a known egg donor, in order to avoid the expense, delay and uncertainty of adoption proceedings.¹⁷⁸ In Ontario, judges relied on their *parens patriae* jurisdiction in *KGD v CAP*, in ordering that a child be registered under the name of the biological father as the sole parent, without mention of the anonymous egg donor and gestational mother¹⁷⁹ and in *MD v LL*, Nelson J went further to issue a declaration that the gestational mother was not a mother, having found that certainty and stability of parenthood was in the best interests of the child¹⁸⁰.

96(1) (“[w]here the court finds on a balance of probabilities that the relationship of mother and child has been established, the court may make a declaratory order to that effect,” s 100(2)).

¹⁷⁷ *Rypkema v BC*, 2003 BCSC 1784, 233 DLR (4th) 760. See Ontario *CLRA*, *supra* note 22 (“[w]here the court finds on balance of probabilities that the relationship of mother and child has been established, the court may make declaratory order to that effect” at s 4(3)).

¹⁷⁸ *BAN v JH*, 2008 BCSC 808, 294 DLR (4th) 564.

¹⁷⁹ *KGD v CAP* [2004] OJ No 3508 (SCJ). The Department of Vital Statistics in this case was also found responsible for half of the applicant’s legal costs given that the legislative gap had necessitated the court application.

¹⁸⁰ *MD v LL* [2008] OJ No 907, 90 OR (3d) 127 (relying on Ontario *CLRA supra* note 22, s 4 and *Courts of Justice Act, supra* note 121, s 97). See *JR v LH, supra* note 121.

In all of the above cases, the affected parties had consented to the parentage ordered. A declaration has been refused in such circumstances in only one reported case in Manitoba, where the pre-birth declaration sought by the intending parents was found not to be authorized by statute.¹⁸¹ In *JR v LH*, Kiteley J noted that if a conflict between the gestational and genetic mothers had existed, she would have had to consider whether more than one mother could be declared.¹⁸² In the only reported case in Canada involving a contest with the gestational/genetic mother, the intending parents who had care of the child since birth were given interim custody but the case did not proceed to trial.¹⁸³ The paucity of litigation may reflect a high incidence of satisfactory outcomes but it may also be attributed to financial cost or a perceived low prospect of success.¹⁸⁴ Busby and Vun note that most of the empirical evidence to date suggests that gestational mothers are generally satisfied with their role in the process and detach early in the pregnancy.¹⁸⁵ Nonetheless, there are cases where gestational mothers have bonded or attached during pregnancy, experienced distress and refused to relinquish the child,

¹⁸¹ *JC v Manitoba*, 2000 MBQB 173, [2000] MJ No 482. Although Manitoba's *Family Maintenance Act* allows for pre-birth declarations of paternity, it is silent regarding maternity. The Court found that legislature intended that the vital statistics records should reflect who actually gave birth to the child. The Department of Vital Statistics was not opposed to declaration of parentage as requested by the applicants so long as it came after birth.

¹⁸² *JR v LH*, *supra* note 121 at paras 17-18.

¹⁸³ *HLW and THW v JCT and JT*, 2005 BCSC 1679, [2005] BCJ No 2616. See also *AJ v MC* (1992), 286 California Reporter 369 (genetic parents obtained a declaration over the gestational mother).

¹⁸⁴ Karen Busby & Delaney Vun, "Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers" (2010) 26 Can J Fam L 13 at 38.

¹⁸⁵ *Ibid* at 67-76.

contrary to the expectations of all parties.¹⁸⁶ Special provision for gestational mothers responds to gender equity by recognizing the significant role played by them in the life of the newborn child, the effort and risks of gestation and the inability to predict accurately the consequences of conception, including the occurrence of pre-natal bonding.¹⁸⁷

Summary

The cases discussed in this Part represent attempts to deal with the failure on the part of most legislatures to grapple comprehensively with the unique challenges posed by reproductive technologies. By statute, multiple parents are recognized only in British Columbia; while intending parents are recognized in eight jurisdictions, in the Yukon, Newfoundland and Labrador, only male spouses qualify. Outcomes remain highly uncertain in New Brunswick, Manitoba and Saskatchewan and in the latter jurisdiction also appear subject to an overriding requirement that a child not be declared fatherless. In five jurisdictions, known gamete donors do not acquire parental status purely by reason of their donation but their status in others is unclear, with the use of anonymous donors being the only sure way of ensuring familial security. Gestational mothers are recognized as mothers in four jurisdictions but in many others their status, in the event of a contest, would also be uncertain. In Saskatchewan, maternity has to date been interpreted solely in genetic terms which may thereby prevent recognition of parentage by a gestational mother but also an intending social mother, even where the genetic or gestational mother consented to a loss of parentage.

¹⁸⁶ *Ibid* at 15-16. See most famously, the case of Mary Beth Whitehead in *In re Baby M*, 537 Atlantic Reporter (2d) 1227 (NJ 1988).

¹⁸⁷ *Supra* note 163.

In addition to generating familial insecurity and inequality in these varied contexts, inconsistencies in outcomes across jurisdictions lead to forum shopping.¹⁸⁸ Below, I assess the extent to which reliance on the doctrine of *parens patriae* can mitigate harmful outcomes and facilitate the well being of children in the absence of legislative reform.

LEGISLATIVE GAPS AND THE DOCTRINE OF PARENS PATRIAE

A superior court has an inherent jurisdiction to act in the best interests of vulnerable parties, including children, where a legislature has failed to do so. The scope of this jurisdiction is undefined and potentially broad.¹⁸⁹ In early cases involving children born to unmarried parents, superior courts relied on their equitable jurisdiction to grant fathers' rights to custody and access and did so without inquiring into the Legislature's intentions.¹⁹⁰ Recent cases, however, suggest that although the child need not be at immediate risk,¹⁹¹ intervention must both be necessary to protect the child's welfare¹⁹² and the failure on the part of the Legislature to act must not have been deliberate.¹⁹³ While reliance on the *parens patriae* jurisdiction of superior courts has provided a way of dealing with claims related to reproductive technologies in the absence of legislative reform, it is not a panacea.

¹⁸⁸ Busby & Vun, *supra* note 184 at 90-91.

¹⁸⁹ *E (Mrs) v Eve*, [1986] 2 SCR 388 at 426, 31 DLR (4th) 1.

¹⁹⁰ See Boyd et al., *Autonomous Motherhood?*, *supra* note 12, ch 2.

¹⁹¹ *DWH v DJR*, *supra* note 90 at para 61.

¹⁹² *Dovigi v Razi*, 2012 ONCA 361 at para 21, 110 OR (3d) 593, leave to appeal refused [2012] SCCA No 348.

¹⁹³ *AA v BB*, *supra* note 15.

In *AA v BB*, the Ontario Court of Appeal drew on *Beson v Newfoundland*¹⁹⁴ in finding a legislative gap that could be remedied through the exercise of the court's inherent *parens patriae* jurisdiction.¹⁹⁵ The Court declared the biological mother and father as well as the lesbian co-partner of the mother parents of a child even though the legislation in question explicitly recognized only two parents. According to the Court, when the current *CLRA* was enacted in 1978 in Ontario, the unique challenges posed by reproductive technologies were generally unknown and unforeseen.¹⁹⁶ Although reliance on *parens patriae* generated an outcome inconsistent with the express and unambiguous language of the statute, the statute itself was based on a limited premise and was never intended to deal with assisted conception.

As discussed, there are several potential gaps in conventional parentage legislation across Canada. Statutes in several jurisdictions do not address the possibility of multiple parents and even more jurisdictions fail to address the relative roles and responsibilities of sperm and egg donors, gestational mothers and intending parents. Were these gaps intended? It

¹⁹⁴ *Beson v Newfoundland*, [1982] 2 SCR 716, 1982 CanLII 32 (the statute was deficient because no right of appeal was provided for the pre-adoptive parent where allegations of sexual abuse were unfounded and it was in the child's best interests to stay in that home). See also *MD v LL*, *supra* note 180 (because Ontario's *Vital Statistics Act* did not contemplate the possibility of conception through the implantation of ovum, the Court could rely on *parens patriae* to declare that the gestational mother was not the mother and remove ambiguity as to who was responsible for the child); *MDR v Ontario*, *supra* note 76 (*parens patriae* was not available because the Legislature was found to intend other avenues of recourse [through *CLRA* declarations or adoption] in cases involving non-biological parents).

¹⁹⁵ *AA v BB*, *supra* note 15 at para 30.

¹⁹⁶ *Ibid* at para 21.

seemed important to the Appeal Court in *AA v BB* to determine “whether the *CLRA* was intended to be a complete code and, in particular, whether it was intended to confine declarations of parentage to biological or genetic relationships.”¹⁹⁷ In the latter event, “it would be difficult to find that there is a legislative gap, at least as concerns persons with no genetic or biological link to the child.”¹⁹⁸ Moreover, according to some cases, the gap must be filled in a manner consistent with the legislative intent or the scheme of the Act as a whole.¹⁹⁹ Although the court in *AA v BB* found that the *CLRA* “favours biological parents”, it “does not define parentage solely on the basis of biology.”²⁰⁰ By contrast, whether the legislation in other provinces, particularly Saskatchewan and Manitoba, is based on a biological norm is arguably not as clear.

However, the Ontario court went on to find that a legislative gap could exist even if the *CLRA* was intended to limit declarations to biological parents provided the issue of reproductive technologies and assisted conception had not been contemplated or foreseen by the legislature. In 1978, when Ontario moved to abolish illegitimacy, developments in reproductive technologies were “beyond the vision” of the Legislature.²⁰¹ “There is nothing in the legislative history of the *CLRA* to suggest that the Legislature made a deliberate policy

¹⁹⁷ *Ibid* at para 32.

¹⁹⁸ *Ibid* at para 31.

¹⁹⁹ See e.g. *T(KG) v D(P)*, 2005 BCSC 1659 at para 67, 21 RFL (6th) 183 (to allow an adoption by a same sex ex-partner where the birth mother did not consent would be contrary to the scheme of the Act); *O’Driscoll v McLeod* (1986) 10 BCLR (2d) 108, 1986 CanLII 735 (BCSC) (the clear intent of the legislature cannot be overridden where there is no legislative gap).

²⁰⁰ *Supra* note 15 at para 32.

²⁰¹ *Ibid* at para 34.

choice to exclude the children of lesbian mothers from the advantages of equality of status accorded to other children under the Act.”²⁰²

Obviously, *parens patriae* cannot generally be relied upon in provinces that have recently legislated in relation to assisted conception.²⁰³ In other jurisdictions, it must be established that the failure to address assisted conception was not contemplated at the time existing legislation was enacted.²⁰⁴ The Saskatchewan *CLA*, for example, was amended to abolish the status of illegitimacy in 1990, 12 years after the Ontario Legislature.²⁰⁵ Reproductive technologies were not common but were in use. Indeed, the Saskatchewan Law Reform Commission had, as early as 1981, proposed specific legislation dealing with the legal position of all parties relying on artificial insemination.²⁰⁶ As well, failure to legislate on reproductive technologies constitutes a substantial, rather than a minor, gap in parentage law.²⁰⁷ Nonetheless, there is no

²⁰² *Ibid* at para 38.

²⁰³ See e.g. *DWH v DJR*, 2011 ABQB 608 at para 141, 7 RFL (7th) 84.

²⁰⁴ See *JU v Alberta*, 2001 ABCA 125 at para 7, 281 AR 396 (such an oversight must not be presumed and must be clearly established,). For findings of no legislative gap where the legislature’s intention was found to be contrary to the position sought by the applicant, see *WAM v BC* [1985] BCJ No 2060, 47 RFL (2d) 173; *Re DT* [1992] NSJ No 289 (CA); *RL v CAS Niagara* (2002) 34 RFL (5th) 44, 167 OAC 105.

²⁰⁵ The Act was amended in 1998 only to allow for a French translation; no substantive changes were made at that time. The *Adoption Act* was, however, amended in 1998 to allow same sex couples to adopt.

²⁰⁶ Law Reform Commission of Saskatchewan, *Tentative Proposals for a Human Artificial Insemination Act (Sakatoon: Law Foundation of Saskatchewan, 1981)* online: Law Reform Commission of Saskatchewan <http://lawreformcommission.sk.ca/Human_Artificial_Insemination_Act_Tentative_Proposals.pdf>

²⁰⁷ See *Rebus v McLellan* [1992] NWTJ No 183 (de Weerd J. found (at

evidence in debates preceding the passage of the *CLA* in 1990 that the Legislature specifically contemplated the existence of these technologies or made a deliberate choice as to their impact in enacting the *Act*. Like the Ontario Court of Appeal, courts in other provinces may also not be prepared to assign “a discriminatory intent [to the Legislature] in a statute designed to treat all children equally” and may find it necessary to protect the best interests of a child in such situations.²⁰⁸ As Nicholas Bala and Robert Leckey note, in the family law context *Charter* values may indirectly influence superior courts in their interpretation of the law or their exercise of *parens patriae* jurisdiction.²⁰⁹

para 17) that the failure to provide for retroactive support was “much more than a mere gap in the legislation in the present instance; there is an unbridgeable void” that could not be filled through the exercise of *parens patriae*). But see *Hunt v Smolis-Hunt*, 2001 ABCA 229, paras 21-34, 286 AR 248, (the Court ordered retroactive support with *parens patriae* powers where the *Divorce Act* was silent on the issue and there was a “rational, functional connection” between retroactive support and the objects of the *Act*)

²⁰⁸ *AA v BB*, *supra* note 15 at para 38. See *DWH v DJR*, *supra* note 90 (*parens patriae* was used to grant a declaration to a gay intending parent in the context of a *Charter* remedy). Some cases have also held that the exercise of *parens patriae* is not dependent on finding a legislative gap if it is the only way to meet the paramount objective of the legislation: *Frontenac Children’s Aid Society v JD* [2009] OJ No 3760, 180 ACWS (3d) 423 at para 14; *CR v Children’s Aid Society of Hamilton* [2004] OJ No 3301, 70 OR (3d) 618 (SCJ) at paras 29, 48, 50.

²⁰⁹ Nicholas Bala & Robert Leckey, “Family Law and the *Charter*’s First 30 Years: An Impact Delayed, Deep, and Declining but Lasting” (2013) 32 CFLQ 21 at 24-25. See also Kelly, “Equal Parents”, *supra* note 13, (argues that the value of equal status should inform the interpretation of the best interests of the child in cases involving lesbian and single mothers who conceive through assisted conception). See *DWH v DJR*, *supra* note 90.

Assuming a legislative gap can be established, each individual case will then be decided in terms of the best interests of the child in question.²¹⁰ Although others may incidentally benefit, the *parens patriae* jurisdiction is to be exercised for the benefit of the protected person, not for the benefit of others.²¹¹ This approach can provide the flexibility to recognize gamete donors, gestational mothers and intending parents where and when it accords with the child's welfare, taking into account agreements and disagreements between parties, as well as other relevant factors. Retaining discretion in this manner is arguably a better option than interpreting a statute narrowly or in ways that can generate unwelcome results for future parties, as may follow in the wake of *WJQM v AMA*.

However, deciding these issues on a case by case basis may still leave parties without general rules to guide their conduct and shape their expectations. Where *parens patriae* has been relied upon, judges have generally not undertaken an extensive examination of the child's best interests but have concluded, rather summarily, that the latter will be served by certainty and stability.²¹² In virtually all such cases, the relevant parties have consented or had long established relationships with the children. In *MDR v Ontario*, Rivard J held that because the exercise of *parens patriae* jurisdiction was limited to an individual remedy, the Court could not consider the best interests of children not before it nor bind others whose claims

²¹⁰ See *MDR v Ontario*, *supra* note 76 at paras 105-110.

²¹¹ *E (Mrs) v Eve*, *supra* note 189 at para 77; *DWH v. DJR*, *supra* note 90 at para 62.

²¹² E.g. *MD v LL*, *supra* note 180 at para 67 (where all parties consented); *KGD v CAP*, *supra* note 179 (where the biological father applied for registration, the egg donor was unknown, and the gestational mother consented).

had to be determined on an individual basis.²¹³ Thus, what is in the best interests of each individual child could potentially depend upon a host of particular factors including the existence of conflict and the relative parental capacity and economic status of the parties. This highly discretionary approach will not resolve inconsistencies between jurisdictions nor promote family security and reduce conflict for children generally.²¹⁴

Moreover, because *parens patriae* looks solely to a determination of a child's best interests, outcomes need not be grounded in nor necessarily reflect the principle of equal familial status. In *MDR v Ontario*, Rivard J noted that in deciding cases on a best interests standard, judges "may fail to consider other important legislative objectives."²¹⁵ Outcomes that depend solely upon the best interests of a child have the potential to render significant interests of prospective primary parents, including an interest in gender equity, irrelevant, and to ignore or understate the critical intersection of parental interests with the well-being of the child. Admittedly, the Ontario appellate court in *AA v BB* did interpret its *parens patriae* powers in light of equality of familial status and more recently, in dealing with legislation pre-dating the current *Family Law Act* in Alberta, the Court of Appeal concluded that "it is not in a child's best interests for *her parent* to be denied the same benefits that flow automatically to heterosexual parents."²¹⁶ Although the Alberta Court appeared to grasp the relational quality of the interests at stake in finding that "children benefit when the law recognizes the reality of their

²¹³ *Supra* note 76 at paras 105-110.

²¹⁴ See also Nicole LaViolette, "Dad, Mom – and Mom: The Ontario Court of Appeal's Decision in *AA v. BB*" (2007) 86:3 *Can Bar Rev* 665 cited by Kelly, *Equal Families*, *supra* note 13 (it is "unable to fill these gaps in any coherent, consistent and policy-driven way" at 5).

²¹⁵ *MDR v Ontario*, *supra* note 76 at para 84.

²¹⁶ *DWH v DJR*, *supra* note 90 at para 50.

family situations, even when that reality falls outside the norm”,²¹⁷ such outcomes are not guaranteed in all cases.

If the exercise of a court’s *parens patriae* jurisdiction is inadequate, can a more adequate response be compelled through a *Charter* challenge? Challenges to the status of illegitimacy under the *Charter* were influential in finally abolishing discriminatory provisions in relation to child maintenance and inheritance in some jurisdictions. In the next section, I briefly sketch the constitutional dimensions of a principle of equality of familial status under section 15 of the *Charter* and identify the potential barriers to success that exist in the context of assisted conception.

SECTION 15 OF THE *CHARTER*

The general issue to be assessed in the context of assisted conception is whether the failure of some jurisdictions to recognize an intending, social parent as a parent either in lieu of or in addition to the genetic or gestational parents constitutes an infringement of section 15 the *Charter*.²¹⁸

²¹⁷ *Ibid* at para 60.

²¹⁸ Section 7 of the *Charter* may also be relevant since a failure to recognize parental status may constitute a threat to “liberty” or to “security of the person.” The psychological security of children born into conflictual situations and of parents whose plans are frustrated is arguably threatened in the context of assisted conception. In *Pratten v BC*, *supra* note 153, neither the Superior Court nor the Court of Appeal upheld the claim that a “right to know one’s past” was a right or interest protected under s 7. At stake in the context of assisted conception more generally is not mere knowledge of the identity of a donor but the benefits that follow from recognition of a more secure and immediate parental relationship. Nonetheless, it is unclear whether an applicant could meet the standard enunciated in *Pratten* of a right that is “so ‘fundamental’ that it is entitled to independent constitutionally protected status under the *Charter*” per SD Frankel at para 50. Additionally, as the Court of Appeal noted at para 46, more

Section 15 guarantees the equal protection and benefit of the law without discrimination on both enumerated and analogous grounds.²¹⁹ Arguably, children and parents in heterosexual biologically-related families have rules that directly apply to and govern their situation but parents using and children born of assisted conception in some jurisdictions are deprived of these benefits and exposed to arbitrary and uncertain outcomes. Since *Kapp*,²²⁰ and *Withler*,²²¹ two primary questions are to be addressed under section 15: does the law create a distinction based on an enumerated or analogous ground, and does the distinction create a disadvantage by perpetuating prejudice or stereotyping? More recently, a majority of the Court made clear in *Quebec v A* that prejudice and stereotyping are not “discrete elements of the test” that need to be proven by a plaintiff but rather potential indicia of disadvantage more generally due to membership in an enumerated or analogous group.²²²

established s 7 jurisprudence suggests that the state must also actively deprive the person of a right to security contrary to an identified principle of fundamental justice. Challenges to illegitimacy did not rely on s 7 and the question of whether the lack of legislative recognition in the context of assisted conception violates s 7, including whether it constitutes a deprivation as well as a breach of fundamental justice, is beyond the scope of this paper.

²¹⁹ *Charter, supra* note 1 (“[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”, s 15(1)).

²²⁰ *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483.

²²¹ *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396.

²²² *Quebec v A*, 2013 SCC 5 at paras 172, 185-86, 325, 354 DLR (4th) 191.

In relation to the first issue, potential grounds of discrimination in the assisted conception context that may be relied upon, either singly or in combination, include sex, sexual orientation, marital or family status and manner of conception. In *Corbiere v Canada*, the Supreme Court identified an analogous ground as a “personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.”²²³ Sexual orientation²²⁴ and marital status²²⁵ have clearly been identified as analogous grounds under section 15, but family status and manner of conception have yet to be considered by the Supreme Court. Laws in relation to illegitimacy were frequently challenged on the basis of discrimination against “unmarried females”²²⁶ and in a few cases, single fathers, on the grounds of both sex and marital status.²²⁷ Children were able to rely on the circumstances of

²²³ *Corbiere v Canada (Minister of Indian & Northern Affairs)*, [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1, McLachlin & Bastarache JJ (as McLachlin was then).

²²⁴ *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609; *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385; *Williams v Haugen*, [1988] SJ No 732, 55 DLR (4th) 720 (CA), leave to appeal to SCC refused [1989] 1 SCR ix.

²²⁵ *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693; *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83, [2002] 4 SCR 325; *Quebec v A*, *supra* note 224; *Jackson v Zaruba* 2013 BCCA 81, [2013] 28 RFL (7th) 289.

²²⁶ *Williams v Haugen*, *supra* note 224; *Bomboir v Harlow*, [1987] 5 WWR 55, [1987] SJ No 304; *Gorzen v Litz*, [1988] 4 WWR 763, 50 DLR (4th) 758 (SKCA); *LK v TWL*, [1988] BCJ No 3101, 31 BCLR (2d) 41; *Panko v Vandesyne*, [1993] SJ No 132, 101 DLR (4th) 726. See also *Friesen v Gregory*, [1986] SJ No 662, 55 Sask R 245, Dickson J (justifying the restriction of CUPA legislation under s 15(2) as “single mothers who choose to raise their children are disadvantaged” at para 14).

²²⁷ See e.g. *NM v BC* (Superintendent of Family and Child Services, (1986) 34 DLR (4th) 488, [1987] 3 WWR 176 (BCSC) (that consent

their birth in several instances as well, as this was seen as a matter in which they were “entirely helpless.”²²⁸ Children born ‘out of wedlock’ were also easily characterized as a discrete and insular minority.²²⁹

More recently, the British Columbia Superior Court in *Pratten v BC* found that manner of conception was an analogous ground in an action by a person conceived through assisted conception who sought disclosure of records identifying sperm donors.²³⁰ Arguably, the loss of secure parentage in assisted conception, like the loss of citizenship because of the gender of one’s parent or a loss of benefits linked to a mother’s marital status,²³¹ is a loss suffered directly

of birth father to adoption not required found to be a violation of s 15). *Contra Re DT* (1992) 91 DLR (4th) 230, 111 NSR (2d) 430 (NSSC), rev’d on other grounds (1992) 92 DLR (4th) 289, 113 NSR (2d) 74; and *CES v Children’s Aid Society of Metropolitan Toronto*, (1988) 64 OR (2d) 311, 49 DLR (4th) 469; *AG of Nova Scotia v Phillips* (1986) 34 DLR (4th) 633, 26 CRR 332 (NSCA) and *Reference Re Family Benefits Act* (1986) 75 NSR (2d) 338, 26 CRR 336 (NSCA) (denial of family benefits to single fathers violates s 15 and is struck down) and *Shewchuk v Ricard* [1986] BCJ No 335 (CA) (that fathers could not seek child support from mothers under paternity legislation violated s 15 but was saved under s 1).

²²⁸ *Williams v Haugen*, *supra* note 226 at 733 per Sherstobitoff JA; *Christante v Schmitz*, [1990] 4 WWR 744, 83 Sask R 60 (QB); *Surette v Harris Estate*, (1989) 91 NSR (2d) 418, 16 ACWS (3d) 256 (TD); *Milne v Alberta (Attorney General)* [1990] 5 WWR 650, 74 CLR (4th) 403 (QB) and *NM*, *ibid* per Huddart LJSC at 500 (DLR).

²²⁹ *Milne*, *supra* note 228.

²³⁰ *Supra* note 153 at para 224. This issue was conceded on appeal and not dealt with by the Court of Appeal.

²³¹ See *Benner v Canada* [1997] 1 SCR 358, 143 DLR (4th) 577 at paras 83-86 (“the guarantees of s 15 regarding race, skin colour, or ethnic background could otherwise be rendered nugatory by consistently making the parent of the actual target the focus of discrimination

by the child and as such, is not a case of discrimination by association (where a person is relying on the identity of another who has wholly suffered the disadvantage).²³²

Gruben and Gilbert, however, suggest that family status would provide a more solid basis than manner of conception upon which to launch a case involving assisted conception because it is more apt to be seen as a distinction that perpetuates prejudice or stereotyping or that identifies a group subject to historical discrimination.²³³ Manner of conception, as evident in Marsha Garrison's endorsement of identical outcomes in relation to both sexual and technological conception, may also generate a formal equality analysis. Elaine Craig has similarly argued that reliance on family status rather than sexual orientation is more likely to avoid a formal equality approach to section 15 and to promote recognition of familial relationships that deviate from the heterosexual norm.²³⁴ However, manner of conception need not rely upon a sameness model if the failure to take account of salient differences related to the manner of conception itself is found

rather than the target him- or herself" at para 86). See also *MDR v Ontario*, *supra* note 76 at para 197.

- ²³² In *Wynberg v Ontario* (2006) 82 OR (3d) 561, 369 DLR (4th) 435 at para 206, the Ontario Court of Appeal rejected a claim of discrimination on the grounds of family status by parents of autistic children, holding that the parents were relying not on their own identity but rather on the identity or characteristics of their children,. Arguably, this characterization ignores the unique relational quality of parental status and the unavoidable suffering of parents whose children cannot secure an appropriate education.
- ²³³ Vanessa Gruben & Daphne Gilbert, "Donor Unknown: Assessing the Section 15 Rights of Donor-Conceived Offspring" (2011) 27 Can J Fam L 247 at 265-67.
- ²³⁴ "Family as Status in *Doe v Canada*: Constituting Family under Section 15 of the *Charter*" (2007) 20 National Journal of Constitutional Law 197.

to be discriminatory. The existence, for example, of agreements and the extent of involvement or degree to which interests of the parties are affected by the particular manner of conception itself should be considered relevant.²³⁵ Manner of conception may also be more broadly conceived of in terms of circumstances of birth, a ground which was relied on by children considered 'illegitimate' in the past.

Nonetheless, family status may better reflect the socially imputed sense of inferiority or deficiency and shame that has historically been used as a basis for stereotyping families that deviate from the conventional two-parent heterosexual model. Family status may also better capture the relational quality of the interests at issue and the negative impact of non-recognition on children as well as other family members. Moreover, it can encompass a range of varied circumstances. The Federal Court of Appeal in *Thibaudeau v R* identified the status of a separated custodial parent as an incident or component of family status, and noted "the fact that family status or some similar expression figures as a prohibited ground of discrimination in most human rights statutes also serves to confirm its analogous nature to the grounds enumerated in the *Charter*."²³⁶ Most human rights statutes prohibit discrimination on the basis of family status but do not define it. Legislation in Saskatchewan and Ontario define family status as the "status of being in a parent and child

²³⁵ See *supra*, text accompanying notes 73-75, 149-52, and see cases suggesting that equal treatment does not require identical treatment, *infra*, note 264.

²³⁶ [1994] 2 FC 189, 114 CLR (4th) 261 per Hugesson JA at para 45, rev'd [1995] 2 SCR 627, 124 DLR (4th) 449 without discussion of marital or family status by the majority. McLachlin J (as she then was) in dissent found that separated or divorced custodial parenthood itself constituted an analogous ground of discrimination which was broadly immutable and defined a group historically subject to disadvantage.

relationship”,²³⁷ which begs the question of how a parent-child relationship itself should be defined.²³⁸ Courts have also referenced single motherhood as an established source of prejudice and discrimination, although this has usually been identified as discrimination on the grounds of sex and marital status rather than family status.²³⁹

Non-biological parenthood may also qualify as an incident of family status but the claims of adoptive parents have not met with uniform success under the *Charter*. While adoptive parenthood was identified as an analogous ground at trial in *Schafer v Canada*, the appellate court questioned, though it did not determine, whether adoptive motherhood constituted an immutable characteristic or identified a discrete

²³⁷ *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 2(1)(h.1) (which includes step-parents, adoptive parents and persons standing in the place of a parent); *Human Rights Code*, RSO 1990, c H.19, s 10(1); *Alberta Human Rights Act*, RSA 2000, c A-25 (Alberta defines family status more narrowly as “the status of being related to another person by blood, marriage or adoption” s 44(1)(f)).

²³⁸ In *Pilette c R*, 2009 FCA 367, 319 DLR (4th) 369, the denial of a tax credit to parents supporting dependent children over 18 appeared to qualify as a distinction based on family status but family status itself was not seen to comprise a homogeneous vulnerable group and therefore presumably did not qualify as an analogous ground. The lack of co-residence with a child one financially supports was not seen as a distinction based on family status and co-residence was not identified as an analogous ground in *Fannon v Canada (Revenue Agency)*, 2012 FC 876, 219 ACWS (3d) 227.

²³⁹ See e.g. *Falkiner v Ontario (Ministry of Community and Social Services, Income Maintenance)* [2002] 59 OR (3d) 481, 212 DLR (4th) 633 (CA) (relying on sex, marital status and receipt of social assistance); *R v Rehberg* (1994) 111 DLR (4th) 336, 127 NSR (2d) 331 NSSC (single mothers); *Dartmouth/Halifax Regional Housing Authority v Sparks* (1993), 119 NSR (2d) 91, 101 DLR (4th) 224 (NSCA) (sex, race and income) and *Droit de la famille – 111526*, 2011 QCCS 2662, [2011] RJQ 907 (divorced single mothers).

minority that has suffered stereotyping or prejudice.²⁴⁰ Biological parents have in fact been found to be victims of discrimination where greater benefits were provided to adoptive parents.²⁴¹ Biology has also been given weight in the allocation of parental rights such as custody and access to children²⁴² and biological fatherhood was given constitutional status in *Trociuk v BC* in relation to the naming of children.²⁴³ Indeed, the biological aspect of parenthood raises the question of whether family status could be relied on to strengthen claims to access or custody by sperm donors.²⁴⁴

The legal and social history of adoption does suggest that non-biological parenthood identifies a family form that has disadvantaged family members and subjected them historically to stereotyping and prejudice. At common law, adoption was not a recognized form of parentage. As Elizabeth Bartholet suggests, adoptive families have traditionally been perceived in western cultures as unnatural and inevitably troubled,²⁴⁵ and stereotypical attitudes about the presumed characteristics of

²⁴⁰ [1997] 35 OR (3d) 1, 149 DLR (4th) 705, leave to appeal to SCC refused [1997] SCCA No 516. *Accord Tomasson v Canada (Attorney General)*, 2007 FCA 265, [2008] 2 FCR 176; *Re Centennial College of Applied Art and Technology & OPSEU* (1998) 69 LAC (4th) 105, [1998] OLAA No 1051. All of these cases challenge the denial of maternity benefits to adoptive parents.

²⁴¹ See e.g. *Schachter v Canada*, (1988) 52 DLR (4th) 525, 11 ACWS (3d) 161, violation on the ground of parental status conceded on appeal [1992] 2 SCR 679, 93 DLR (4th) 1.

²⁴² In this context, as courts have at times recognized, the weight given to biological ties can deflect claims made by others who enjoy race and/or class privilege relative to the biological parent.

²⁴³ *Trociuk v BC*, supra note 76.

²⁴⁴ Craig, supra note 234 raises this possibility at 219.

²⁴⁵ Supra note 27.

individual adoptive families persist even as adoption is more common. These attitudes affect both parents and children although courts appear to accept more readily the historically disadvantaged status of adopted children rather than adoptive parents.²⁴⁶ As Gruben and Gilbert note, there are differences between adopted children and children created through assisted conception: in the latter case, at least one of the parents is often a genetic parent and the birth is arranged in advance.²⁴⁷ However, both signify a departure in some measure from conventional biological parentage and in both cases, most children would have been, but for its abolition, subject to the taint of illegitimacy. The assumption that biology is an exclusive or necessary condition of parentage also gives rise in the context of assisted conception to a culture of secrecy and shame that can expose children to psychological harm.

Beyond the issue of analogous grounds, there are also questions as to whether the laws in question “create” distinctions and if so, whether these distinctions perpetuate disadvantage. The laws related to illegitimacy, which were challenged under the *Charter*, expressly distinguished between children of married or unmarried parents. Most were also clearly detrimental to the status and rights of children of unmarried parents by imposing restrictive conditions on the ability of mothers to obtain support from putative fathers that were not applied to children of married parents²⁴⁸ or by

²⁴⁶ See e.g. *Schafer*, *supra* note 240 at paras 26-27, “[t]here can be no doubt, as well, that adopted children have suffered legal disadvantage, but the advantages denied adoptive parents, save for the Act itself, are neither impressive nor persuasive” at para 50. See also *Strong v Marshall Estate* 2009 NSCA 25, 309 DLR (4th) 459 at para 31 and the BC Court of Appeal’s finding in *Pratten*, *supra* note 153, that adoptive children were protected under s 15(2) of the *Charter* as a historically disadvantaged group.

²⁴⁷ *Supra* note 233 at 261-62.

²⁴⁸ *Williams v Haugen*, *supra* note 224; *PAD v LG* (1988) 89 NSR (2d)

preventing children from inheriting on intestacy.²⁴⁹ In all these cases, children were not similarly treated and the resolution of inequality entailed similar or identical treatment. Justifications under section 1, such as the orderly distribution of property in the case of intestacy statutes or evidentiary burdens, were typically dismissed without substantial discussion.²⁵⁰

In the context of assisted reproduction, by contrast, the laws at issue include both explicit and implicit exclusions that fail to take account of material differences between sexual and assisted conception. First, there is the exclusion of social intending parents from the status of parents. If parentage legislation is interpreted as identifying only biological parents as legal parents, as may well be the case in Saskatchewan and Manitoba, the law has thereby created a distinction that denies intending social parents the legal status of parentage. The failure to extend protection of the law to a particular group can be challenged under section 15; whether the legislation excludes explicitly or by way of omission is immaterial so long as the exclusion is shown to have a disproportionate impact on

7, NSJ No 600 (NS Fam Ct); *Murley v Hudye*, (1994) 150 AR 67, 112 DLR (4th) 220 (QB); *LK v TWL*, [1988] BCJ No 3101, 31 BCLR (2d) 41 (Prov Ct); *JALK v JR*, (1996) 193 AR 26, 141 DLR (4th) 25 (CA) (challenges to time limitations on applications for maintenance). *Milne v Alberta*, *supra* note 228 (termination of a right to maintenance on marriage of the mother). *Panko v Vandesype*, *supra* note 226 (termination of a right to maintenance where contrary to a private agreement). *Gorzen v Litz*, *supra* note 226 *Bomboir v Harlow*, *supra* note 226; *Murley v Hudye*, *ibid*; *LK v TWL*, *ibid* (challenges to the requirement of corroboration of a mother's testimony). *Christante v Schmitz*, *supra* note 228 (other procedural limitations).

²⁴⁹ *Surette v Harris Estate*, *supra* note 228; *Tighe v McGillivray Estate*, (1994) 112 DLR (4th) 201, 127 NSR (2d) 313 (CA).

²⁵⁰ See e.g. *Milne*, *supra* note 228; *Panko*, *supra* note 226. Claims that putative fathers would be disadvantaged in disproving paternity were found baseless, especially in light of blood or genetic testing.

a protected group.²⁵¹ In this context, recognition of secure parentage is a benefit provided by law to children of heterosexual biological parents, but not to children conceived through the use of assisted conception.

Assuming the basis for the discrimination (whether directly or indirectly on the grounds of family or marital status, sex, sexual orientation or manner of conception) is recognized under section 15, social intending parents cannot acquire the immutable, lifelong status of parenthood in relation to children they have helped to conceive with the intention of being a parent, short of adoption.²⁵² While an adoption can be sought, this requires a post-birth legal proceeding and generally, the consent of biological parents. Unlike adoption, the intending parents in assisted conception are involved from the outset in the planning for the child. Commitments are made in advance of child's birth and relied on by all parties with the view to generating a stable environment for the rearing and development of the child. Arguably, this exclusion does perpetuate disadvantage by imposing a differential burden on families that do not conform to a heterosexual biological norm.²⁵³

²⁵¹ *Friend v Alberta*, *supra* note 224 per Cory JJ, at paras 56, 61, 76, 84.

²⁵² Most of the intending parents who have relied on a *Charter* challenge were lesbian or gay and able to claim discrimination on the basis of sexual orientation. See e.g. *MDR v Ontario*, *supra* note 76 (non-biological heterosexual intending partners were found able to “pass” as biological parents and register their particulars on the Statement of Live Birth without government scrutiny, unlike non-biological same sex intending partners); *Fraese v Alberta*, *supra* note 105 (a lesbian intending partner challenged a co-parent provision limited to male spouses); *DWH v DJR*, *supra* note 90 (a gay intending parent challenged presumptions that were limited to male spouses of birth mothers). See *AA v BB*, *supra* note 15, (*obiter* referencing a discriminatory intention at para 38).

²⁵³ Arguably, the law distinguishes on its face and thereby constitutes

Moreover, this differential burden is based upon and can perpetuate both prejudice and stereotyping that fails to correspond to a claimant's actual characteristics or circumstances. In *Quebec v A*, Abella J defined prejudice as the "holding of pejorative attitudes based on strongly held views about the appropriate capacities and limits of individuals or groups of which they are a member."²⁵⁴ Historically, the families affected by the type of exclusion in question, namely same sex couples, single parent families and heterosexual non-biological families, were all subject to widely held beliefs that they provided inferior or defective settings in which to raise children. As Lebel J for the minority noted, even apparently neutral rules may perpetuate prejudice by establishing a "hierarchy of worth" and "[treating] certain individuals like second-class citizens whose aspirations are not equally deserving of consideration."²⁵⁵ Stereotyping, according to Abella J, "like prejudice, [is] a disadvantaging attitude, but one that attributes characteristics to members of a group regardless of their actual capacities."²⁵⁶ While some empirical studies suggest that child outcomes differ on average according to family form, outcomes in individual cases, as discussed, clearly depend upon a range of variables that include stability, parenting ability or capacity, social or economic supports, and an absence of parental conflict.²⁵⁷ Casting all families that deviate from the heterosexual, biological nuclear norm in a pejorative light is, in other words, a classic illustration of negative stereotyping that both abstracts from the "actual need,

direct discrimination. If it were seen as adverse effect discrimination, having a disproportionately negative impact on a group, the onus on the claimant at the second stage would be higher, see *Withler*, *supra* note 221, at para 64 per McLachlin CJ and Abella J.

²⁵⁴ *Quebec v A*, *supra* note 222 at para 326.

²⁵⁵ *Ibid* at paras 197-98

²⁵⁶ *Ibid* at para 326.

²⁵⁷ See *supra*, text accompanying notes 54-62.

capacity or circumstances of the claimant”²⁵⁸ and “has the effect of perpetuating arbitrary disadvantage ... because of his or her [group] membership.”²⁵⁹

Beyond the exclusion of intending parents, other sources of controversy include the explicit limitation of parenthood in some statutes to one mother and father. Allowing for only one of each gender would directly exclude same sex couples whose families will, by definition, involve not one but two mothers or two fathers.²⁶⁰ The fact that presumptions apply only to heterosexual males may also constitute discrimination on grounds of sex, sexual orientation, and family status. Wilkinson J in *PC v SL* cast doubt in *obiter* on the validity of such a claim by a lesbian intending parent,²⁶¹ but in *DWH v DJR*, a similar provision in the former *Alberta Act* was found to discriminate against male individuals who were not in a heterosexual relationship with the birth mother by not granting them a presumption of paternity.²⁶²

The *Charter* implications are decidedly more uncertain when the claim entails the relinquishment of parenthood or the recognition of an intending parent (genetic or otherwise) *in lieu of* a gamete donor or gestational mother. Does the failure to exclude a sperm donor from the status of a parent constitute a

²⁵⁸ *Quebec v A*, *supra* note 222 per Lebel J at para 203.

²⁵⁹ *Ibid* per Abella J at para 331.

²⁶⁰ For discrimination on such grounds in relation to registry statutes, see *Fraess v Alberta*, *supra* note 105; *MDR v Ontario*, *supra* note 76; *Gill v Murray*, *supra* note 76. The fact that heterosexual couples may also be affected by this requirement under parentage statutes could be immaterial since finding a comparator group is no longer required for a s 15 claim, see *Withler*, *supra* note 221.

²⁶¹ *PC v SL*, *supra* note 87 at paras 17, 20.

²⁶² *Supra* note 90.

violation of section 15? This omission affects all individuals using assisted conception, including heterosexual intending parents, but it can disproportionately impact same sex couples and single parents, as they do not benefit from the statutory presumptions under parentage statutes.²⁶³ Assuming that this omission creates a discriminatory distinction between biological and non-biological parents (by virtue of family or marital status, the manner of conception, sexual orientation, and/or sex), a court would also have to grapple with whether it perpetuates disadvantage. While the omission may increase potential sources of financial support for a child, it may also, more importantly, compromise familial security and introduce instability and conflict into a child's life. The omission also again reflects a refusal to recognize a distinctive familial form based on a stereotyping of all same sex or single parent families as deficient.

The failure to address the status of gestational mothers in some jurisdictions raises similar issues but also the question of whether the potential exclusion of parentage status, as found in *WJQM v AMA*, discriminates against gestational mothers (on the grounds of sex and manner of conception) by failing to recognize differences in reproduction between men and women. According to *Andrews v Law Society of BC*, "identical treatment may frequently produce serious inequality."²⁶⁴ Parity between genetic mothers and fathers should thus not be the deciding factor in disputes between genetic and gestational mothers.

²⁶³ *MDR v Ontario*, *supra* note 76 at para 195. Lesbian couples are also more likely than heterosexual couples to use known donors – and thus the issue is more likely to arise in that context, Kelly, "(Re)forming Parenthood," *supra* note 68 at 190.

²⁶⁴ [1989] 1 SCR 143 at para 26, SCJ No 6, McIntyre J; see *Brooks v Canada Safeway Ltd* [1989] 1 SCR 1219, SCJ No 42.

Constitutional claims of a section 15 violation in the context of assisted conception are clearly much more complex than the challenges that were advanced in relation to illegitimacy, even though discrimination in both contexts, as I have argued, reinforces the same kind of prejudice. The net effect of virtually all of the *Charter* challenges to illegitimacy was to recognize children of unmarried parents as legitimate and to extend parentage to and expand the private support obligations of unmarried biological fathers.²⁶⁵ By contrast, the claims being advanced in the context of assisted conception would extend parentage beyond the two-parent heterosexual biological norm and vary the number of parents to more or less than two in some cases. While such claims may be controversial, at the same time, the claims fit well with the individualistic premises of the *Charter* in that they call attention to the fact that the well-being of children varies according to the individual circumstances of their households. Legal recognition of parentage in the context of assisted conception would acknowledge that family members should not be stigmatized and arbitrarily excluded at law based on stereotypical assumptions related to family structure. The fact that assisted conception arises from individual plans and agreements may also resonate as exercises in individual choice and autonomy, values that have been considered and embraced by some judges of the Supreme Court under both sections 15 and 1.²⁶⁶

²⁶⁵ Judy Fudge, “The Privatization of the Costs of Social Reproduction: Some Recent *Charter* Cases” (1989) 3 Can J Women & L 246.

²⁶⁶ See e.g. *Walsh*, *supra* note 225 and *Quebec v A*, *supra* note 222 per LeBel J. (within a s 15 analysis) and McLachlin CJ (under s 1 for the majority).

CONCLUSION

Whether legislatures will be sufficiently moved by the prospect of a *Charter* claim to provide equality of familial status where children are conceived through assisted conception is an open question. A number of other factors influential in the abolition of illegitimacy are not as pressing or salient in the context of such a potential reform. Whereas increasing numbers of children were born outside of marriage into common law unions from the 1970s onward, the number of children born using assisted conception is not dramatically surging. While many of the children were being reared by parents in households functionally similar to heterosexual marital homes, thereby legitimizing their status, assisted conception potentially affects a diverse range of family forms, involving not only heterosexual marital unions but social and multiple parentage, same sex relationships, and single parenthood. Equalizing the status of children of unmarried parents also ultimately placed more emphasis on the obligations and rights of biological fathers, which was consistent with the neoliberal privatization agenda of the 1980s and 90s and the increasing emphasis on both genetic ties and fatherhood in relation to child welfare upon separation or divorce. By contrast, women in lesbian relationships and single mothers directly challenge a child's need for fathers or genetic parents and to some degree, the privatization agenda. Thus, the question of what serves the well-being of children generally is still contested in the context of assisted conception. Finally, while illegitimacy presented a clear violation of formal equality, the resolution of claims arising from assisted conception is complex, and legislative efforts have varied across jurisdictions. Even in the face of the multiple pressures that favoured the abolition of illegitimacy, there was a significant delay in legislative reforms in jurisdictions like Saskatchewan, with one jurisdiction, Nova Scotia, still retaining the concept of legitimacy.

Notwithstanding these differences, governments have an obligation to provide certainty and stability for all children and parents, even those children born by way of unconventional arrangements. The present state of the law on assisted conception within and across jurisdictions, however, gives rise to numerous inconsistencies, inequalities and ad hoc outcomes. Just as resistance to abolishing illegitimacy reflected a reluctance to encourage non-marital sex and single parenthood and a failure to recognize equality of familial status, legislative gaps in assisted conception may also reflect a reluctance to accept single parenthood or same sex families, even at the cost of destabilizing heterosexual families established through assisted conception. Any attempt, however, to distinguish single parents or same sex parents from two-parent heterosexual families should raise *Charter* concerns. As with the old story of illegitimacy, ensuring the security and well being of all children is ultimately linked to a need to accept both more diverse familial forms and a greater measure of social responsibility for children.