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BOOK REVIEW

Fiona Kelly, *Transforming Law's Family: The Legal Recognition of Planned Lesbian Motherhood* (Vancouver: UBC Press, 2011).

Shelley A.M. Gavigan*

“Can you tell me the story of how you came to be a mother?” With this inspired question, Fiona Kelly began her research interviews of lesbian mothers who participated in the project that gave rise to her important book, *Transforming Law's Family: The Legal Recognition of Lesbian Parenthood*. Kelly's focus on planned lesbian motherhood reminds us that the women in her study, as is usually the case with lesbians, did not find themselves pregnant as a result of encounters in the back seat of a car or other accidents. Parents by choice, not chance, the lesbian mothers who opened their lives and stories to her, do not have “law or biological assumptions to fall back on [and] must define for themselves what makes someone a parent and where the boundaries might lie.”¹ Kelly's first question must have felt like a breath of fresh air to the mothers, with its express invitation, and implicit recognition that their path to motherhood would have been unique and non-normative.

Kelly organized her research around four focal questions: how the lesbian mothers define ‘family’; how parenthood is understood and defined within lesbian families; the role of sperm donors within a lesbian family; and finally,

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¹ Fiona Kelly, *Transforming Law's Family: The Legal Recognition of Planned Lesbian Motherhood* (Vancouver: UBC Press, 2011) at 6.

their attitudes toward law reform, and the model, if any, they preferred. The theoretical and political implications of this methodology cannot be overstated: Kelly's research subjects were not asked to respond to state or legal definitions or prescriptions; they were invited to speak from their own definitions, of their own experience, and from that foundation, rather than the categories of law, to think through a form of law reform that would reflect their lives, choices and priorities. In other words, a law that was shaped by them for them, that placed them at the centre rather than at the margins or borderlands.

Kelly interviewed mothers in thirty-six lesbian families in Western Canada, primarily based in and around three large urban centres, Vancouver, Edmonton, and Calgary. One interesting finding is that "all of the mothers saw themselves as a family prior to the birth of their children, though several feel that having children "solidified" their family."² While this perception may appear to lend support for the primacy of the adult relationship recognition campaigns, Kelly offers another interesting interpretation: she suggests that given the traditional view of the family as the nest for procreation, the biological inability of lesbian couples to procreate has excluded them historically from family, and thus, "most of the mothers understand their families in opposition to this norm."³ For Kelly, "this ongoing commitment to a definition of family that eschews traditional norms, even in the face of biological procreation is perhaps testament to the ongoing power of the concept of chosen family within the lesbian and gay community."⁴

² *Ibid* at 77.

³ *Ibid.*

⁴ *Ibid.*

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The lesbian mothers also severed the tie between marriage and parenting.⁵ Despite the prominence and vaunted importance of the achievement of the legal victories in respect of same sex marriage, the primary concern of these lesbians is the nature and quality of their, and others', relationships with their children. Only 25% of the families that participated in the study - nine of the thirty-six - were married.⁶ Indeed, Kelly found a "critical edge" to the perspective they took to law. Her informants were neither drawn to nor compelled by the language of "equal families" if equal meant only formally equal to an idealized heterosexual norm; they had something better in mind. As Kelly found,

[T]hey identified their own family practices and worked backwards. They argued that their families, like many of those headed by heterosexuals, come in diverse forms and that diversity should be the value that underlies family recognition. Thus rather than seek to equate their families with existing conceptions, they demanded that the concept of family be rethought.⁷

Their perspective, Kelly reminds us, suggests that "the lesbian and gay voices that are often heard in courts are neither fully representative nor universal."⁸

Evincing a sensibility steeped in intimate knowledge of the depth and extent of homophobia and reflecting the courage it takes to live openly and proudly, eschewing the primacy and

⁵ *Ibid* at 111.

⁶ *Ibid* at 111.

⁷ *Ibid* at 166.

⁸ *Ibid* at 165-66.

inevitability of patriarchy, the lesbian mothers were acutely wary of law's promise and mindful of law's bite. Kelly found that while "law is very much a part of the lives of all the mothers" she interviewed, the expressions of distrust of the legal system and litigation that Kelly heard from the mothers were forged through experience: all but two of the thirty-six families had "engaged with the law in one way or another."⁹ While the mothers she interviewed understood the importance of law and of the legitimacy to be gained through legal recognition, Kelly also heard their reservations with the campaigns and litigation strategies for adult relationship recognition. In particular, the interview subjects expressed very strong concern that courts have not been experienced as sites where the integrity of the (non-patriarchal) lesbian family has been respected or understood, not least because "courts are more than willing to insert donors into [unwilling] lesbian families."¹⁰ They readily embraced the opportunity offered by Kelly's research to offer their own definitions and experience of "family" and "parent;" Kelly found that the lesbian mothers had expansive, flexible definitions of both – definitions that emphasized "relationship" more than "relatedness"¹¹ and "front-line parenting" (or the work of parenting) over biology.¹² For most, if not all, and not surprisingly, given the biological asymmetry of lesbian families, a biological connection alone to a child does not make one a parent without an additional relationship of care.¹³

Thirty-four of the thirty-six families had turned to an anonymous sperm donor in order to conceive. This choice

⁹ *Ibid* at 116.

¹⁰ *Ibid* at 42.

¹¹ *Ibid* at 89.

¹² *Ibid* at 90-91.

¹³ *Ibid* at 89.

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reflected a desire not only to share parenting but equally important, it also reflected a fear of the courts and a shared perception of a “bias towards fathers.”¹⁴ As Kelly notes, this sentiment derives from a very real sense of “how difficult it is to assert their lesbian family in the face of the enormous symbolic meaning that attaches to the designation “father.”¹⁵

In fact, Kelly found that “most lesbian mothers *and their donors* wish to exclude donors from the status of legal parent, [but] a small number have chosen to co-parent their children within a three or four parent unit.”¹⁶ That is, a number of the mothers were prepared to contemplate the involvement of sperm donors in the lives of their families, but they emphasized the importance of having the freedom to self-define within each family unit.¹⁷ Most of the mothers interviewed by Kelly “refuse to accept that their entitlement to legal recognition rests on the extent to which their families reflect traditional norms.”¹⁸

Despite the fact, as Kelly found, that the lesbian mothers approached the matter of law and law reform with a healthy dose of skepticism, they were neither naive nor agnostic as to law’s power to contribute to legitimacy. They appear to have engaged seriously with Kelly on the question of law reform and the possibility of devising a legislative framework that would reflect and respect the values and experience of lesbian families and their parenting choices. Consistent with their commitment to the unique and alternative nature of their families, Kelly noted two dominant themes:

¹⁴ *Ibid* at 101.

¹⁵ *Ibid* at 107.

¹⁶ *Ibid* at 27 (emphasis in original).

¹⁷ *Ibid* at 102.

¹⁸ *Ibid* at 166.

first, most of the mothers endorsed a legislative model “capable of recognizing multiple parents, or non-parental figures, such as involved sperm donors, without jeopardizing the security of the lesbian family;”¹⁹ secondly, most favoured a legislative framework that would provide for a presumption of automatic parental status to the lesbian conjugal couple, whilst permitting for additional parental figures to ‘opt in’.²⁰

Based on the responses of the mothers, Kelly drafted model legislation to incorporate this vision: *Parentage of Children Born of Assisted Reproduction*. Part I of Kelly’s model legislation sets out “parental presumptions” which define a “parental project,”²¹ stipulate when it will be found to exist, and express the presumption that when “a child [is] born of a parental project involving assisted procreation between two spouses . . . the spouse will be presumed to be the child’s parent.”²² Part II of the model legislation sets out, inter alia, the “opt in” procedures for a person to apply, within one year of the birth of a child and with the consent of the legal parent or parent, to be added as a legal parent.

It bears emphasizing that the presumptions and opt-in procedures reflected in Kelly’s model legislation are grounded in the vision and experience of the lesbian families, a “legal model that resembles chosen family.”²³ Kelly worried that it

¹⁹ *Ibid* at 136.

²⁰ *Ibid* at 145.

²¹ “A parental project involving assisted procreation exists from the moment a person alone or spouses or common-law partners by mutual consent decide, in order to have a child, to use for the purpose of conception the genetic material of a person who is not party to the parental project” (*ibid* at 156).

²² *Ibid*.

²³ *Ibid* at 88.

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might be utopian, and thus dismissed as unrealistic or unrealizable, but judging from British Columbia's *Family Law Act*²⁴ (which received royal assent after her book was published), it appears that the British Columbia legislature shared at least some of her vision.

I do raise two small queries. The first concerns the use of the term "middle class" and the significance of "class" as an analytic concept. Kelly characterizes her research participants as (largely) middle class,²⁵ "clustered in the 'caring industries' – teaching, nursing, and social work."²⁶ But what precisely makes them "middle class" (other than the North American context where everyone who is not homeless, on welfare, or a billionaire, is said to be middle class)? While these lesbians may be regarded and regard themselves as middle class, they are likely members of trade unions, possibly with access to extended health benefits by virtue of collective agreements – which may also account for their financial ability to access the services of fertility clinics. Additionally, a significant number of the women in Kelly's study are not landed (in relation to property); they are tenants who live in rental housing or in housing co-ops. Thus, I need more information about their class relations and location before I would move them out the working class into the middle class.

²⁴ *Family Law Act*, SBC 2011, c 25 (royal assent 24 November 2011, coming into force 18 March 2013), Part 3. One of the innovations of the new legislation is the framework it provides for determining a child's legal parents in the context of assisted reproduction. See in particular s 20(1) for the definition of "intended parent" or "intended parents" and s 24 which provides that a donor is not automatically a parent within the meaning of the Act.

²⁵ Kelly, *supra* note 1 at 14-15.

²⁶ *Ibid* at 15.

I also worry about the discourse of “project” (as in “parental project”) to express the essence of what is being undertaken when lesbians, donors, and others take this step. Mindful that the term parental project appears to be entering the legal vernacular,²⁷ I nonetheless am of the view that it is preferable to use a concept that does not conjure the image of a science fair when what is being contemplated is less a project and something more fully human and social: a relationship.

But, these are small points in the context of an important book that reinserts and centres the values and politics – and critical edginess – of lesbians into what really does merit the label of (long term) ‘project’: the transformation of family law. As I read Kelly’s book, I was reminded of the challenge laid down by Jean Barman on the importance of a focus on the specificity of experience. Barman, writing in another context and concerned with the representation of Aboriginal women in Aboriginal history, has asked, “What happens when we turn the past on its head and make our reference point Aboriginal women instead of Aboriginal men?”²⁸ Fiona Kelly offers an answer to a similar question for lesbians and family law. She has turned the premises of family law upside down and made our reference point lesbian families. We need to do this more often in law: look to the actual lived experiences and

²⁷ As appears to be the case in Quebec: see Civil Code of Québec, R.S.Q., 1991, c.64, ss 538 – 542. Section 538 provides:

A parental project involving assisted procreation exists from the moment a person alone decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project.

²⁸ Jean Barman, “Taming Aboriginal Sexuality: Gender, Power, and Race in British Columbia, 1850-1900” in Mary Ellen Kelm and Lorna Townsend, eds, *In the Days of Our Grandmothers: A Reader in Aboriginal Women’s History in Canada* (Toronto: University of Toronto Press, 2006) 270 at 271.

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perspectives on the ground when devising arguments or drafting legislation. For this alone, Kelly's book should be compulsory reading by all and everyone interested in families and law.