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ARE YOU MY MOTHER? PARENTAGE IN A NONCONJUGAL FAMILY

Natasha Bakht and Lynda M. Collins*

INTRODUCTION

Two women friends and their son made national¹ and international² headlines when a court in Ontario declared

* We are grateful for the invaluable research assistance provided by Vanessa Baker-Murray and the kind, creative genius of our lawyer, Marta Siemiarczuk. Thanks also to Professor Vanessa Gruben and the anonymous peer reviewers for their insightful comments.

¹ See e.g. “How Two Friends Fought to Be Legal ‘Co-Mommas’ to a 7-Year-Old Boy—and Won”, *CBC Radio* (21 February 2017), online: <www.cbc.ca/radio>; Julie Ireton, “Raising Elaan: Profoundly Disabled Boy’s ‘Co-Mommas’ Make Legal History”, *CBC News* (21 February 2017), online: <www.cbc.ca/news>; CTVNews.ca Staff, “Groundbreaking Family: Two Women, One Boy and a Legal Precedent”, *CTV News* (21 February 2017), online: <www.ctvnews.ca>; Ashley Csanady, “Meet the Co-Mommas: Women who Are Partners in Raising a Son, but Not Romantic Partners”, *National Post* (4 April 2017), online: <nationalpost.com>.

² See e.g. Tanveer Mann, “Two Best Friends Make Legal History by Becoming First to Co-Parent”, *Metro* (24 February 2017), online: <metro.co.uk>; Radhika Sanghani, “Child-Sharing: Meet the Best Friends Who’ve Legally Adopted Together”, *The Telegraph* (31 March 2017), online: <www.telegraph.co.uk>; Hayley Jones, “Want to Raise Kids with Your BFF? Move to Canada”, *Daily Beast* (27 March 2017), online: <www.thedailybeast.com>; Paromita Chakrabarti, “How I Met Your Mother”, *The Indian Express* (9 April 2017), online: <indianexpress.com>; Jan Bruck, “Best Friends Become First to Co-Parent in Canada”, *BBC News* (22 March 2017), online: <www.bbc.com/news>; Monica Coviello, “La mia migliore amica è

that Lynda Collins was the parent of then six-year-old Elaan Bakht, the biological child of her friend, Natasha Bakht. Their story (our story) seemed to touch the hearts of many people around the world who were open to and interested in yet another family form that defies the traditional heteronormative, nuclear model.³ Our case

diventata mamma di mio figlio”, *Vanity Fair* (22 March 2017), online: <www.vanityfair.it>; Eva Wiseman “Why Shouldn’t the Modern Family Be a Team Effort?”, *The Guardian* (26 March 2017), online: <www.theguardian.com/international>; Radhika Sanghani, “Platonic Parenting—Is This the Way of the Future?”, *The West Australian* (13 April 2017), online: <thewest.com.au>; Gemma Saura, “Elaan y sus madres amigas”m *La Vanguardia* (24 June 2017), online: <www.lavanguardia.com>.

- ³ See Outlook, BBC World Service, “We make a good team . . .” (21 March 2017), posted on *Outlook, BBC World Service*, online: Facebook <www.facebook.com/BBCOutlook/posts/10155101845682902>; BBC News, “Meet Natasha Bakht and Lynda Collins.” (25 March 2017), posted on *BBC News*, online: Facebook <www.facebook.com/bbcnews/videos/1391064667623263/?autoplay_reason=user_settings&video_container_type=0&video_creator_product_type=0&app_id=273465416184080&live_video_guests=0>. See also Lynda Collins & Natasha Bakht, “Attention, Canadian Singles: Why Not Raise a Child with Your Best Friend?”, *CBC* (8 May 2017), online: <www.cbc.ca>; E-mail from Laila Malik to Natasha Bakht and Lynda Collins (24 March 2017):

I wanted to write this quick note in the thick of the various news pieces about your family that have been circulating recently, just to add my deep appreciation of all three of you and the joy, wonder and radical impact you’re having on the world. I imagine that for the most part, you’re just doing you, but in the very conservative spaces that I sometimes occupy I’m seeing flickers of light that I’ve never seen in reaction to the ways you’re paving . . . I’ve watched the BBC vid several times

began because we found ourselves co-parenting, yet not cohabiting, and were quite simply concerned for the future of Elaan, who has multiple and complex disabilities. We sought an order that would secure Elaan's existing relationship with Lynda and ensure Lynda's equality with other parents.⁴

A critique of patriarchal, heteronormative family forms has always been central to feminist and critical Queer theoretical approaches to law in general and family law in particular.⁵ Feminist scholars have argued convincingly that traditional common law approaches to the family have privileged white, able-bodied, middle-class, heterosexual families (and white, able-bodied, middle-class, heterosexual men in particular). Our case broke new legal ground, but would almost certainly never have happened were it not for the decades of work of countless advocates for alternative family forms, including those involving single parents, same-sex couples, multi-generational families, and parents who make use of reproductive technologies. There can be little doubt that

now, and am watching people I know to be very resistant to anything other than dominant, patriarchal narratives of family pause and think. Historic indeed, in ways perceptible and imperceptible.

⁴ See *Application for Declaration of Parentage, Collins/Bakht* (Affidavit of Natasha Bakht at para 17) [Bakht Affidavit]; *Application for Declaration of Parentage, Collins/Bakht* (Affidavit of Lynda Collins at paras 19, 20–29) [Collins Affidavit].

⁵ See Fiona Kelly, *Transforming Law's Family: The Legal Recognition of Planned Lesbian Motherhood* (Vancouver: UBC Press, 2011).

our success was made possible by the waves of *Charter*⁶ and family law litigation by these communities, which prepared the Ontario Superior Court to be open to a family structure that was previously unknown to Canadian law. In our particular context, we also benefited from the disability rights movement and the many parents who fought for the right of children with disabilities to be raised at home by their families.⁷

In Part I of this article, we introduce our unique parenting partnership: We are friends who do not cohabit, but are raising our son, Elaan (who has complex disabilities), together. We explain how and why our family came into existence. In Part II, we delineate the legal arguments we made in order to formalize our relationship, specifically, how Lynda was declared Elaan's parent. Our declaration of parentage argument was grounded in the Court's inherent *parens patriae* jurisdiction. We posit that it was in Elaan's best interests to have Lynda declared a second parent, that there was a legislative gap in the

⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

⁷ *Convention on the Rights of the Child*, GA Res 44/25, UNGAOR, 44th Sess, Supp No 49, UN Doc A/44/49 (1989) 166 at 167–68 (arts 2, 8). See also Mitchell L Yell et al, “The Legal History of Special Education: What a Long, Strange Trip It’s Been!” (1998) 19:4 Remedial & Special Education 219 at 220. Regrettably, care at home is not the universal reality for children with disabilities around the world. See Georgette Mulheir, “Deinstitutionalisation: A Human Rights Priority for Children with Disabilities” (2012) 9 Equal Rights Rev 117, online: <www.equalrightstrust.org/ertdocumentbank/err9_mulheir.pdf>.

*Children's Law Reform Act*⁸ that permitted the Court to make the declaration, and that our nonconjugal status was not a legal impediment to the declaration.⁹

In our view, it is always in a child's best interests to have all the emotional, financial, and pragmatic support necessary to meet his or her needs. It is, similarly, always in a child's best interest to ensure that his or her custodial parent has all the support that she or he needs. There are a number of ways to accomplish these twin goals, drawing on various sources of support including family, friends, and state assistance. Often, and particularly in the cases of children born with unanticipated special needs, it takes time and experimentation to determine how best to meet a child's needs and those of her custodial parent. In Elaan's case, we found that his needs were best met through a combination of support from his biological mother, his non-biological mother, extended family, privately-funded care, and state support in the form of in-home assistance and access to a superb special-needs school. All of these pieces were, and are, necessary to ensure his well-being. Thus, in his case, it is accurate to say that legal recognition

⁸ RSO 1990, c C 12 [*CLRA*].

⁹ Conversely, a conjugal relationship with the biological or adopted parent should not be determinative of parental status. The Alberta Court of Appeal reached an opposite conclusion in *Doe v Alberta*, 2007 ABCA 50, 278 DLR (4th) 1, where the biological mother entered into an express written agreement with her cohabiting male partner (who did not father the child), which stipulated that the partner had neither parental rights nor any obligation to support the child. For an insightful analysis of the Court's reliance on the traditional nuclear family to impose parental status on the basis of spousal status, see Brenda Cossman, "Parenting Beyond the Nuclear Family: *Doe v. Alberta*" (2007) 45:2 *Alta L Rev* 501.

and protection of his second parent was in his best interests. We would not wish to suggest that this conclusion can be generalized to other families. Clearly, children can thrive in a single-parent family, supported by friends, family, and public services. Certainly, courts should be careful not to favour heteronormative two-parent households, resisting the temptation to “find fathers”¹⁰ for children where parenthood does not actually exist. This assessment must necessarily be made on a case-by-case basis.

In Part III of the article, we describe Ontario’s new *All Families are Equal Act*,¹¹ including restrictions that might have prevented our family from being recognized had our case been heard a few weeks later than it was. We argue that loving parental relationships can be created in a myriad of ways and that courts must have the ability to examine new family formations in keeping with changing social realities and to protect the best interests of children in unique situations. The emergence of new family forms involving same-sex couples and those who use reproductive technologies (among other permutations) has already disrupted centuries-old definitions of what it means to be a family. At the same time, the creation of new non-normative families has opened up space for a recognition that the patriarchal nuclear family has never been the norm

¹⁰ Susan B Boyd et al, *Autonomous Motherhood?: A Socio-Legal Study of Choice and Constraint* (Toronto: University of Toronto Press, 2015) at 30.

¹¹ *An Act to amend the Children’s Law Reform Act, the Vital Statistics Act and various other Acts respecting parentage and related registrations*, SO 2016, c 23 [*All Families are Equal Act*].

in many socio-cultural communities.¹² Indeed, “[t]he traditional family structure remains significantly more prevalent among middle or upper class white individuals.”¹³ Thus, a legal regime that only recognizes traditional families will disadvantage vulnerable children, including racialized children and those with complex disabilities. Finally, in Part IV, we examine historical and contemporary examples of nonconjugal parenting. We argue that a child’s right to be loved must not be limited by his or her parents’ marital/cohabiting status, sexual relationship, or, indeed, when the parental relationship came into existence. We conclude that the state should support any and all relationships that have the capacity to further loving and happy homes for all children.

PART I: LOVE MAKES A FAMILY (OUR STORY)

We are both professors in the Faculty of Law at the University of Ottawa. We have been friends and colleagues for more than a decade, but we are not “spouses”¹⁴ or a same-sex couple.¹⁵ We do not cohabit together, although we do reside in vertically adjacent units in the same condominium. We have, since Elaan was a baby, co-parented him. In some respects, we treat our two units as the upstairs and downstairs of a shared family home. In

¹² See Stephanie Coontz, *Marriage, a History: From Obedience to Intimacy or How Love Conquered Marriage* (New York: Viking, 2005) at 24–31.

¹³ Jessica R. Feinberg, “Friends as Co-Parents” (2009) 43:4 *USF L Rev* 799 at 814.

¹⁴ See *Family Law Act*, RSO 1990, c F-3, s 1(1) [*FLA*].

¹⁵ See Bakht Affidavit, *supra* note 4 at paras 1, 3, 4; Collins Affidavit, *supra* note 4 at para 1.

other ways, we co-parent Elaan like any other parents who do not reside together.¹⁶ Our unique living situation defies easy categorization; some might call us *sui generis*, but we consider ourselves a family that shares unconditional love, trust, and consistent care as our foundation.

Natasha made the decision in 2009 to become a single mother by choice,¹⁷ using anonymous donor sperm. Over the course of her pregnancy, Lynda offered to become Natasha's birth coach.¹⁸ Lynda was present at Elaan's birth and was the first person other than the surgeon to see him. We imagined that Lynda would be a significant person in Elaan's life, but we did not intend, at that time, for her to become his parent.

About six months after Elaan's birth, it became clear that he was not meeting typical developmental milestones. After several tests, Elaan was diagnosed with periventricular leukomalacia,¹⁹ which eventually resulted

¹⁶ This may include separated or divorced couples who raise children together, multiple-parent families who agree in advance to raise children in different households, or some other family variation we have not thought of. In terms of our living arrangement, Elaan lives and sleeps in Natasha's unit, but he often spends time in Lynda's unit where some of his clothes, feeding supplies, toys, books, and adaptive equipment can also be found.

¹⁷ See Boyd, *supra* note 10 at 14–15.

¹⁸ See Bakht Affidavit, *supra* note 4 at paras 3, 5; Collins Affidavit, *supra* note 4 at para 5.

¹⁹ "Periventricular leukomalacia (PVL) is a type of brain injury affecting infants. The condition involves the death of small areas of brain tissue around fluid-filled areas called ventricles. The damage creates 'holes' in the brain. 'Leuko' refers to the brain's white matter. 'Periventricular' refers to the area around the ventricles":

in the more specific diagnoses of complex cerebral palsy, spastic quadriplegia, cortical visual impairment, asthma, epilepsy, acid reflux, and sleep apnea. Elaan is non-verbal, though his comprehension is very good. He communicates by using a head-operated switch device and by answering “yes” with his smile. He requires assistance with all activities of daily living including mobility, dressing, toileting, and eating. He is fed through a gastric tube and uses a variety of adaptive equipment including a wheelchair, a wheeled walker, a standing frame, and various types of specialized seating. He is a bright, joyful, and beautiful little boy who adores music, school, and the outdoors. Elaan needs 24-hour care and will continue to need such care for the rest of his life.²⁰

Very quickly following Elaan’s birth, Lynda’s role as an important “aunt” in his life turned to that of a daily caregiver alongside Natasha, her role increasing over time to the point where she became a second mother to him. Lynda is intimately involved in all areas of Elaan’s daily

“Periventricular Leukomalacia” *Medline Plus* (6 November 2017), online: <<https://medlineplus.gov/ency/article/007232.htm>>.

²⁰ See Bakht Affidavit, *supra* note 4 at para 25; Collins Affidavit, *supra* note 4 at para 11; *Application for Declaration of Parentage, Collins/Bakht* (Affidavit of Dr. Anne Rowan-Legg at paras 2–3) [Rowan-Legg Affidavit]. The enumeration of Elaan’s medical issues in this way can sound daunting and even reductionist. We are very conscious that Elaan is much more than a list of his medical diagnoses. As parents, we feel privileged to have his joyous spirit; he is teaching us so much about what is important in life. However, we needed the Court to understand the details of raising a child with multiple complex disabilities—and the increased caregiving responsibilities this involves—in order to make the case that having a second parent was in Elaan’s best interests.

life.²¹ When he was just a year old, Lynda sold her three-bedroom house to move into Natasha's condominium building so that she could help to raise Elaan more conveniently on a daily basis.²²

Lynda and Natasha share all child rearing, including day-to-day obligations relating to Elaan, such as feeding him, dressing him, bathing him, attending to his school work and social life, attending to his medical care and therapies, and all other regular and major aspects of child rearing.²³ Lynda and Natasha, along with Elaan, eat meals and shop together, visit families and friends together, nurse Elaan's hurts together, and plan for his future together.²⁴ We share in Elaan's financial support²⁵ and coordinate our teaching schedules so that one of us is always available to care for Elaan should he be ill or have a doctor's appointment.²⁶ Most importantly, Lynda and Elaan share a deep loving bond that is characteristic of a parental relationship. Though he cannot express his feelings verbally, Elaan's responses and interactions demonstrate that he experiences Lynda as one of his parents.²⁷ Natasha also treats Lynda as a co-parent,

²¹ See Bakht Affidavit, *supra* note 4 at paras 18–23; Collins Affidavit, *supra* note 4 at paras 3, 9, 13, 16.

²² See Collins Affidavit, *supra* note 4 at paras 14, 19–20.

²³ See Bakht Affidavit, *supra* note 4 at paras 24–36; *Ibid* at paras 20–29.

²⁴ See Bakht Affidavit, *supra* note 4 at para 17; Collins Affidavit, *supra* note 4 at paras 16, 20, 63.

²⁵ See Collins Affidavit, *supra* note 4 at paras 61–63.

²⁶ See Bakht Affidavit, *supra* note 4 at para 43.

²⁷ See *ibid* at paras 23, 38.

involving her in all aspects of decision making regarding Elaan's medical care, nutrition, schooling, recreation, and therapies.²⁸

Eventually, we sought to have our de facto parenting arrangement recognized in law. This was important to us for a number of reasons. For Natasha, it was about peace of mind. Given Elaan's specialized needs for care and support, which will only increase as he grows older, knowing that Elaan had another legal parent to rely on was reassuring. Having Lynda as a second parent would ensure that Elaan would be eligible for her medical insurance benefits and the disabled dependents provisions of her pension, that he could inherit on intestacy, and that he would have another person legally required to meet his needs physically, emotionally, spiritually, and financially.²⁹ "For Lynda, it was about being able to say to doctors and teachers (and anyone who would listen!) 'this is my son!'"³⁰ But a formal recognition of her parentage would also ensure that Lynda could consent to medical treatment, register Elaan in school, claim him as a dependent for any tax purposes, and make decisions regarding his education and moral upbringing. Without the formal recognition of her parentage, if any authority were to question Lynda's legal relationship to Elaan, she would have none other than that of a "babysitter". We also felt it was important to honour the relationship that had grown so organically between Lynda and Elaan and to

²⁸ See *ibid* at paras 2, 17-18, 37-45; Collins Affidavit, *supra* note 4 at paras 57-58.

²⁹ See *A(A) v B(B)*, 2007 ONCA 2 at para 14, 83 OR (3d) 561.

³⁰ Collins & Bakht, *supra* note 3.

simultaneously challenge the historic hegemony of marriage and “one-size-fits-all models of parenting.”³¹

PART II: A FAMILY MAKES LAW

In April 2016, we filed an application³² with the Superior Court of Justice, Family Court, seeking a declaration of parentage for Lynda.³³ We filed affidavits³⁴ outlining our position that Elaan’s best interests would be served with legal recognition of Lynda’s role in his life. Our Application was filed as a “basket motion” (or unopposed motion) and thus, we were not required—though we were prepared—to submit a factum. We would have argued that the Court should use its inherent *parens*

³¹ *Ibid.*

³² We sought an application for a declaration of parentage pursuant to section 4 of the *CLRA*, *supra* note 8. Section 4 of the *CLRA* states: “Any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child” (*ibid.*). However, because the *CLRA* was interpreted to permit a child to have only one male parent and one female parent (see *Rutherford v Ontario (Deputy Registrar General)* (2006), 81 OR (3d) 81 at para 102, 270 DLR (4th) 90 (Ont Sup Ct) [*Rutherford v Ontario*]; *A(A) v B(B)*, *supra* note 29 at para 34), we were, in fact, asking the Court to invoke its *parens patriae* jurisdiction to fulfill our request.

³³ We also sought an order for joint custodial rights of Elaan with respect to major decisions about his care and upbringing under the *CLRA* (recognizing that this alone would not accurately reflect Lynda’s true role in Elaan’s life as his mother) and an order amending Elaan’s birth certificate under the *Vital Statistics Act*, RSO 1990, c V 4, to show both Natasha Bakht and Lynda Collins as parents of Elaan. See *Application for Declaration of Parentage, Collins/Bakht*, *supra* note 4 at paras 1–4.

³⁴ See Bakht Affidavit, *supra* note 4; Collins Affidavit, *supra* note 4.

patriae jurisdiction to grant the declaration because: (a) it would be in Elaan’s best interests to do so; (b) there was a legislative gap in the *Children’s Law Reform Act*; and (c) nonconjugal is not a legal impediment to the proposed declaration.

(A) ELAAN’S BEST INTERESTS

In our application and draft factum, we argued that it was in Elaan’s best interests to have Lynda’s role as his parent legally recognized through a declaration of parentage. Because his needs for care and support are profound, and because as he gets older, meeting his needs physically, emotionally, and financially will become even more challenging, having two legal parents would be a significant benefit to him.

The *Child and Family Services Act*³⁵ precluded Lynda from adopting Elaan because she is not a “relative”³⁶ by blood or marriage. Natasha would have had to give up her parental rights to Elaan in order for Lynda to adopt him, which was not what we wanted. We were also unable to make use of the simplified step-parent adoption route as we were not in a conjugal relationship.³⁷ The fact that marital status was the only hurdle preventing us from accessing the step-parent adoption provisions in the *CFSA* is discriminatory and almost certainly unconstitutional, but

³⁵ RSO 1990, c C 11 [*CFSA*].

³⁶ See *ibid*, ss 3(1), 141(8).

³⁷ See *ibid*, s 158(2)(b). See also Shelley AM Gavigan, “Legal Forms, Family Forms, Gendered Norms: What Is a Spouse?” (1999) 14:1 *CJLS* 127 at 156.

we opted not to pursue this legal route. Because the future care of a child with disabilities like Elaan's is exorbitantly expensive,³⁸ we felt it would be financially irresponsible to spend the amount of money needed to constitutionally challenge the legislation.³⁹ A declaration of parentage, as the Ontario Court of Appeal noted in *A.(A.) v. B.(B.)*, "provides practical and symbolic recognition of the parent-child relationship",⁴⁰ conferring the same rights and obligations as those of biological or adoptive parents.⁴¹

As in *A.(A.) v. B.(B.)*,⁴² we believe it was significant that Natasha, Elaan's biological parent, supported the application for the declaration of parentage.⁴³

³⁸ See Donna Anderson et al, "The Personal Costs of Caring for a Child with a Disability: A Review of the Literature" (2007) 122:1 Public Health Reports 3 at 7.

³⁹ See "How Much Does a Family Lawyer Cost?", *Fine & Associates* (blog), online: <www.torontodivorcelaw.com/family-lawyer-cost/>.

⁴⁰ *Supra* note 29 at para 15.

⁴¹ In particular, a declaration of parentage: confers "all the rights and obligations of a custodial parent"; "determines lineage"; "is a lifelong immutable declaration of status"; "allows the parent to fully participate in the child's life"; "ensures that the child will inherit on intestacy"; allows the declared parent to "obtain an OHIP [Ontario Health Insurance Plan] card, a social insurance number, airline tickets and passports for the child"; allows the declared parent to "register the child in school"; would require the declared parent's consent for any future adoption; and allows the declared parent to "assert her rights under various laws, such as the *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A.": *ibid* at para 14.

⁴² See *supra* note 29 at paras 4, 14.

⁴³ In *DLC v GES*, 2006 SKCA 79 at para 61, 270 DLR (4th) 597, the Court articulated "a deep social and legal norm which presumes that fit parents generally act in their children's best interests." As the Court

However, we are not of the view that this should be determinative. In our case, Natasha's support of the application showed that a loving and capable parent and the person who knows Elaan best also trusted the applicant to care for her child like a parent. The ultimate question, however, ought to be whether a declaration of parentage is in the child's best interests.⁴⁴ This might include an inquiry into whether the parent seeking the declaration has a parental relationship with the child, whether there is love and affection between the child and the applicant parent, the length of time that the parent-like relationship has existed, the ability and willingness of the proposed parent to provide for the child, the child's preferences, if ascertainable,⁴⁵ and the relationship between the legally-

noted, "[i]t also reflects a fundamental corollary view that a fit parent's assessment of a child's best interests should not be lightly interfered with" (*ibid*).

⁴⁴ Because human relationships are multifaceted, complicated, and dynamic, there should be no presumption that a specific relationship between an adult and a child does not give rise to the possibility of the adult being found to be a parent. The appropriate approach is to closely examine the realities of the relationship and all of its circumstances. We believe, however, that the custodial parent's views should be given very substantial weight and careful consideration in determining the best interests of the child. As the Saskatchewan Court of Appeal noted in *DLC v GES*, "[s]ingle parents, in particular, often need assistance from friends and others in caring for their children. Those caregivers will frequently develop a strong attachment to the children and *vice versa*. But . . . it would be a serious overstep to impose court-sanctioned visiting rights as a consequence of such relationships": *ibid* at para 65.

⁴⁵ These indicia of a parental relationship are comparable to section 24(2) of the *CLRA*, *supra* note 8, which directs judges hearing custody or access applications to consider the needs and circumstances of the child.

recognized parent and the applicant parent.⁴⁶ This would be a context-dependent, fact-specific inquiry that puts the child's interests first. Importantly, a best interests inquiry must not import questionable biases such as a desire for children to be raised in an environment that most closely resembles the traditional heteronormative family. Because the courts' *parens patriae* jurisdiction is fundamentally about protecting the interests of vulnerable children, it allows courts to craft individualized remedies for unique situations.

In our case, to establish that it was in Elaan's best interests to have Lynda declared a parent, we gathered affidavits from friends, family members, and Elaan's professional caregivers to testify to the vital parental role that Lynda plays in Elaan's life, and that the family is healthy, happy, and functioning well. Elaan's paediatrician since 2012, Dr. Anne Rowan-Legg, who observed Lynda and Elaan on multiple occasions in both clinic and hospital settings, stated in her affidavit:

⁴⁶ With respect to this final criterion, if the relationship between the legally-recognized parent and the applicant parent is particularly antagonistic, it may well not be in the best interests of the child for the declaration of parentage to be granted. For example, in *Buist v Greaves*, the Court denied an application for declaration of parentage where the biological mother opposed it and there was a high "level of suspicion, misunderstanding and difficulty . . . permeat[ing] the current relationship" between the parties: [1997] OJ No 2646 at 10, 11 OFLR 3 (Ont Ct J (Gen Div)). In that case, the child did not consider the Applicant his mother and the Applicant had drafted and commissioned an affidavit confirming the biological mother was the child's sole parent (see *ibid* at 16–17).

[Lynda] presents as a responsible and loving parental figure for Elaan . . . I have had the opportunity to care for many children with complex medical needs. . . . I feel that I can, through this professional role, attest to some of the specific qualities of parents that are able to care for children with special needs. The role takes incredible patience, commitment, creativity (to troubleshoot difficult situations), unflappability, optimism, confidence, and deep love. I have seen all of these qualities, amongst many others, in both Lynda and Natasha. They are remarkable individuals, and an even stronger team. . . .

Given Elaan's complex medical needs, and the joy he clearly derives from his close bond with Lynda, I believe that it is in Elaan's best interests that Lynda be recognized as his legal parent. This will give Lynda the opportunity to participate fully in medical decision-making for Elaan, and will ensure that Elaan enjoys the physical, financial and psychological support of two legal parents.⁴⁷

Like Dr. Rowan-Legg, Anne Levesque, a disability rights lawyer and friend of the Bakht-Collins family, also observed that Lynda and Natasha form a strong parental unit for this uniquely vulnerable child. Ms. Levesque noted:

⁴⁷ Rowan-Legg Affidavit, *supra* note 20 at paras 4, 8, 10.

As a human rights lawyer, I have served as a member and chair of the Human Rights Committee of the Council of Canadians with Disabilities—Canada’s largest disability rights and advocacy group—for nearly a decade. Based on my experience, two of the greatest barriers facing persons with disabilities in Canada are poverty and social exclusion. In my view, Lynda’s Application for a Declaration of Parentage, if granted, will help Elaan overcome these two important barriers.⁴⁸

Finally, the evidence of Leslie Walker, Principal of Elaan’s school at the Ottawa Children’s Treatment Centre, was also strongly supportive of the Application. Ms. Walker stated:

Having observed hundreds of families during my years in special needs education, I would say that Lynda, Natasha and Elaan present as a loving and effective family unit. Lynda is clearly intimately involved with every aspect of Elaan’s life and she demonstrates an obvious interest in and dedication to his education. Lynda works actively with our team to maximize Elaan’s progress and wellbeing and is clearly committed to him as a parent. Elaan in turn clearly derives joy,

⁴⁸ *Application for Declaration of Parentage, Collins/Bakht* (Affidavit of Anne Levesque at paras 5, 10).

love and a sense of security from Lynda's presence in his life.⁴⁹

Parents of children with complex disabilities face significant risks of caregiver burn-out and physical injury throughout the lifetime of their children.⁵⁰ By granting the declaration, we argued that the Court would be serving Elaan's best interests, both directly and indirectly, by providing an additional level of legal security and assurance to his biological parent. Parents of children with complex disabilities are often particularly in need of support because of the dramatic financial and emotional impact of raising and supporting these kids in a society that is not responsive to their various needs. In such a context, state support is clearly critical to ensure that both the caregiver and the child are given the assistance needed to thrive.⁵¹ However, recognizing more parents can also introduce the potential for creating more financial

⁴⁹ *Application for Declaration of Parentage, Collins/Bakht* (Affidavit of Leslie Walker at paras 8–9).

⁵⁰ See generally NA Murphy et al, "The Health of Caregivers for Children with Disabilities: Caregiver Perspectives" (2006) 33:2 Child 180, online: Pub Med <www.ncbi.nlm.nih.gov/pubmed/17291322>. See also S Matthew Liao, *The Right to Be Loved* (New York: Oxford University Press, 2015) at 138–139, who argues that "the duty to promote a child's being loved gives us further reasons to promote the primary dutybearers' welfare, health, psychological well-being, and so on, through generous welfare policies."

⁵¹ See Karen Syma Czapanskiy, "Chalimony: Seeking Equity between Parents of Children with Disabilities and Chronic Illnesses" (2010) 34:2 NYU Rev L & Soc Change 253 at 254–255. See also Christine Dobby, "Whose Responsibility? Disabled Adult 'Children of the Marriage' under the *Divorce Act* and the Canadian Social Welfare State" (2005) 20 Windsor Rev Legal Soc Issues 41.

support,⁵² more hands-on care, and more comfort, which will tend to be in a child's best interests.

Elaan revels in playing and spending time with his family. He recognizes Lynda as his parent and knows he can depend on her to care for him. Though the legal declaration would make no practical difference to our daily lived reality from Elaan's perspective, we took the position that it was in his best interests to have Lynda's role as his parent legally recognized. It was important for "law to catch up with life".⁵³

(B) FILLING THE LEGISLATIVE GAP IN THE CLRA

It is well established that courts may exercise their *parens patriae* jurisdiction to fill a legislative gap, including in the context of declarations of parentage.⁵⁴ In this case, a surprising gap in the *CLRA* allowed the Court to invoke *parens patriae*. Despite more than two decades of *Charter* jurisprudence on same-sex family rights, the *CLRA* did not allow the issuance of a declaration of parentage where it would result in a child having two mothers or two fathers.⁵⁵ This anomaly was patently inconsistent with contemporary Canadian values and *Charter* jurisprudence, and

⁵² "In contrast to many traditional families where only one parent contributes financially to the household," two friends may provide greater economic stability to a child where the family consists of "two financially independent individuals": Feinberg, *supra* note 13 at 815.

⁵³ E-mail from Angela Cameron to Natasha Bakht and Lynda Collins (17 November 2016).

⁵⁴ See *A(A) v B(B)*, *supra* note 29 at para 7.

⁵⁵ See *Rutherford v Ontario*, *supra* note 32 at para 102.

demonstrated the existence of a legislative gap in the statute. As the Court of Appeal held in *A.(A.) v. B.(B.)*:

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.⁵⁶

Similarly, the social and technological developments that lead two female friends to raise a child together were not contemplated by the legislature in drafting the *CLRA*. The *CLRA* was intended to promote the equality of all children but failed to keep pace with changes in society. The Court of Appeal explained:

Present social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the *CLRA*'s legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child's parents as adopting parents or "natural" parents. The

⁵⁶ *Supra* note 29 at para 34.

CLRA, however, does not recognize these forms of parenting and thus the children of these relationships are deprived of the equality of status that declarations of parentage provide.⁵⁷

Following the lead of the litigants in *A.(A.) v. B.(B.)*, we sought a declaration of parentage under the *CLRA*, knowing that (as in that case) the Court would likely decline because of the clear precedent stating that the *CLRA* precluded such a declaration when it would result in a child having two mothers. We then expected the Court, as it did in *A.(A.) v. B.(B.)*, to resort to its *parens patriae* jurisdiction to fill this obvious gap in the legislative scheme. Since the Court's order actually issued the declaration pursuant to the *CLRA* and there were no reasons provided in our case,⁵⁸ the use of the *parens patriae* jurisdiction remains unclear in our case.

However, even if there was no legislative gap in the *CLRA*, in our view, the Court would be justified in exercising its *parens patriae* jurisdiction in order to fulfill the *Act's* paramount objective.⁵⁹ Without the Court's intervention, the legislation actually becomes self-defeating, undermining rather than promoting Elaan's

⁵⁷ *Ibid* at para 35.

⁵⁸ The court order states: "Lynda Margaret Collins is a parent of the child, Elaan Das Bakht, born February 9, 2010 and that Lynda Margaret Collins shall be recognized in law as a parent of Elaan Das Bakht pursuant to section 4 of the *Children's Law Reform Act*."

⁵⁹ In *A(A) v B(B)*, *supra* note 29 at para 20, the Court of Appeal said the purpose of the *CLRA* was to declare that all children should have equal status.

equality and best interests. Here, the legislative gap was clear and had already been elucidated by the Court of Appeal in *A.(A.) v. B.(B.)*.⁶⁰

(C) NONCONJUGALITY IS NOT A LEGAL IMPEDIMENT TO A DECLARATION OF PARENTAGE

Finally, our draft factum argued that nothing in the *CLRA* or the jurisprudence prevents the court from issuing a declaration of parentage in a nonconjugal context. The *CLRA* permits courts to recognize nonbiological or social parents where the parent-child relationship has been established on a balance of probabilities.⁶¹ As the court held in *A.W.M. v. T.N.S.*: “In these changing times, court decisions on [declarations of] parentage focus less on the biological connection between child and parent and more on the substance of the relationship.”⁶² Moreover, “the declaration made . . . is not that the applicant is a child’s natural parent, but that he or she is recognized in law to be the father or mother of the child.”⁶³

In *Low v. Low*,⁶⁴ for example, the Court granted a declaration of parentage to the nonbiological father of a child born through artificial insemination, though the applicant’s marriage to the child’s mother had broken down some four years before the judgment. Similarly, in

⁶⁰ See *ibid* at paras 38–40.

⁶¹ See *supra* note 8, s 13(3).

⁶² 2014 ONSC 5420 at para 24, 54 RFL (7th) 155.

⁶³ *A(A) v B(B)*, *supra* note 29 at para 32.

⁶⁴ (1994), 114 DLR (4th) 709, 4 RFL (4th) 103 (Ont Ct J (Gen Div)).

D.W.H. v. D.J.R.,⁶⁵ the Alberta Court of Queen's Bench granted a declaration of parentage to the gay, nonbiological father of a child, where the applicant had never been in a conjugal relationship with the child's lesbian mother and was no longer in a conjugal relationship with the child's biological father. The Court held that "[i]t [was] contrary to the best interests of the child S. to be limited to the legal recognition of a sole parent".⁶⁶ The trial Court in *A.(A.) v. B.(B.)* noted that "[r]ecognition of parentage under the *CLRA* does not depend upon marital status."⁶⁷

In the recent case of *B.C.P. and L.P. v. A.R.P.*,⁶⁸ Justice Kiteley aptly observed:

Having heard many applications for declarations of parentage, these cases reflect the diversity of circumstances that are presented. . . . where a single person (without a domestic partner) is impregnated using [Assisted Reproductive Technologies] . . . *and other permutations and combinations in the straight and LGBTQ communities.*⁶⁹

Here, the Court clearly recognized the wide number of situations that may lead to declarations of parentage being sought, suggesting courts' openness to alternative parenting arrangements in the face of a changing society.

⁶⁵ 2011 ABQB 608, aff'd 2013 ABCA 240, 364 DLR (4th) 420.

⁶⁶ *Ibid* at para 139.

⁶⁷ (2003), 225 DLR (4th) 371 at para 16, 38 RFL (5th) 1 (Ont Sup Ct).

⁶⁸ 2016 ONSC 4518, 87 RFL (7th) 219.

⁶⁹ *Ibid* at para 8 [emphasis added].

For all practical purposes, Lynda and Natasha are in an analogous position to ex-spouses who are functioning effectively in co-parenting their child. The fact that a conjugal union never existed between us is immaterial to the best interests of Elaan—the *raison d'être* of the *CLRA*. “A person’s ability to love and offer emotional support to a child depends on his or her personality traits (such as empathy, sympathy, understanding, and kindness) and has no logical connection to that individual’s marital or relationship status.”⁷⁰ Indeed an analysis that focuses on the conjugal (or nonconjugal) nature of the relationship between the parents and fails to focus on each parent’s relationship with the child and their ability to co-parent simply misses the mark.

In terms of parenting ability, there is no logical reason to privilege sexual connections over all others. In fact, to do so would be to fail to offer much needed support to more vulnerable families, particularly those raising children with disabilities. An insistence on conjugality also disregards and discourages the myriad ways in which people exchange love and care.⁷¹ If law is to remain neutral among the various visions of the good life,⁷² it must be open to alternative family formations while remaining ever vigilant of a child’s best interests. The Law Commission of Canada presciently argued in its report, *Beyond*

⁷⁰ Feinberg, *supra* note 13 at 815.

⁷¹ See Nicole Civita, “Cauldrons for Intimacy and Conduits of Care: The Forms and Functions of Post-Marriage Families” (JD Paper, Georgetown Law, 2007) [unpublished].

⁷² See Milton C Regan Jr, *Family Law and the Pursuit of Intimacy* (New York: NYU Press, 1993) at 122, cited in Civita, *ibid*.

Conjugality,⁷³ that individuals must be accorded the maximum freedom to determine the relationships that matter to them. “The state ought to support any and all relationships that have the capacity to further relevant social goals, and to remain neutral with respect to individuals’ choice of a particular form or status.”⁷⁴

Ultimately, the Court was convinced that it was in Elaan’s best interests to have Lynda as a second parent and we received an order on November 7, 2016 formally declaring Lynda to be a parent of Elaan.⁷⁵

PART III: ALL FAMILIES ARE EQUAL* (*MAY NOT APPLY TO SOME FAMILIES)

Our legal victory was sweet, but in some ways short-lived. While we personally received the result we needed, on

⁷³ Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Law Commission of Canada, 21 December 2001) at 18 [*Beyond Conjugality*].

⁷⁴ *Ibid.* See also Judith Stacy, “Toward Equal Regard for Marriages and Other Imperfect Intimate Affiliations” (2003) 32:1 Hofstra L Rev 331.

⁷⁵ The Court did not provide any reasons for its decision. Thus, our case is not available on any legal database. We were simply given an order that “Lynda Margaret Collins is a parent of the child, Elaan Das Bakht. . . and that [she] shall be recognized in law as a parent of Elaan Das Bakht pursuant to section 4 of the *Children’s Law Reform Act*.” Lynda also received joint custodial rights together with Natasha regarding major decisions about the care and upbringing of Elaan. The Deputy Registrar General for the Province of Ontario was directed to amend Elaan’s birth certificate to add Lynda as a parent pursuant to section 2 of Regulation 1094 under the *Vital Statistics Act*. See *Vital Statistics Act*, RRO 1990, Reg 1094, s 2.

December 5, 2016, the *All Families are Equal Act* received royal assent.⁷⁶ The Honourable Yasir Naqvi, Attorney General of Ontario, introduced the *AFEA*, explaining its goal of treating all children equally and ending the uncertainty parents face when their children are conceived using assisted reproductive technologies. The *AFEA* developed out of an earlier private member's bill, which never passed.⁷⁷ The new *Act*, which made amendments to the *Children's Law Reform Act*, the *Vital Statistics Act* and thirty-nine other statutes in Ontario, sought to address several issues, including rules regarding the use and reimbursement of surrogates,⁷⁸ pre-conception parentage agreements, and was the first overhaul of antiquated parentage laws in the province since 1978.

The intention of the legislation is certainly progressive in that it attempts to dismantle the historically presumed connection between biology and parentage and recognizes to some extent that families may take different forms. The new legislation is particularly significant in providing clarity and certainty to LGBTQ parents who conceive through assisted reproduction.⁷⁹ The *AFEA* provides that the parents of a child conceived through

⁷⁶ Bill 28, *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment)*, 2nd Sess, 41st Leg, Ontario, 2016 (assented to 5 December 2016), SO 2016, c 23 [*AFEA*].

⁷⁷ Bill 137, *Cy and Ruby's Act (Parental Recognition)*, 1st Sess, 41st Parl, Ontario, 2015 (referred to the Standing Committee on Regulations and Private Bills 10 December 2015).

⁷⁸ The scope of this paper does not allow an examination of these provisions.

⁷⁹ Assisted reproduction under *AFEA* "means a method of conceiving other than by sexual intercourse": *AFEA*, *supra* note 76, s 1(1).

assisted reproduction are the birth parent and the birth parent's partner, if any, at the time of the child's conception.⁸⁰ This eliminates the need for the non-biological parent to go to court to have his or her parental status recognized in law using a declaration of parentage. It also settles in advance the legal relationship of donors of genetic material with respect to children born through assisted reproduction. The *AFEA* also permits multiple parents, up to four people, to be recognized without a court order, if all parties entered into a written pre-conception agreement to be parents of the child together.⁸¹

The new legislation is forward-looking in recognizing that alternative families exist, permitting parentage more easily in the context of conjugal same-sex couples, nonconjugal parents and multiple-parent families. However, while the purpose of the *AFEA* was to “create a bill that puts what's best for kids first—having a loving family”,⁸² ironically, the *AFEA* may foreclose the possibility of courts exercising their *parens patriae* jurisdiction to recognize certain non-normative families.

⁸⁰ *Ibid*, s 8(1).

⁸¹ The birth parent is required to be one of the parties to this pre-conception agreement: *ibid*, s 9(2)(b). Section 9(4) of *AFEA*, *ibid*, confirms that on the birth of a child contemplated by a pre-conception parentage agreement, the parties to the agreement shall be recognized in law to be parents of the child.

⁸² Ministry of the Attorney General, “About the All Families are Equal Act, 2016”, (29 November 2016), online: <<https://news.ontario.ca/mag/en/2016/11/about-the-all-families-are-equal-act-2016.html>>.

Under the *AFEA*, putative parents must form the intention to parent before the child's conception and that intention must be formalized in a pre-conception agreement. This requirement is coherent when one considers that LGBT parents generally plan the birth of their children and need to ensure certainty in this planning process. But, the intention to parent pre-conception is not the only way to ensure that children's interests are put first. Loving families can be and are created after a child's birth. Indeed, this is what step-parents, and those who "stand in the place of a parent" as it is understood in the context of child support, do regularly.⁸³

Yet the *AFEA* specifically restricts the granting of a declaration of parentage in certain situations. Specifically, section 13(4) of the *CLRA* states that a court shall not issue a declaration of parentage where:

1. A declaration of parentage. . . results in the child having more than two parents;
2. A declaration of parentage. . . results in the child having as a parent one other person, in addition to his or her birth parent, if that person is not a parent of the child under section 7, 8 or 9 [who is not otherwise a parent biologically, through a pre-conception parentage agreement, or by virtue of being the spouse of a birth parent where assisted reproduction is used].⁸⁴

⁸³ *CFSA*, *supra* note 35, s 158(2)(b). See also *FLA*, *supra* note 14, ss 1(1), 31; *Family Law Act*, SBC 2011, c 25, s 147(4) [*FLA* (BC)]; *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 2(2)(b).

⁸⁴ *AFEA*, *supra* note 76, s 13(4) [emphasis added].

Section 13(5) establishes the following prerequisites for a declaration of parentage in the above context:

1. The application for the declaration is made on or before the first anniversary of the child's birth, unless the court orders otherwise.
2. Every other person who is a parent of the child is a party to the application.
3. There is evidence that, before the child was conceived, every parent of the child and every person in respect of whom a declaration of parentage respecting that child is sought under the application intended to be, together, parents of the child.
4. The declaration is in the best interests of the child.⁸⁵

In other words, these provisions preclude a declaration of parentage where the intention to parent arises after a child's birth, even where such a declaration may be in the child's best interests.

The courts' *parens patriae* jurisdiction is an inherent power, arguably protected under section 96 of the Constitution. The Supreme Court has held that courts have an obligation to exercise it where necessary to protect the best interests of children.⁸⁶ However, the *AFEA* appears to

⁸⁵ *Ibid*, s 13(5).

⁸⁶ *Beson v Director of Child Welfare (Nfld)*, [1982] 2 SCR 716 at 724, 30 RFL (2d) 438.

at least attempt to fetter judicial discretion in this regard. Section 3 states that the *Act* determines “parentage for all purposes of the law of Ontario”⁸⁷ and section 13(4) states that a court “shall not issue a declaration of parentage”⁸⁸ in certain enumerated circumstances. This unusual step appears to be an attempt to preclude the issuance of a declaration of parentage under the *parens patriae* jurisdiction. If so, the provision is perhaps open to constitutional challenge, or may be ignored by judges who are confident in their inherent power to make rulings based on the *parens patriae* jurisdiction. Only time will tell.

An examination of the *Hansard* for the *AFEA* reveals that some legislators were concerned about the intention to parent restrictions placed on declarations of parentage. The Honourable Cheri DiNovo disagreed with the condition requiring the intention to parent to be formalized prior to conception or before a child’s first birthday, rather than allowing the best interests of the child to govern.⁸⁹ The Honourable Catherine Fife expressed similar concerns, noting that these provisions would prevent third and fourth parents from being recognized⁹⁰ where such parents formed the intention to parent after the

⁸⁷ *AFEA*, *supra* note 76, s 3.

⁸⁸ *Ibid*, s 13(4).

⁸⁹ Ontario, Legislative Assembly, *Official Report of the Debates (Hansard)*, 41st Leg, 2nd Sess, No 11 (3 October 2016) at 1450 (Hon Cheri DiNovo).

⁹⁰ *Ibid* at 1540 (Hon Catherine Fife). The *AFEA* restricts the number of parents to four where a pre-conception agreement is entered into. This statutory limit on the number of parents is somewhat arbitrary.

child's birth.⁹¹ The fact that these concerns were contemplated by the legislature suggests that people who are excluded from the *AFEA* by virtue of forming the intent to parent after the child's birth may not be able to use the courts' *parens patriae* jurisdiction. It would be very difficult to establish a legislative gap where the debates disclose that the legislature foresaw and considered such a situation and deliberately decided to exclude such people from parentage declarations.

While courts have noted that the existence of a legislative gap is not the only justification for exercising *parens patriae* jurisdiction, this is not a well-developed area in the context of declarations of parentage.⁹² The possibility that section 97 of the *Courts of Justice Act*⁹³

⁹¹ The *AFEA* is faithful to the letter of the legal precedent set in *A(A) v B(B)*, *supra* note 29 that a child may legally have three parents and perhaps even furthers the multiple parent scenario by permitting up to four parents who are parties to a pre-conception agreement. However, being faithful to the spirit of multiple parent families must also recognize that such families may be created in more ways than one (other than through an agreement pre-birth).

⁹² In *CR v Children's Aid Society of Hamilton* (2004), 8 RFL (6th) 285 at para 125, Czutrin J held that the *parens patriae* jurisdiction does not depend upon a legislative gap if the exercise of that jurisdiction is the only way to meet the paramount objective of legislation. In that case, the relevant legislation was the *Child and Family Services Act*, which articulates the promotion of "the best interests, protection and well being of children" as the paramount purpose of the *Act*: *supra* note 35, s 1(1). While there is no "paramount objective" specifically articulated in the *CLRA* as it pertains to declarations of parentage, in *A(A) v B(B)*, *supra* note 29, the Ontario Court of Appeal noted that the purpose of the *CLRA* was to declare that all children should have equal status.

⁹³ Section 97 of the *Courts of Justice Act*, RSO 1990, c C-43, states: "The Court of Appeal and the Superior Court of Justice, exclusive of the

could be used to make a binding declaration of right has to date only proven useful to people seeking negative declarations of parentage.⁹⁴ The only other avenue available for such parent applicants would be a costly and burdensome constitutional challenge to the *AFEA*.

A more flexible approach to declarations of parentage would have been prudent, given family forms are not set in stone, but constantly evolving. In British Columbia, section 31 of the *Family Law Act* permits courts to issue declarations of parentage “if there is a dispute or any uncertainty as to whether a person is or is not a parent under this Part”.⁹⁵ This section of the *FLA* appears to leave open the possibility that courts might grant declarations of parentage in situations outside of those contemplated explicitly under the *Act* or where there is a dispute about who the parents are. Such a residual provision in Ontario would have avoided excluding some families from an *Act* that claims to be about the equality of all families.

It is hard to understand the reasons for the timing restrictions on declarations of parentage in the *AFEA* as none were alluded to in the legislative debates. Perhaps the statutory limits were implemented to appease opponents concerned about floodgates or to protect the autonomy of intended parents from future interference, by drawing a

Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.”

⁹⁴ In *JR v LH* (2002), 117 ACWS (3d) 276 (Ont Sup Ct J), Justice Kiteley used section 97 of the *Courts of Justice Act*, *ibid*, to declare that the gestational carrier or surrogate, who was not biologically related to the twin children, and her husband were not parents of the children.

⁹⁵ *FLA* (BC), *supra* note 83, s 31.

legislative “bright line”. But the case law does not suggest a stampede of adults seeking to parent children where they are not obliged to do so. In fact, the reverse is true. Many family law cases are about people trying to avoid their parental duties, whether in the context of child support or missed access visits.⁹⁶ Even if people were clamoring to parent children who already have parents, we are not convinced this is necessarily a problem. An appropriate feminist application of the best interests of the child principle ought to be able to guide judicial decisions in such cases. In some instances, excluding a putative second (or subsequent) parent might serve both the best interests of the child and maternal autonomy. In others, recognizing an additional parent might improve the lives of both mothers and children; in all cases, the custodial parent’s views should be given very substantial weight and careful consideration.

Though the *AFEA* was generally ameliorative legislation, it was retrogressive in its restriction of the Court’s ability to protect the best interests of a child on a case-by-case basis where parentage might arise after birth. The timing around when a parental relationship is created is not a sound indicator of whether a particular relationship is important to the best interests of a particular child. And in the context of raising children with disabilities, a situation that is typically only known after a child’s birth, it may undermine efforts by people willing to create atypical families in order to pool resources and care, to

⁹⁶ See *Fair v Fair*, 2012 ONCA 900; *Collins v Colling*, 2017 ONSC 2232; *Punzo v Punzo*, 2016 ONCA 957, 90 RFL (7th) 304.

raise these children in supportive, healthy, loving, and flourishing environments.⁹⁷

PART IV: NONCONJUGAL CO-PARENTING: REVOLUTIONARY OR EVOLUTIONARY?

Numerous international and domestic legal instruments delineate the rights of children to grow up in a loving family.⁹⁸ The right of children to be loved has also been explored by philosopher S. Matthew Liao, who argues “every able person in appropriate circumstances has a duty to promote a child’s being loved *even when the biological*

⁹⁷ For a similar argument in the adoption context in the United States see Feinberg, *supra* note 13 at 802: “[S]ingle individuals whom the state deems eligible to adopt on their own, but who choose not to because of the great difficulties inherent in raising a child alone, may adopt if allowed to do so jointly with a close friend.”

⁹⁸ For example, the United Nations *Declaration on the Rights of the Child* states: “The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection” United Nations, *Declaration of the Rights of the Child*, GA Res 1386(XIV), UNGAOR, 14th Sess, Supp No 16, UN Doc A/4354 (1959) 19 at 20. The *Declaration of the Rights of the Child in Israel* (1989) describes every child as having “the rights to a family life—to nourishment, suitable housing, protection, love and understanding”: *Declaration of the Rights of the Child in Israel*, 1989, online: <<http://cms.education.gov.il/EducationCMS/Units/Pniyot/KavPatuah/ZhuyotTalmid/ZahuyotEladimIsrael.html>>, cited in Liao, *supra* note 50 at 1; *The Children’s Charter of Japan* (1951) declares that “All children shall be entitled to be brought up in their own homes with proper love”: *Children’s Charter of Japan*, 1951, online: <<http://www.s-keimei.or.jp/houritu.htm>>, cited in Liao, *supra* note 50 at 1.

*parents are available.*⁹⁹ Some parents (whether single or partnered) may successfully discharge their duty to love their children using only their own resources, with all this entails in terms of funds, emotional and physical reserves, and time. But many people may find this difficult without assistance, owing to the demands of employment, caregiving of other family members, the special needs of some children or parents, mental health challenges, or other factors.¹⁰⁰ That other persons also have duties¹⁰¹ toward children can alleviate the burdens on the primary caregiver(s) and promote all children's well-being. Examples abound of care for children by people in addition to biological parents.

In African American and Indigenous communities, a network of people, in addition to biological mothers, have often cared for and raised children.¹⁰² Grandmothers,

⁹⁹ Liao, *supra* note 50 at 134.

¹⁰⁰ *Ibid* at 138.

¹⁰¹ Liao notes that other people who are not biological parents, but also have the duty to love children need not do the same thing as parents to fulfill their responsibilities. They might support better childcare programs and more flexible workplace policies or pay taxes and vote for governmental policies that help parents discharge their duties: *ibid* at 138, 140.

¹⁰² See bell hooks, *Feminist Theory: From Margin to Center*, 2nd ed (Cambridge, MA: South End, 2000) at 144; Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (New York: Routledge, 2000) at 45, 173. Sarah Morales notes that historically in Coast Salish communities, grandparents or great aunts and uncles raised children, especially the first born. Within Hul'qumi'num family units, all the offspring of one's aunts and uncles are considered to be your brothers and sisters: Sarah Noël Morales, *Snuw'uyulh: Fostering an Understanding of the Hul'qumi'num Legal*

aunts, other relatives, and non-relatives who are treated like family, have all been part of networks of care. Community-based child care has historically been critical for Black women who had to leave the home to work and provide for their families.¹⁰³ Where childcare is unaffordable or non-existent, these other parents have played essential roles in child rearing. In South Asian communities, multi-generational families are commonplace and numerous. Non-biologically-related adults may function as “aunties” and “uncles” to a child.¹⁰⁴ bell hooks described the tradition of multiple parents and people who do not have biological children sharing child rearing as “revolutionary parenting.”¹⁰⁵ She noted that it is revolutionary in that it opposes the Western ideology that maintains that two

Tradition, (DCL Thesis, University of Victoria, Faculty of Law, 2014) [unpublished] at 114.

¹⁰³ hooks, *supra* note 102 at 144.

¹⁰⁴ Indeed, it may be that Natasha was particularly open to becoming a nonconjugal co-parent because she was raised in an immigrant Indian and Pakistani community in Toronto in which the majority of her local “extended family” were not biologically related to her. Lynda, in turn, was raised in a blended family with four parents—two biological parents and two step-parents who arrived at different points in her childhood and brought with them step-siblings and a half-sibling. We both learned through experience that love makes a family.

¹⁰⁵ hooks, *supra* note 102 at 133. See also Adje van de Sande & Peter Menzies, “Native and Mainstream Parenting: A Comparative Study” (2003) 4:1 *Native J Soc Work* 126 at 129; Angela Mae Kupenda, “Two Parents are Better Than None: Whether Two Single African American Adults—Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other—Should Be Allowed to Jointly Adopt and Co-Parent African American Children” (1997) 35:4 *U Louisville J Fam L* 703 at 707.

biological heterosexual parents, and in particular mothers, should be raising children.¹⁰⁶

The communal caring for children by numerous people in addition to biological mothers, also known as “alloparenting”,¹⁰⁷ may also be seen as evolutionary; the practice dates as far back as the hunter-gatherer period.¹⁰⁸ Anthropologist Sarah Blaffer Hrdy has argued that human evolutionary history is characterized by cooperative offspring care. She notes that homo sapiens could never have evolved if human mothers had been required to raise children on their own. Because infants are so dependent at birth and remain so for years, mothers had to rely on social supports extending beyond their own kin to raise their young.¹⁰⁹ Hrdy compellingly suggests that cooperation in child care was crucial to human success in ancestral hunting and gathering groups.¹¹⁰

¹⁰⁶ See Bella DePaulo, “Why Friends Should Have Full Legal Rights as Co-Parents”, (31 March 2017), *Single at Heart with Bella DePaulo, Ph.D.* (blog), online: <blogs.psychcentral.com>.

¹⁰⁷ *The Oxford English Dictionary* defines alloparent as “An adult animal or person involved in parent-like care of an individual which is not his or her offspring.”: *The Oxford English Dictionary*, *sub verbo* “alloparent”.

¹⁰⁸ Sarah Blaffer Hrdy, *Mothers and Others: The Evolutionary Origins of Mutual Understanding* (Cambridge: Belknap Press of Harvard University Press, 2009) at 32.

¹⁰⁹ *Ibid* at 270.

¹¹⁰ *Ibid* at 271.

Contemporary permutations of alloparenting¹¹¹ likely also exist in abundance, though the area is arguably understudied. One documented example concerns a remote community in northern Tanzania, where the Kurya Indigenous people have a longstanding tradition of heterosexual women marrying each other in order to preserve their homes and lifestyles without husbands. The women live, cook, and raise children together, though they are not lovers. Women may take male lovers, but any resulting children are raised in the female marriage.¹¹² This practice has seen a resurgence recently, as women seek more freedom and power.¹¹³ In Western societies, adults are similarly seeking multiple paths to family formation, including intentional nonconjugal parenting units.

In 2014, the New York Circuit Court heard an uncontested second parent adoption application by two friends who were co-parenting a child.¹¹⁴ The parties were long time co-workers and friends. Although they were “opposite-sex” co-parents, they did not live together and

¹¹¹ “In a number of cultures, both within and outside the United States, community members often come together to raise children, with friends of the biological parents assuming a parental role in the child’s life.”: Feinberg, *supra* note 13 at 802. See also Kupenda, *supra* note 105 at 712.

¹¹² Coontz, *supra* note 12 at 26–27.

¹¹³ WITW Staff, “In Tanzania, Straight Women Are Marrying One Another”, *New York Times* (2 August 2016), online: <nytlive.nytimes.com/womenintheworld/2016/08/02/in-tanzania-straight-women-are-marrying-one-another/>. See also Coontz, *ibid* at 27.

¹¹⁴ *Matter of G*, 251 NYLJ (3d) 26 (Sur Ct, NY County 2013) [*Matter of G*].

had never dated. The friends tried to have a child together using assisted reproduction, however, they were not successful in conceiving. They decided to adopt a child, travelling together to Ethiopia for the adoption. Since the parties were not married and could not legally adopt in Ethiopia, they decided that the mother would adopt their daughter on her own and wait until their return to New York before bringing an application for a second parent adoption. The parties also both agreed that if they were unsuccessful in obtaining a second parent adoption, they would continue to co-parent together informally. When the child was two years old, the parties applied jointly for a second parent adoption. The court interpreted section 110 of the *Domestic Relations Law*, which had been amended to permit adoption by “any two unmarried adult intimate partners together”¹¹⁵ to include nonconjugal partners. In her analysis, Justice Mella held that the 2010 amendment to the *Act*, suggested the legislature intended for the phrase to encompass more than just common law partners. Indeed, the court stated, “the experience of jointly and intentionally parenting a child is itself of the most intimate nature.”¹¹⁶

¹¹⁵ DOM § 110 (2014) [emphasis added].

¹¹⁶ *Matter of G*, *supra* note 114 at para 24. In *Matter of A*, 27 Misc 3d 304 (Fam Ct, Queens County 2010), the court permitted a paternal grandmother and a paternal aunt to jointly adopt three children. The mother and aunt lived together and were committed to each other and to the three children. Similarly, in *Matter of Chan*, 37 Misc 3d 358 (Sur Ct, NY County 2012), the prospective parent who had previously lived with the mother and had been a “functional parent” but was not a spouse or living with the mother in a conjugal relationship, established that the adoption would be in the best interests of the child. However, in the earlier case, *Matter of Garrett*, 17 Misc 3d 414 (Sur Ct, Oneida County 2007), the court denied the joint petition adoption by a natural

The judge was also satisfied that the child's best interests would be served by having her father recognized as a parent given that the friends actually functioned as the child's parents and had created a nurturing family environment.¹¹⁷

Many people are now connecting on co-parenting websites such as Modamily¹¹⁸ or Family By Design,¹¹⁹ which offer opportunities to find co-parents as well as resources for navigating the parenting partnership process. This can include single people who want to have a child and share responsibilities for raising the child together without necessarily being in a romantic relationship. Some have suggested that the decoupling of romance and marriage from having children is a positive step that, especially for women, removes the pressure to find the right romantic relationship in order to become a parent.¹²⁰ Indeed, single mothers by choice have also cited this rationale for their mothering decisions.¹²¹

mother and her biological brother for him to become the child's legal father.

¹¹⁷ *Matter of G*, *supra* note 114 at para 6.

¹¹⁸ *Modamily*, online: <www.modamily.com>.

¹¹⁹ *Family by Design*, online: <www.familybydesign.com>.

¹²⁰ See Makda Ghebresslassie, "Partners in Parenting, Not Love: Singles Pair up to Raise A Child", *CBC News* (15 February 2017), online: <www.cbc.ca/news>.

¹²¹ See Rachel Lau, "Single Parent by Choice: Women Turn to Sperm Donors to Conceive", *Global News* (27 April 2017), online: <globalnews.ca/news>.

In terms of stability, many people enter conjugal relationships in search of the one person with whom they expect to spend the rest of their lives. However, these relationships arguably involve a greater chance of dissolution than close friendships, which studies show are often important, stable, intimate, and committed.¹²² “Many women report feeling emotionally closer to their female friends than to their husbands; and research shows that women usually make a deep commitment and devote a great deal of time and intensity to their friends.”¹²³

This is not to suggest that nonconjugal co-parenting units are superior to their more traditional counterparts. Indeed, in our view, our case stands for the proposition that there is no limit to the configurations of relationships that can support the healthy raising of children. Natasha’s decision to co-parent with Lynda after initially thinking she would be a single mother by choice should not be taken as a statement about the capacity of single mothers (or fathers) to effectively raise children with or without disabilities.¹²⁴ Our co-parenting arrangement came about

¹²² See Feinberg, *supra* note 13 at 812. Among the Na community in the Yunnan Province of southwestern China, brothers and sisters live together in non-incestuous relationships, jointly raising, educating, and supporting the children to whom the sister gives birth. “Among the Na, sibling relationships are much more meaningful and long-lasting than love affairs or sexual relationships. . . some of the sibling-based households . . . remained together for ten or more generations, with brothers and sisters practically inseparable—‘companions for life.’”: Coontz, *supra* note 12 at 32–33.

¹²³ Feinberg, *supra* note 13 at 812.

¹²⁴ Indeed even “single mothers by choice typically rely on support networks of various forms, refuting any notion that their autonomous

organically and we felt that it worked for each of us—and especially for Elaan. The most effective parenting requires being flexible in form so as to be able to respond to all parties' needs and interests as they evolve.

Moreover, parenting does not occur in a vacuum. Many people play crucial roles in a child's life and parents and children require ongoing support from multiple sources.¹²⁵ This is especially the case for parents raising children with complex disabilities. That nonconjugal co-parenting has been a necessary part of our history and continues to exist in more contemporary cultural practices suggests that States, social agencies, and other institutions should support conditions for all kinds of relationships that further children's right to be loved¹²⁶ without reference to conjugality. Regardless of the gender, dis/ability, sexual orientation, race, religious background, biological connection to the child, or marital status of the parent(s), most families want what is best for their children. They

motherhood is conducted in splendid isolation.”: Boyd, *supra* note 10 at 15.

¹²⁵ As we write this section of the paper, we are sitting in a hospital room while our dear friend strokes Elaan's hair to help him sleep. She has become a significant support to both of us and yet another adult that Elaan can rely on. Because parenting a child (certainly any child, but especially one with complex disabilities) is so incredibly unpredictable and time-consuming, we are ever grateful for all of the day-to-day care we get from family, friends, our different communities, and professional resources.

¹²⁶ Liao, *supra* note 50 at 139.

want to be able to create a home or homes that are safe, loving, and happy environments.¹²⁷

CONCLUSION

The traditional family structure no longer reflects the realities of modern day parenting. As same-sex couples, single parents, blended families, and multiple parent families have demonstrated, non-traditional families can and do provide children with the love, support, and stability they need to flourish. Family law recognizes and protects many such non-traditional family compositions. Given this shift in both society and family law, it makes little sense to deny individuals the latitude to determine which important relationships should be brought within the scope of law.¹²⁸

We believe that our case shows that family law ought to be steered in the direction that “exalts freedom, honours commitment and encourages care.”¹²⁹ If family policy explicitly privileges conjugal relationships or nonconjugal relationships that are only formed in one particular way (for example, before conception), it will fail to offer much-needed support to more vulnerable families, including those raising children with complex disabilities. There was certainly a desperate need to restructure parentage laws in Ontario, as the *All Families are Equal Act* did. However, it ought not to have restricted the ability of judges to determine when a novel family formation is in

¹²⁷ See Joshua Gamson, *Modern Families: Stories of Extraordinary Journeys to Kinship* (New York: NYU Press, 2015).

¹²⁸ *Beyond Conjuality*, *supra* note 73 at 117.

¹²⁹ Civita, *supra* note 71 at 12.

the best interests of a child. We must leave open the possibility for love to be imagined in ways we had not anticipated. The interest in parenting partnerships may well grow as the number of single people continues to increase.¹³⁰ This may result in a rejuvenation of older familial practices or new incarnations of parenting. What ought to matter is the love and care that children have the right to receive. As society acknowledges the ever-

¹³⁰ See Bella DePaulo, "What Has Changed for Single Americans in The Past Decade", *The Washington Post* (20 September 2016), online: <www.washingtonpost.com/news>; Claire Brownell, "They're One of Canada's Fastest Growing Demographics, So Why Are Politicians Ignoring The Single Voter?", *National Post* (12 June 2015), online: <news.nationalpost.com>.

expanding cadre of family compositions,¹³¹ law should not lag behind.¹³²

¹³¹ The interest and fascination with non-traditional families is evident in popular culture. See *Three Men and a Baby*, 1987, DVD (Burbank, Cal: Touchstone Home Entertainment, 2002); *Kate and Allie—The Complete Series*, 1984, DVD (Pointe-Claire, Que: Unidisc Music Inc, 2010); *Modern Family: The Complete First Season*, 2009, DVD (Los Angeles: 20th Century Fox Home Entertainment, 2010); *Full House: The Complete Series Collection*, 1987, DVD (Burbank, Cal: Warner Home Video, 2015); *Sister, Sister: The Complete Collection*, 1994, DVD (Toronto: Visual Entertainment Inc, 2016); *Two and a Half Men: The Complete Series*, 2003, DVD (Burbank, Cal: Warner Home Entertainment, 2015); *Fuller House: The Complete First Season*, 2016, DVD (Burbank, Cal: Warner Brothers, 2017); *The L Word Complete Series*, 2004, DVD (Hollywood: Paramount Pictures Home Entertainment, 2011). We recently rediscovered that even the classic Canadian novel *Anne of Green Gables* by Lucy Maud Montgomery involved the nonconjugal parenting by a brother and sister of an orphaned girl, while the sequel chronicles the formation of another family involving two women friends (Marilla and Rachel Lynde) raising adopted children together. LM Montgomery, *Anne of Green Gables* (Toronto: McGraw Hill Ryerson, 1968); LM Montgomery, *Anne of Avonlea* (Toronto: McGraw Hill Ryerson, 1968).

¹³² Another area in which family law is lagging behind the reality of modern parenting, is the prohibition in BC's *Family Law Act* that does not permit the creation of parenting agreements or domestic contracts related to a child's upbringing before separation: See *FLA* (BC), *supra* note 83, s 44(2). This legislative provision was created at a time when it was thought children were only being raised in the context of a conjugal couple that lives in the same household. With the recognition of multiple-parent and nonconjugal-parent families who never intend to live together, this section must be amended so parents can agree to parenting and guardianship responsibilities in an agreement should they so wish. See Barbara Findlay & Zara Suleman, *Baby Steps: Assisted Reproductive Technology and the BC Family Law Act* (Vancouver: CLEBC, 2013), online: <www.barbarafindlay.com> at 7. For an example of a parenting agreement, see Stacy, *supra* note 74 at 332–334.