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## Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility

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## GENDERING LEGAL PARENTHOOD: BIO-GENETIC TIES, INTENTIONALITY AND RESPONSIBILITY

Susan B. Boyd\*

*Recent legal developments in Canada have produced contradictory trends in relation to defining parenthood and determining parental rights and responsibilities. In some cases, the intention to parent appears to be given considerable weight. In others, bio-genetic ties prevail, or influence the extent to which intentionality will be recognized. This article suggests a feminist approach to the determination of legal parenthood, drawing on literature about the gendered nature of parenting law, fathers' rights, and the fragmentation of parenthood. It explores the apparently contradictory legal trends by examining the extent to which bio-genetic ties and intentionality inform the fragmentation of parenthood, and argues that gender still plays an important role in mediating both intentionality and bio-genetic ties. Strategic possibilities in relation to law reform are suggested, drawing on empirical studies about non-traditional families, especially lesbian-headed families. These studies point to a complex approach to bio-genetic ties and intentionality that the law may need to address in order to better protect the best interests of children and to enhance the autonomy of women who wish to define the conditions under which they parent a child.*

*Des développements juridiques récents au Canada ont produit des tendances contraires en rapport avec la définition du statut de parent et la détermination des droits et des responsabilités parentaux. Dans certains cas, on semble accorder beaucoup de poids à l'intention de devenir parent. Dans d'autres, les liens bio-génétiques prévalent, ou influencent la mesure dans laquelle sera reconnue l'intentionnalité. Cet article présente une approche féministe à la détermination du statut juridique de parent, s'inspirant des écrits au sujet de la nature sexiste du droit parental, des droits des pères et de la fragmentation du concept de parent. Il explore les tendances juridiques d'apparence contraires en examinant la mesure dans laquelle les liens bio-génétiques et l'intentionnalité s'imposent dans la fragmentation du concept de parent et soutient que le sexe continue à jouer un rôle important lorsque sont établis les rapports entre l'intentionnalité et les liens bio-génétiques. L'auteure suggère des possibilités stratégiques de réforme du droit en s'inspirant d'études empiriques au sujet de familles non-traditionnelles, surtout celles ayant une lesbienne comme chef. Ces études indiquent une approche complexe aux liens bio-génétiques et à*

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*l'intentionnalité dont le droit devra peut-être tenir compte afin de mieux protéger les meilleurs intérêts des enfants et d'accroître l'autonomie des femmes qui veulent définir les conditions dans lesquelles elles deviennent parent d'un enfant.*

## I. INTRODUCTION

[S]hould the legal parent-child relationship arise from (a) strictly biological connection to the child; (b) an intent on the part of the adult to create the relationship; (c) a combination of the two; (d) a relationship to someone with the biological connection with the child?<sup>1</sup>

In the mid-1990s, a flurry of literature on legal parenthood emerged, arising from the increased visibility of lesbian mothers co-parenting children from birth and the vexed question of the role of sperm donors in relation to lesbian headed families.<sup>2</sup> The potential of “extended” family forms that might include, for instance, two mothers and a father, to challenge the patriarchal norm of the heterosexual nuclear family was intuitively attractive,<sup>3</sup> as was the challenge to assumptions that genetic ties determine familial ties. Still, several authors cautioned that even when lesbians and gay men were concerned, parenting claims arose in a highly gendered context, especially given the ongoing – and possibly accelerating – imperative within the legal system to “find fathers” for children. Despite dramatic improvements in the legal status of lesbian mothers, the ability of women to raise children autonomously from men was not yet secure. Moreover, legal recognition of a sperm donor as a father could be seen as a valuing of patriarchal genetic ties, while women’s socially constructed care-giving responsibilities remained taken for granted and undervalued in society. Women’s intentions in relation to their chosen family form were often undermined. These factors, some suggested, must be taken into account when assessing the ability of “alternative” family forms to challenge normative assumptions and when considering how law might recognize “alternative” families.<sup>4</sup>

The past decade has witnessed changes that invite a re-visiting of this analysis of legal parenthood. Same sex marriage has been legalized in Canada and unmarried same sex cohabitants are legally recognized for many purposes. Family law has become largely gender neutral, partly due to the increased recognition of same sex relationships, but also reflecting the

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<sup>1</sup> *Fraess v. Alberta (Minister of Justice and Attorney General)* (2005), 23 R.F.L. (6<sup>th</sup>) 101 (Q.B.) at para. 12 Clarke J.

<sup>2</sup> The American case *Thomas S. v. Robin Y.*, 599 N.Y.S. 2d 377 (Fam. 1993), reversed on appeal, generated considerable analysis, including by lesbian feminists: e.g. Katherine Arnup & Susan Boyd, “Familial Disputes? Sperm Donors, Lesbian Mothers, and Legal Parenthood” in Didi Herman & Carl Stychin, eds., *Legal Inversions: Lesbians, Gay Men, and the Politics of Law* (Philadelphia: Temple University Press, 1995), 77-101; Kate Harrison, “Fresh or Frozen: Lesbian Mothers, Sperm Donors, and Limited Fathers” in Martha Albertson Fineman & Isabel Karpin, eds., *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (New York: Columbia University Press, 1995), 167-201; Nancy Polikoff, “Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors are Not Fathers” (2000) 2 *Geo. J. Gender & L.* 57-90. See also Ruthann Robson, “Mother: The Legal Domestication of Lesbian Existence” in Martha Albertson Fineman & Isabel Karpin, eds., *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (New York: Columbia University Press, 1995), 103-117.

<sup>3</sup> Rebecca Westerfield, “Is it possible for a child to have too many devoted and supportive parents or too much love?” *Lesbian/Gay Law Notes* 33 (letter, June 1993), at 2.

<sup>4</sup> Arnup & Boyd, *supra* note 2.

influence of the fathers' rights lobby.<sup>5</sup> Sexuality and procreation have increasingly become uncoupled both technologically and socially, and "baby making of all sorts, including the hi-tech and clinical kind, has increasingly occurred outside heterosexual marriage."<sup>6</sup> For women a major consequence is that pregnancy need not arise as a result of sexual intercourse with a man. Also, childrearing need not correlate with biological or even gestational connection with a child. It is no longer possible to rely on old legal assumptions that genetic parenthood is congruent with birth or the fact that a man is married to or in a relationship with a birth mother.<sup>7</sup> We have known for some time the flaws in the presumption of paternity – the presumption that the husband of a woman who gave birth is the genetic father of the child, originally designed primarily for patriarchal inheritance purposes.<sup>8</sup> However, only since egg donation became feasible was the common law presumption that the woman who gave birth was also the genetic mother disturbed.<sup>9</sup> Suffice to say that easy presumptions about parenthood can no longer be drawn from the facts of either birth or marriage.

Legal systems have barely begun to rethink their norms and presumptions to take account of these new social and technological realities.<sup>10</sup> Little law reform has occurred in Canada in comparison to some other western countries such as the U.K., which has clarified that legal maternity will be defined by reference to birth.<sup>11</sup> Canada's federal law dealing with regulation of reproductive technologies does not address the implications for parenting law, although it has made it clear that human reproductive material is not for sale.<sup>12</sup> Nor have many provinces clarified the complex questions arising from donor insemination and surrogacy as well as same

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<sup>5</sup> Susan Boyd & Claire Young, "Feminism, Law, and Public Policy: Family Feuds and Taxing Times" (2004) 42 Osgoode Hall L. J. 545.

<sup>6</sup> Maureen Sullivan, *The Family of Woman: Lesbian Mothers, Their Children, and the Undoing of Gender* (Berkeley: University of California Press, 2004) at 1.

<sup>7</sup> As Roxanne Mykitiuk points out, the common law presumption of paternity and the legal construct of legitimacy illustrate that paternity is social: "Beyond Conception: Legal Determinations of Filiation in the Context of Reproductive Technologies" (2001) 39 Osgoode Hall L.J. 771 at 782. Of course, prior to the advent of reproductive technologies, some women nurtured children without having a genetic or gestational tie to them, for example when children are adopted, or, in Black communities in the United States: Dorothy E. Roberts, "The Genetic Tie" (1995) 62 U. Chicago L. Rev. 209 at 269-272.

<sup>8</sup> Many experts (genetic and otherwise) state that about 10% of children have a different father from the one who is listed on the birth registration and socially recognised: Carolyn Abraham, "Mommy's little secret" *Globe and Mail* (14 December 2002) F1. While various studies and reports give numbers from 0.8% to over 30%, recent research indicates the actual overall rate is likely under 10% and perhaps even under 5%: Kermyt G. Anderson, "How Well Does Paternity Confidence Match Actual Paternity? Evidence From Worldwide Non-Paternity Rates" (2006) 48 *Current Anthropology* 511; Mark A. Bellis, Karen Hughes, Sara Hughes & John R. Ashton, "Measuring paternal discrepancy and its public health consequences" (2005) 59 *J. Epidemiology & Community Health* 749.

<sup>9</sup> Gillian Douglas, *An Introduction to Family Law*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2004) at 41. Cindy Baldassi has recently found evidence that the presumptions related to motherhood are less clear in their origins and of less ancient heritage than is commonly assumed: *Babies or Blastocysts, Parents or Progenitors? Embryo Donation and the Concept of Adoption* (LL.M. thesis, University of British Columbia, 2006) [unpublished] at 80-90.

<sup>10</sup> For an exception, see Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Position Paper Two: Parentage* (Melbourne, July 2005).

<sup>11</sup> Stuart Bridge, "Assisted Reproduction and the Legal Definition of Parentage" in Andrew Bainham, Shelley Day Sclater & Martin Richards, eds., *What is a Parent? A Socio-Legal Analysis* (Oxford & Portland, Oregon: Hart Publishing, 1999), 73 at 76-77.

<sup>12</sup> *Assisted Human Reproduction Act*, S.C. 2004, c.2. The federal government does not have primary jurisdiction over definitions of parenthood.

sex parenting, although the trend thus far appears to be to start with the premise that the birth mother is the legal mother.<sup>13</sup> Canadian judges who are faced with new questions of legal parenthood must therefore exercise considerable discretion by extrapolating from existing (often old) legislation and precedent on children, parenthood, adoption, and so on.

Little Canadian case law exists on questions arising from surrogacy or lesbian and gay parenting, barring the few recent, mainly lower court cases discussed below. For instance, it is not certain that a married lesbian couple will be automatically recognized as the exclusive legal parents of a child born into their marriage if a known sperm donor or genetic father exists or makes a claim.<sup>14</sup> The potentially contradictory relationship between fact scenarios involving lesbian co-parents who intend to raise their child without a male parent and the Supreme Court of Canada's affirmation of the rights of genetic fathers in the *Trociuk* case<sup>15</sup> is far from being sorted out. Current family law statutes offer little assistance in determining who the legal parents of a child are, and often refer to "mother" and "father".<sup>16</sup> Moreover, it remains unclear at a policy level whether law reform on same sex parenting should be geared towards protection of the "homonuclear" family based on dyadic parenting, or a multiple parent model.<sup>17</sup>

This article first outlines the trends and literatures informing its attempt to develop a feminist approach to the determination of legal parentage and parenthood. It then reviews recent Canadian cases dealing with legal parenthood, which variously emphasize bio-genetic ties and intention. The third part analyzes the extent to which bio-genetic ties and intentionality inform the fragmentation of parenthood that seems evident in the cases, and the extent to which gender still plays a role in determining legal parenthood. The final part raises strategic possibilities in relation to law reform, drawing in part on empirical studies of non-traditional families such as lesbian headed families and step-families. These studies point to a complexity of treatment of bio-genetic ties and intentionality that the law may need to address in order to better protect the best interests of children.

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<sup>13</sup> As of the end of 2006, only Québec, the Yukon, Manitoba, Alberta and Newfoundland appear to have legislation clarifying that the partner of a woman inseminated using donor sperm will be the legal father. Manitoba's statute allows for the woman's common law female partner to be registered as the co-parent: *Vital Statistics Act*, C.C.S.M. c. V60, s. 3(6) as does Québec's. As a result of the cases *Gill and Maher, Murray and Popoff v. Ministry of Health*, 2001 BHRT 34 [*Gill*], *A.A. v. New Brunswick (Department of Family and Community Services)*, [2004] NBHRBID No. 4 [*A.A. v. New Brunswick*], and *M.D.R. v. Ontario (Deputy Registrar General)*, [2006] O.J. No. 2268 (Sup. Ct. J.) (QL), P.U. Rivard J., this is also the situation in B.C. N.B., and Ontario.

<sup>14</sup> An exception might be Québec, where a civil union between parents carries significant weight along with the additional element of a "parental project" between the parents. Article 538.3 of the Code Civil states that, "if a child is born of a parental project involving assisted procreation between married or civil union spouses during the marriage or the civil union or within three hundred days after its dissolution or annulment, the spouse of the woman who gave birth to the child is *presumed* to be the child's other parent." [emphasis added]. In *L.O. v. S.J.* [2006] J.Q. no 450 (Sup. Ct.), decided that a sperm donor for lesbian parents was not a legal parent because he had not been part of the parental project. But see *S.G. v. L.C.* [2004] R.D.F. 517 (Sup. Ct.), where a marriage between two lesbians who were both on the birth registration conflicted with the judge's assessment that a parental project existed between the birth mother and the sperm donor, not the birth mother and her lesbian partner.

<sup>15</sup> *Trociuk v. British Columbia* [2003] 1 S.C.R. 835 [*Trociuk* SCC].

<sup>16</sup> E.g. *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 27 on Parental Guardianship and ss. 34 and 35 on custody.

<sup>17</sup> Fiona Kelly, "Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and Their Children into Canadian Family Law" (2004) 21 Can. J. Fam. L. 133.

## II. TRENDS AND LITERATURES

### A. The Gender of Parenting Law

The fraught area of post-separation parenting disputes has shown that the field of parenting remains gendered even in the face of an increasingly formalistic, gender neutral stance in the field. The status of fathers in relation to children has been strengthened, whereas the caregiving labour and responsibility of mothers is often, and possibly increasingly, undervalued or rendered invisible.<sup>18</sup> It is not clear that the best interests of children are served under this trend. As well, women's inequality in society and in the family is increasingly overlooked – even, disappointingly, in Canadian equality rights jurisprudence.<sup>19</sup> Indeed, in the 21<sup>st</sup> century the gender of custody law has become perversely invisible at the level of public policy in Canada.<sup>20</sup> Ironically, the increased invisibility of motherwork<sup>21</sup> has arguably occurred in part due to the need to make family law more gender neutral so as to accommodate same sex relationships. Bringing a gender sensitive analysis to parenting law can, then, generate some degree of tension with the politics of inclusion for same sex families. However, in a society that remains highly gendered, including in relation to parenting, it is, I suggest, necessary to do so.

An important factor informing gender neutral trends in parenting law is that fathers' rights claims to formal equality in relation to children have obtained considerable purchase in both the legal and popular culture. The political climate is heavily influenced by the fathers' rights movement, which seeks ways to enhance the legal status of fathers based on bio-genetic ties alone. Many conservative fathers' rights advocates stress bio-genetic rights in their law reform interventions, and by no means feel that their right to parent is constrained by the legal institutions of marriage or divorce.<sup>22</sup> That is, it is increasingly irrelevant to determinations of legal parentage whether a man has a relationship with the mother of a child. While many applaud the new interest of men in fatherhood, the consequences are complex – not least for women's ability to make decisions in relation to children and chosen family forms. One Canadian group has suggested that fathers should have rights to children based on genetics alone, asserting an essentialist vision of parenthood that obviates the significance of social parenting, for which mothers are still held more responsible in society<sup>23</sup>:

I think it should be a law that both parents are on the birth certificate. I believe if the mother does not tell who the father is but if a man does come forward at any time, even if it's 10 years later, and says "I am that child's father", that due diligence is done. It's simple to do. A simple test will prove if that man is the father, and then that man will have the opportunity to enter into that child's life in a productive role.<sup>24</sup>

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<sup>18</sup> E.g. Susan B. Boyd, *Child Custody, Law, and Women's Work* (Don Mills: Oxford University Press, 2003).

<sup>19</sup> See, e.g., Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003) 48 McGill L. J. 627.

<sup>20</sup> Boyd & Young, *supra* note 5.

<sup>21</sup> Lorna Turnbull, *Double Jeopardy: Motherwork and the Law* (Toronto: Sumach Press, 2001).

<sup>22</sup> Janice Drakich, "In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood" (1989) 3 C.J.W.L. 69 at 81. For a cross-national treatment of fathers' rights activism and its impact on law reform, see Richard Collier & Sally Sheldon, eds., *Fathers Rights Activism and Law Reform in Comparative Perspective* (Oxford: Hart Publishing, 2006).

<sup>23</sup> Boyd, *Child Custody*, *supra* note 18, at 173; Jane Lewis & Elaine Welsh, "Fathering practices in twenty-six intact families and the implications for child contact" (2005) 1 Int'l J. L. in Context 81.

<sup>24</sup> Family Forum, public consultations of the Special Joint Committee on Custody and Access, May 19, 1998.

Even before the fathers' rights movement, the importance of paternity was in "*inverse relationship* to the amount of physical and emotional care provided by fathers."<sup>25</sup> Further enhancement of paternal rights makes this inverse relationship even more acute.

Moreover, the "pro-contact" culture promoted by modern family law often demonizes mothers who do not nurture contact between fathers and children.<sup>26</sup> This culture has developed mainly in relation to parents who divorce or separate after a period of cohabitation. However, as we shall see, some cases suggest a more general shift towards a normative model that enhances paternal contact with children, regardless of whether a cohabitation relationship has existed between their genetic parents.<sup>27</sup>

## **B. Fragmenting Parenthood: A Gendered Phenomenon**

Feminist scholars have recently pointed out that both fatherhood and motherhood have become increasingly fragmented concepts, especially as a result of developments in relation to reproductive technologies. Drawing on research documenting the increasing separation of marriage and parenthood through which families have become fragmented,<sup>28</sup> Sally Sheldon suggests that the fragmentation of families relies especially on a fragmentation of *fatherhood*.<sup>29</sup> That is, after a child's biological parents separate, a child may come to have both a biological father and a social father, while continuing – as most children do – to live with a (re-partnered) genetic mother. Moreover, reproductive technologies allow for even greater possibilities concerning the sub-division of fatherhood into genetic and social components than does the rise of cohabitation, divorce, single-parenting, and step-parenting. Sheldon argues that over the past decade, in the U.K. at least, cracks in the overdetermining power of the ideology of the traditional nuclear/exclusive family have emerged, for example, with greater recognition of unmarried (genetic) fathers, even if a mother is in a relationship with a man who is acting as a social father. There is increasing openness to the idea that it can be in the best interests of a child to have more than one man sharing some claim to recognition as her father.

Fatherhood is not, of course, the only form of parenthood that has fragmented and found multiple means through which to be recognized. Motherhood – once defined by gestation and birth – has with the advent of reproductive technologies been even more fragmented than fatherhood, into its genetic, gestational, and rearing aspects. Notably, however, the fragmentation of fatherhood and of motherhood does not occur in the same way, nor does it happen in a gender neutral manner.<sup>30</sup> Family law judges have, says Roxanne Mykitiuk, "always been willing to bestow paternal status upon men on the basis of *either* biological *or* social relationships."<sup>31</sup> But now technology has expanded the choice that fathers experience in relation to parenthood:

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<sup>25</sup> Carol Smart, "'There is of Course the Distinction Dictated by Nature': Law and the Problem of Paternity" in Michelle Stanworth, ed., *Reproductive Technologies: Gender, Motherhood, and Medicine* (Minneapolis: University of Minnesota Press, 1987), 107 at 117.

<sup>26</sup> Helen Rhoades, "The 'No Contact Mother': Reconstructions of Motherhood in the Era of the 'New Father'" (2002) 16 Int'l J. L. Pol'y & Fam. 71-94; Susan B. Boyd, "Demonizing Mothers: Fathers' Rights Discourses in Child Custody Law Reform Processes", (2004) 6 J. Assoc. for Research on Mothering 52.

<sup>27</sup> In the U.K. context, see Sally Sheldon, "Fragmenting Fatherhood: The Regulation of Reproductive Technologies" (2005) 68 Mo. L. Rev. 523 at 528-9.

<sup>28</sup> Carol Smart & Bren Neale, *Family Fragments?* (Cambridge: Polity, 1999).

<sup>29</sup> Sheldon, "Fragmenting", *supra* note 27.

<sup>30</sup> Mykitiuk, "Beyond Conception", *supra* note 7 at 772. See also Roxanne Mykitiuk, "Fragmenting the Body" (1994) 2 Austl. Feminist L. J. 63.

<sup>31</sup> Mykitiuk, "Beyond Conception", *supra* note 7 at 785. This point is similar to that made by Smart, *supra* note 25 concerning the inverse relationship between care and the importance of paternity.

Recent advances in genetic testing have offered fathers a *double* element of choice. A man who is not married to the mother of his child can choose to recognize that child as his own, while married men can choose to deny paternity on the basis of genetic evidence.<sup>32</sup>

The choices that women make in relation to motherhood may not, however, be as free as men's in relation to fatherhood. While biological fathers may choose whether to develop a social tie with children, a mother's biological connection with a child tends to impose an automatic social relationship.<sup>33</sup> Even in the face of reproductive technologies, Mykitiuk notes that the concept of maternity remains a naturalized one that too often fuses genetic, gestational, and caregiving roles. As a result, maternal legal status tends to be accorded to women only if they fulfil both the biological and behavioural requirements: a birth mother's failure to properly care for a child "denaturalizes" her, rendering her unfit as a mother.<sup>34</sup> In the case of lesbian co-mothers, the non-birth mother fails to offer the biological component, as a rule, and often encounters an uphill battle to be legally recognized.<sup>35</sup> Moreover, since both men and women are capable of nurturing and rearing infants,<sup>36</sup> women's disproportionate responsibility for caregiving labour is increasingly rendered invisible. Finally, and perversely, reproductive technology means that maternity itself is now indeterminate – that is, a child can have a genetic mother and a birth/biological mother, and anyone can play a caregiving role.<sup>37</sup> At the same time, paternity now appears to be completely certain, due to DNA testing, whereas it was indeterminate in the past. Reproductive technologies place "the asymmetry of filiation law in sharp relief."<sup>38</sup>

With the gendered and fragmented nature of parenthood in mind, I turn now to literatures that have considered the implications of the "new parenthood" by analyzing the relevance of, first, bio-genetic ties and, second, intentionality.

### 1. The role of bio-genetics

Many authors have noted a widespread tendency for legal and social policies to indulge in genetic essentialism, the Human Genome Initiative being a commonly cited example. Increasingly, it is regarded as crucial for a child to know the "truth" about her genetic origin and identity.<sup>39</sup> I take the view that determination of a child's best interests is more complex and must pay more attention to social parenting and the quality of relations among parents. Moreover, it is clear that the construction of "the genetic tie" is not natural, neutral, or even necessarily scientific; rather it is socially and historically indeterminate and is often mediated,

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<sup>32</sup> Mykitiuk, "Beyond Conception", *supra* note 7 at 783.

<sup>33</sup> Roberts, *supra* note 7 at 254.

<sup>34</sup> Mykitiuk, "Beyond Conception", *supra* note 7 at 790.

<sup>35</sup> It is possible for a co-mother to donate her egg to the gestational/birth mother, so that one offers a genetic and the other a biological component, but this scenario remains rare. See Fiona Kelly, "Resisting Social Motherhood: The Asymmetrical Development of Maternal and Paternal Claims to Parenthood", (Paper, *Legal Intersections*, the Annual Meeting of the Canadian Law and Society Association, York University, June 2, 2006) [unpublished, on file with the author] for an analysis of the uncertain status of lesbian co-mothers, drawing on Mykitiuk's asymmetry analysis.

<sup>36</sup> Mykitiuk, "Beyond Conception", *supra* note 7 at 792.

<sup>37</sup> See Baldassi, *supra* note 8, Chapter 4.

<sup>38</sup> Mykitiuk, "Beyond Conception", *supra* note 7 at 793.

<sup>39</sup> Julie Wallbank, "The Role of Rights and Utility in Instituting a Child's Right to Know Her Genetic History" (2004) 13 Soc. & Legal Stud. 245. Margaret Somerville takes genetic essentialism to an extreme, arguing that children have the right not only to an identified biological mother and father but also to be reared by them: "Gay rights, children's rights" *National Post*, July 14, 2005 (online).



problematically, by the race, class, and gender of the parties involved. Determinations of parenthood, for example, have reinforced hierarchies based on race and racism, class, and patriarchy. As a result, the genetic tie “links individuals together while it preserves social boundaries.”<sup>40</sup>

In terms of gender, Western family law has privileged the male seed over the female “growing of children.”<sup>41</sup> Indeed, there was a time under the common law when a child born to an unmarried woman was defined as *filius nullius* (child of no-one) despite the child’s genetic and biological link to the mother. In terms of race, Roberts has shown that in the United States, the notion that race is inherited “has shaped the social meaning of the genetic tie to maintain a racial caste system based on white superiority and racial purity.”<sup>42</sup> She also suggests the importance of looking at race and gender together: laws on slavery, and more contemporarily, child protection laws, tend to weaken the presumption of maternal rights when the bond between Black women and their genetically related children is at issue.<sup>43</sup> In contrast, genetic ties between white women and white children have been reinforced, so long as women abide by taboos against sexual relations between white women and Black men.<sup>44</sup>

In recent years, family law has stressed genetic parenthood in relation to both parental (mostly paternal) rights to have contact with children, and parental (mostly paternal) liabilities such as child support. Fathers’ rights advocates, state policy, and family law have all stressed the former, whereas state policy in relation to fiscal responsibilities and family law is more concerned with the latter. This trend to emphasize genetics is contradictory, since it has occurred alongside the increasing visibility of “alternative” family forms that do not rest on assumptions of bio-genetic ties. Lesbian headed families provide a clear example. But many working in that field suggest that these family forms continue to be viewed as “aberration” from the norm, and that familial ideology premised on “natural” genetic ties still dominates questions of who is a mother and who is a father for various purposes.<sup>45</sup>

Moreover, the legal system seems ambivalent about the role of genetics in relation to the responsibilities of legal parenthood. The emphasis on genetic ties in relation to child support means that genetic fathers might be held responsible for their children’s financial support regardless of any intended or actual social relationship between them.<sup>46</sup> But in a reflection of the fiscal imperative of the neo-liberal state, it is also the case that men who are not genetically related to a child, but are found to have acted as the child’s social parent, can be held liable for child support.<sup>47</sup> It is clear that genetics play a role, but are not of exclusive importance, in determining the responsibilities, if not the rights, of legal fatherhood.

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<sup>40</sup> Roberts, *supra* note 7.

<sup>41</sup> Barbara Katz Rothman, “Daddy Plants a Seed: Personhood under Patriarchy” (1996) 47 *Hastings L. J.* 1241 at 1245. See also Barbara Katz Rothman, *Recreating Motherhood* (New Brunswick, N.J.: Rutgers University Press, 2000). [*Recreating*].

<sup>42</sup> Roberts, *supra* note 7 at 213.

<sup>43</sup> Roberts, *supra* note 7 at 267-9.

<sup>44</sup> *Ibid.* at 226-227.

<sup>45</sup> E.g. Kelly, *supra* note 35.

<sup>46</sup> Sally Sheldon, “Unwilling Fathers and Abortion: Terminating Men’s Child Support Obligations?” (2003) 66 *Mo. L. Rev.* 175. Nicholas Bala suggests that Canada has one of the most expansive definitions of social fatherhood in this regard: “‘Who is a ‘Parent’? ‘Standing in the Place of a Parent’ and the *Child Support Guidelines* s. 5”, in *Special Lectures on Family Law* (Toronto: Irwin Law, 2006), forthcoming.

<sup>47</sup> *Chartier v. Chartier*, [1999] 1 SCR 242. Brenda Cossman, “Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project” in Brenda Cossman & Judy Fudge, eds. *Privatization, Law and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 169-217.

## 2. The Role of Intentionality

Increasingly, the role of intentionality has been flagged in relation to legal parenthood.<sup>48</sup> For instance, some authors in literature on surrogacy have argued that legal recognition should be given to a person's intention or desire to be regarded as a parent, and to fulfill parental functions.<sup>49</sup> Indeed, Marjorie Shultz suggested in 1990 that "intentional arrangements that arise out of reproductive technology offer the opportunity for a constructive experiment," noting that existing status-based parental responsibility (e.g. divorced or unwed fathers' obligations to children) has hardly been a model of success.<sup>50</sup> A woman who commissions a surrogate mother to carry a child for her but who has no genetic connection to the child may nevertheless view herself as responsible in part for initiating the existence of the child,<sup>51</sup> indicating a form of intentionality quite different from that which would accompany a genetic tie. Traditional surrogacy cases seem to follow this line of thought, often awarding custody to the "intentional parents", although it must be noted that these parents typically include at least one genetic parent (male) who has donated his sperm.<sup>52</sup> Genetics and intention here operate in combination. As well, the intended family form (one father, one mother) in many surrogate arrangements fits nicely within a traditional heterosexual nuclear ideology. That said, Richard Storrow has suggested that intent-based schemes for parentage will foster equality for unmarried, gay and lesbian and single persons.<sup>53</sup>

A focus on intention might at first glance appear promising in relation to modern legal parenthood, but it quickly becomes clear that intention begs many questions. As Janet Dolgin has made abundantly clear, the concept of intent is deceptively simple, not least because intent is difficult to determine.<sup>54</sup> Whose intent is prioritized? How do we determine intention and at what moment in time? Must intention be mutual? What if there are competing intentions and/or competing memories of original intentions? Moreover, intent precedes and explains choice, which in turn "is essential to the world of the marketplace"<sup>55</sup> and is generally viewed as contrary to traditional ideas about family relations, due to its inherent liberal individualism. As well, judges appear, perhaps rightly, to be reluctant to concede the inevitability of choice, or the dominance of contract, in relation to cases arising from reproductive technologies. Janet Dolgin argues that American courts generally have dealt with intent in a contradictory manner indicating

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<sup>48</sup> The classic case of intention-based parenthood is adoption, but until recently the secrecy surrounding adoption has done its best to obscure the lack of a genetic tie between adoptive parents and child in order to recreate the adoptive family in the image of the traditional heterosexual nuclear family: Katrysha Bracco, "Patriarchy and the Law of Adoption: Beneath the Best Interests of the Child" (1997) 35 *Alta. L. Rev.* 1035.

<sup>49</sup> In the U.K., see Chris Barton & Gillian Douglas, *Law and Parenthood* (London: Butterworths, 1995).

<sup>50</sup> Marjorie Maguire Shultz, "Reproductive technology and intent-based parenthood: an opportunity for gender neutrality" (1990) *Wis. L. Rev.* 297 at 396. See John Lawrence Hill, "What does it mean to be a 'parent'? The claims of biology as the basis for parental rights" (1991) 66 *NYU L. Rev.* 353.

<sup>51</sup> Mykitiuk suggests that reproductive technologies "can help to put to rest the gendered legal fictions constructed around the alleged facts of nature by providing an opportunity and a means for the courts to expand the concept of parenthood and extend legal recognition of the number of parents a child may have to more than two". At the same time, she finds that judges are still mostly wedded to traditional family forms; *supra* note 7 at 815.

<sup>52</sup> For example, *In the Matter of Baby M*, 537 A2d 1227; 109 NJ 396 (Sup. Ct. 1988).

<sup>53</sup> Richard F. Storrow, "Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage" (2002) 53 *Hast. L.J.* 597.

<sup>54</sup> Janet L. Dolgin, *Defining the Family: Law, Technology, and Reproduction in an Uneasy Age* (New York & London: New York University Press, 1997).

<sup>55</sup> *Ibid.* at 178.

that only certain parties (generally those with a biological connection to the gamete or child) have the freedom to choose, or that choices supporting traditional family values are more likely to be affirmed.<sup>56</sup> She suggests that intent may be becoming a substitute for blood, or genes, as the basic connection between parents and their “natural” children, but that this approach too is self-contradictory and unstable.<sup>57</sup>

While acknowledging the problems inherent in an intentionality model, I want to hold onto the concept for now. First, it assists in making sense of the otherwise rather contradictory case law below. Second, the notion of intention-based parenthood mediating the significance of bio-genetic ties has arisen in empirical studies on lesbian co-mothers. It is now commonplace to mention that children born into lesbian headed families tend not only to be “wanted” or intended children, but also children who are planned for with considerable care. Their mothers “make decisions and undertake planning and preparation with considerable deliberateness and self-reflexivity.”<sup>58</sup> The notion of intentionality also arises in relation to Kath Weston’s famous invocation of “families we choose” in relation to lesbian and gay kinship.<sup>59</sup> Insights from these studies may permit a more nuanced approach to the type and quality of intentionality that should be emphasized in disputes over legal parenthood. I return to these studies in the last part.

### III. RECENT CANADIAN CASES: TRENDS AND CONTRADICTIONS

As we have seen, the fragmentation of parenthood as well as varying emphases on bio-genetic ties and intentionality play key roles in modern debates and decisions about legal parenthood. Recent Canadian cases offer a way to investigate the extent to which judges accord weight to each of these factors as they grapple with novel fact scenarios. The cases also provide a way to test the extent to which gender, and the gendered nature of caregiving responsibilities, mediates these factors. The fact scenarios in the recent cases reflect the increasing visibility of single parenting and lesbian and gay parenting, scientific advances in relation to the determination of genetic parenthood as well as the challenges of reproductive technologies, and the influence of the fathers’ rights movement. These developments have produced some potentially contradictory trends in determining which of various possible mothers and fathers will be recognized as legally relevant in a child’s life.

#### A. Cases Not Contested by Another Parent

##### 1. Lesbian Co-Mothers and Birth Registration

In some Canadian provinces, the name of the lesbian partner of a woman who gives birth can now be registered as a parent on the birth certificate along with the biological/birth mother. The information about parenthood that is recorded on birth certificates is rebuttable, but certificates nevertheless provide presumptive proof of parent-child relationships and are required for numerous legal and social activities. The right of lesbian co-mothers to register was first gained as a result of a human rights complaint (*Gill and Murray*) filed by two lesbian couples after the Vital Statistics Department in British Columbia refused to register the co-mother as a parent.<sup>60</sup>

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<sup>56</sup> *Ibid.* at 181.

<sup>57</sup> *Ibid.* at 188.

<sup>58</sup> Sullivan, *supra* note 6 at 32.

<sup>59</sup> Kath Weston, *Families We Choose: Lesbians, Gays, Kinship* (NY: Columbia University Press, 1991).

<sup>60</sup> *Gill*, *supra* note 13.

The birth mother in each couple had conceived using anonymous sperm donors, so no competing claim was made by a genetic father. Both couples refused to go through adoption procedures (now streamlined for same sex couples and step-parents in B.C.), arguing that, as the intended parents, they were entitled to a “normal” birth registration.

Testimony revealed that Vital Statistics did not look behind birth declarations made by heterosexual parents, simply assuming that both parties were biologically related to the child. Moreover, since “mother” is defined rather awkwardly in the *Vital Statistics Act (VSA)* by reference to birth,<sup>61</sup> the woman who gave birth was presumed the mother regardless of a genetic connection, which would be missing when egg donation is used. The Government’s claim that the intent of the registration system was to record biological or genetic (not legal) facts about the parents of a child was thus effectively challenged.<sup>62</sup> Instead the Human Rights Tribunal found that the purpose of registration was “to ensure that live births are recorded accurately and promptly so that the information may be used for a myriad of governmental and statistical purposes.”<sup>63</sup> Since in practice only applicants in same sex relationships were questioned about their biological link to the child, the scheme was discriminatory. Vital Statistics was ordered to register the births of the children, list their co-mothers as parents, and modify its forms for future applicants. It now allows co-mothers to register as co-parents, albeit through a more cumbersome process than that required of opposite sex parents.

In Ontario, a successful challenge under s. 15 of the *Canadian Charter of Rights and Freedoms*<sup>64</sup> was made in *M.D.R. v. Ontario (Deputy Registrar General)* regarding the difficulties that lesbian co-mothers experience in registering both mothers’ names as parents.<sup>65</sup> Before declaring that Ontario’s birth registry provisions infringed the applicants’ constitutional equality rights, Rivard J. considered statutory interpretation of the Ontario VSA and *Children’s Law Reform Act (CLRA)* and spoke to the relevance of both biology and intention. He noted that the identification of biological parentage is a key purpose of vital statistics regimes, but not the *only* purpose: “Including non-biological parents in situations where they clearly *intend* to parent the child would fall under a purpose of the VSA.”<sup>66</sup> In discussing the definition of birth in the VSA, Rivard J. clarified that there can be more than one way of defining “mother”: “[c]learly, the person giving birth is a mother, but it is an error of logic to thereby conclude that all mothers must give birth.”<sup>67</sup> However, he found that under the rules of statutory interpretation, only one woman and one man shall be listed as parents. He then went on to find the VSA birth registry provisions unconstitutional. In the course of his analysis, he observed that from the reasonable perspective of the child claimant in the case, “her needs may be better recognized by the inclusion of social parents who *plan to be involved* in caring for her rather than genetic parents who do not.”<sup>68</sup> In giving the Ontario Government a year to remedy the constitutional defects of the VSA, Rivard J. also made it clear that one option that was *not* available was to establish DNA procedures to test all parents, thereby making a system that was completely about

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<sup>61</sup> “‘birth’ means the complete expulsion or extraction from *its mother* . . .” *Vital Statistics Act*, RSBC 1996, Chapter 479, s.1.

<sup>62</sup> *Gill*, *supra* note 13 at para. 74.

<sup>63</sup> *Ibid.* at para. 73.

<sup>64</sup> *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

<sup>65</sup> *M.D.R.*, *supra* note 13..

<sup>66</sup> *Ibid.* at para. 56 [emphasis added].

<sup>67</sup> *Ibid.* at para. 59.

<sup>68</sup> *Ibid.* at para. 211 [emphasis added].

biology.<sup>69</sup> That said, citing *Trociuk*, he noted that birth fathers have rights to be registered that must be protected and rejected a remedy that would have enabled a lesbian mother to acknowledge the second parent of her choice.<sup>70</sup>

The decisions in the lesbian birth registration cases<sup>71</sup> indicate that an intent-based regime of parenthood may be emerging. That is, the intention of the birth/genetic mother to include her lesbian partner as co-parent and the intention of both women to co-parent was respected. However, these were easy cases, in that no known genetic father was available to contest their intention. As well, a familiar dyadic model of parenting was reinforced.

## 2. Gestational Surrogacy and Birth Registration

In *Rypkema v. British Columbia*,<sup>72</sup> also uncontested, a married couple used their own gametes to create an embryo that was implanted in a gestational surrogate mother. Terri Rypkema, the genetic mother, successfully brought an action to be named as mother on the birth certificate, instead of the birth (surrogate) mother. Gray J. wrote the birth mother out of the birth registry, allowing the genetic parents who intended to care for the child to appear on the birth certificate as the mother and father. She drew on three other Canadian gestational surrogacy cases, all uncontested by the birth mother.<sup>73</sup>

The intention-based model similarly prevailed in an Ontario case (*K.G.D. v. C.A.P.*). In this case, a gay man had commissioned a gestational surrogate to bear a child for him, using his sperm and an anonymous egg donor. He was permitted to put his name as a sole parent on the birth registration.<sup>74</sup> Once again, the application was uncontested. The gestational mother had relinquished the child at birth, after which the father had cared for the daughter. The novel aspect is that *no* mother appears on this registration.

These birth registration cases move towards a model under which birth registrations identify the adults who *intend* to take responsibility for a child, rather than recording genetic or biological parentage. In each case, at least one genetic parent was able to determine who would be a legal parent, even if it meant excluding the birth mother. This result may well not have been so easy had the sperm donors contested the applications in the lesbian co-mother cases, or had the genetic mother been involved in and/or contested the application in *K.G.D. v. C.A.P.* – or, indeed, had the gestational mother done so in the gestational surrogacy cases.

## 3. No More Than Two Legal Parents

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<sup>69</sup> *Ibid.* at para 267.

<sup>70</sup> *Ibid.* at para. 261. *Trociuk*, *supra* note 15.

<sup>71</sup> See also *A.A. v. New Brunswick*, *supra* note 13; *Fraess*, *supra* note 1.

<sup>72</sup> *Rypkema v. British Columbia* (2003), 233 DLR (4<sup>th</sup>) 760 (B.C.S.C.).

<sup>73</sup> Two of which ultimately allowed the genetic mother to be registered as the birth mother: *L. v. P.* (No. 0101-22025, Queen's Bench of Alberta, February 15, 2002), apparently unreported; *J.R. v. L.H.*, [2002] O.T.C. 764. In the third, the Vital Statistics Department opposed the application, and the application was denied until after the birth: *J.C. v. Manitoba* (2000), 12 RFL (5<sup>th</sup>) 274. Alberta has now codified the right to a court order in favour of the genetic parents where the gestational mother agrees: *Family Law Act*, S.A. 2003, c.F-4.5, s.12.

<sup>74</sup> *K.G.D. v. C.A.P.*, [2004] O.J. No. 3508 (Sup. Ct. J.) (QL). This published case granted the father's application for 50% of his costs in the original application, which is unpublished. Apparently, the Ontario government developed a policy document at some stage, allowing couples who use surrogates to apply for a CLRA declaration in advance of birth registration, leaving no record of the birth mother: *M.D.R.*, *supra* note 65 at para. 145.

The intention-based model initially encountered legal impediments in an Ontario case *A.(A.) v. B.(B.)*, also uncontested, which involved two lesbian co-mothers and a genetic father.<sup>75</sup> Despite clear intentions on the part of all parties, including both genetic parents, their desired result of declaring more than two persons to be the legal parents of a child was not viewed as possible by the application judge. In this case, a lesbian couple had used a sperm donor known to them to conceive: he was listed as the father on the birth registration along with the birth/genetic mother. He and the birth/genetic mother consented to the co-mother being named as a third parent. Aston J. was willing to declare such, but found no jurisdiction in the court so permitting. Although the *Children's Law Reform Act* permitted a declaration that a person was recognized to be *the* father of a child or *the* mother of a child, the definite article was found to limit a child to one of each.<sup>76</sup> Moreover, Aston J. held that this legislative gap could not be corrected through the court's *parens patriae* jurisdiction. He also registered a floodgates concern that opening the door to three parents might result in floods of custody and access litigation.

Aston J.'s decision was overturned by a unanimous Ontario Court of Appeal on January 2, 2007.<sup>77</sup> Although the Court agreed that the statute permitted one mother only to be named, it used its *parens patriae* jurisdiction to declare A.A. to be a (second) mother of the child. As a result, all three parents in the child's life are now legally recognized. The Court did not, however, order that the legislation be changed, holding that it could not consider *Charter* arguments that were first raised at the appellate level. As a result, the remedy in this case dealt only with A.A.'s individual claim. Any other individuals wishing to be declared a legal parent of a child in similar situations involving non-biological and multiple parentage will have to make separate applications, basing their argument on the child's best interests. It is not known at present whether the Ontario Government will develop a legislative framework permitting registration of three (or more) parents more generally.

## B. Cases Contested by a Parent

The above cases all involved applications for a person (not necessarily a genetic parent) to be named as parent on the birth registry, sometimes displacing another parent, most notably the gestational/birth mother. Notably, none of the cases were contested by a genetic father or genetic or birth mother. Moreover, the intention of at least one genetic parent seemed key in all cases, though it did not prevail in the face of the legal system's resistance to recognizing more than two legal parents.<sup>78</sup> Cases contested by one parent are now emerging, that provide more acute insight into the legal system's approach.

### 1. Lesbian Mothers, Contested Intention, and Terminated Relationships

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<sup>75</sup> *A.(A.) v. B.(B.)*, (2003) 225 DLR (4<sup>th</sup>) 371 (Ont. SJC, Fam Ct).

<sup>76</sup> Rivard J. agreed with this decision in *M.D.R.*, *supra* note 65. See also *Buist v. Greaves* (1997) 72 A.C.W.S. (Ont. Ct. Gen. Div.), a dispute between lesbian co-mothers. But in this case, the judge decided that even if she had the jurisdiction, she would not have declared the non-biological mother to be a mother (at para. 35). Other remedies such as adoption by the co-mother did not work well for this intended three parent family because the donor's parental status would have been terminated. Joint custody would have been a less permanent and secure remedy for the co-mother.

<sup>77</sup> *A.A. v. B.B.*, 2007 ONCA 2.

<sup>78</sup> See Alison Harvison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family" (1998) 6 Am. U. J. Gender & L. 505 for an explanation of this resistance. Note that this resistance appears to be less fierce when it comes to recognizing legal parents for the purposes of child support. Both biological and social fathers can be held liable for child support: see *Wright v. Zaver* (2002), 59 O.R. (3d) 26 (C.A.); *Singh v. Singh*, [1997] B.C.J. No. 2195 (S.C.) (QL).

Inevitably, Canadian cases have finally arisen where a birth mother resists the designation of her former lesbian partner as a legal parent.<sup>79</sup> Thus far, judges have resisted application of a presumption of parenthood to the lesbian partner, even if she lived with the birth mother before and at the time of birth. In a hotly contested 1997 case, a lesbian partner who had planned the conception and birth with the birth mother was refused a declaration that she was a legal mother, a claim for sole or joint custody, and a request that the child not be moved to another city.<sup>80</sup> In the 2005 case, *K.G.T. v. P.D.*,<sup>81</sup> the parties lived together for seven and a half years, during which time, P.D. gave birth to a child. Her partner K.G.T. was involved in the planning of the child and the discussions and procedures regarding artificial insemination with a clinic. K.G.T.'s surname was used as the child's middle name and considerable evidence indicated that the parties, the child, and family and friends regarded her as a "mom". The judge found that intention to co-parent existed even before conception but did not declare K.G.T. to be a legal parent, or allow her to adopt without the birth mother's consent. Rather K.G.T. was awarded joint guardianship and the same access rights that had existed since the parties separated. Sole custody remained with the birth mother, who was found to be the primary caregiver.

Another recent contested case, *P.C. v. S.L.*, involved two women C. and L., who were in a same-sex spousal relationship from 1999 to the beginning of 2005. L. was the birth mother of three children, two of whom were born in a heterosexual relationship before C. and L. were together. L. gave birth to the third child on July 3, 2002. C.'s position was that she and L had a deliberate plan to have a child within their (now terminated) relationship. She asked that the presumption of paternity be extended to her as a woman who cohabited with the birth mother,<sup>82</sup> and for access to all three children. L., on the other hand, suggested that the third child was "merely an accidental and unplanned product of casual intimacy" between her and her male friend.<sup>83</sup> The *Charter* challenge to the presumption of paternity failed (ostensibly because it is based in biological fact<sup>84</sup>) and the access claim was deferred until the biological fathers were given notice.<sup>85</sup>

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<sup>79</sup> There have been more such cases in the United States: Ruthann Robson, "Exploring Parental Rights: Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory" (1994) 26 Conn. L. Rev. 1377-1414.

<sup>80</sup> *Buist v. Greaves*, *supra* note 76, Benotto J. For one of the few discussion of this case, see Shelley A.M. Gavigan, "Mothers, Other Mothers, and Others: The Challenges and Contradictions of Lesbian Parents", in Dorothy E. Chunn and Dany Lacombe, eds., *Law as a Gendering Practice* (Toronto: Oxford University Press, 2000), 100-118 at 112.

<sup>81</sup> *K.G.T. v. P.D.* [2005] B.C.J. No. 2935, (SC), A.F. Wilson J.

<sup>82</sup> For an argument that the presumption of parentage should apply to the children of same sex couples, see Jennifer L. Rosato, "Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption" (2006) 44 Fam. Ct. Rev. 74.

<sup>83</sup> *P.C. v. S.L.*, 2005 SKQB 502, Wilkinson J., at para 1. It is unclear whether the biological father was named on the birth certificate of the youngest child, in which case the problem of having more than two parents might arise.

<sup>84</sup> But see the cases discussed by Mykitiuk, *supra* note 7, in which husbands of women who conceived via sperm donor were declared to be fathers, even though their marriages had broken down: 793-6.

<sup>85</sup> For a similar, but more contested, three-parent case, see *S.G. v. L.C.*, *supra* note 14. Two women were married (although a divorce is underway: *S.G. v. L.C.*, [2005] J.Q. no 7407 (C.S.) (QL), Prost, J.C.S.) and were registered on the birth registry as the parents of a child born using a known donor, S.G., who once dated the birth mother. S.G. requested a declaration of paternity, stating that he had every intention to act as the child's father both prior to her birth and in the future, and received an interim access order. Whether the severing of the lesbian relationship will influence any ultimate decision about how many legal parents this child will have is unknown.

## 2. Surrogacy Gone Wrong

Canada's first major contested traditional (not gestational) surrogacy case has now arisen, *H.L.W. and T.H.W. v. J.C.T. and J.T.*<sup>86</sup> This case involved an action for joint or sole custody of a boy born August 7, 2005, brought by the genetic/birth mother and her husband. They answered an advertisement placed by the T.'s seeking a surrogate mother. H.L.W. agreed to be the surrogate (and genetic) mother in return for expenses. Mr. T. was the sperm donor/genetic father and the child has been with the T.'s since his release from hospital. Mr. T. is listed as a parent on the birth registration along with the genetic/birth mother. Disputes arose concerning the extent of both expenses and contact that the W.'s would have with the child. H.L.W. then refused to consent to adoption by Mrs. T.; the W.'s now wish to raise the child themselves, either jointly or primarily. In a preliminary decision, the W.'s were refused interim access, despite H.L.W.'s status as mother on the birth registration. The pre-birth intention regarding who would assume parental responsibilities seemed to carry weight. Also perhaps implicitly influential was the genetic father's wish to complete his family by having children, whereas the genetic/birth mother and her husband already had four children.

## 3. Fathers and Formal Legal Equality

The parentage case with the greatest precedential weight and most plentiful scholarly commentary, including considerable feminist critique, was moving through the appellate courts when the first lesbian birth registration challenge was decided. In *Trociuk v. British Columbia*,<sup>87</sup> the rights of biological fathers to place their name on the birth registry were promoted by the Supreme Court of Canada in an unprecedented fashion. A biological father brought a successful *Charter* sex equality rights challenge to the British Columbia *Vital Statistics Act*, which gave birth mothers the power *not* to acknowledge fathers on the birth registration.<sup>88</sup> If not acknowledged, fathers then had no power to veto a mother's choice of surname.

The facts in *Trociuk* were complicated. Both parties acknowledged Darrell Trociuk's biological paternity, which he also proved via DNA testing. They had a fraught relationship, once cohabiting for over a year and then continuing a relationship for more than another year, until sometime after the triplets were born. Trociuk provided some support during Rene Ernst's difficulty pregnancy and recovery but they did not cohabit long enough for him to fall within the relevant definition of "spouse".<sup>89</sup> Although they initially filled out a joint birth registration form (never filed), they disagreed on the children's surname. The mother said that Trociuk insisted the children have his surname only; she then gave them her name only after listing him as unacknowledged. He then brought the (ultimately successful) *Charter* challenge that went to the Supreme Court of Canada, the lower courts having decided against him.<sup>90</sup>

The mother, Rene Ernst, later claimed she was willing to alter the registration to acknowledge Trociuk's paternity, but that he refused unless she would also hyphenate the surnames. At trial,

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<sup>86</sup> *H.L.W. and T.H.W. v. J.C.T. and J.T.*, 2005 BCSC 1679. An earlier case was *V.V.H. and P.B.H. v. W.L.P.* (1997) 188 N.B.R. (2d) 130 (Q.B.), Larlee J., where a surrogate/genetic mother was awarded custody and the 'contracting' couple were awarded specified access. The case was complicated by the fact that the surrogate mother was the biological, adopted out, daughter of the contracting mother.

<sup>87</sup> *Supra* note 15.

<sup>88</sup> VSA, *supra* note 61, ss.3(1)(b) & 4(1)(a).

<sup>89</sup> Family Relations Act, R.S.B.C. c. 128, s. 1 "spouse".

<sup>90</sup> *Trociuk v. British Columbia (Attorney General)* (1999), 67 B.C.L.R. (3d) 389 (S.C.); *aff'd* (2001), 90 B.C.L.R. (3d) 1 (C.A.). It is unclear how Darrell Trociuk paid for these appeals. His case became a cause celebre for the fathers' rights movement in B.C. and Canada.



she stated that she “felt that there was no reason why the children should bear the last name of somebody that I was not married to and had no plans to set up a life with.”<sup>91</sup> In other words, her intention at the time of registering the birth, was that her responsibility for the children and her plans concerning how their lives should be lived should be recognized. Trociuk, on the other hand, felt that his relationship with the children, genetic and otherwise, warranted both his name on the registration *and* his influence over their naming. In an earlier application, he was awarded access of six hours per week (which he exercised twice only in the first six months) and ordered to pay child support. He thus had financial but not caregiving responsibility for the children.

The Supreme Court agreed (unanimously) with Trociuk. In a decision much criticized for its simplistic, formal equality analysis,<sup>92</sup> it struck down the offending provisions in the VSA due to its contravention of the father’s equality rights. Deschamps J. said that affirming biological ties between parent and child was “a significant means by which some parents participate in a child’s life.”<sup>93</sup> She also drew on literature criticizing the previous inability of women to pass on their surnames to children to highlight the continuing importance of the process of naming.<sup>94</sup> She found that allowing women the ability to unacknowledge a father without him having recourse to appeal or judicial review was arbitrary. She effectively suggested that only men who are rapists and abusers should be precluded from being named as fathers.<sup>95</sup>

The Supreme Court judgement repeatedly emphasized fathers’ rights, while making only one reference to parental responsibilities. It used a formal equality approach to give biological fathers rights of parental status equal to those of mothers, regardless of the quality of the father’s social relationship with the children, or the mother.<sup>96</sup> The Court also determined that excluding a father from including his particulars on the birth registry and participating in choosing a surname “cannot be presumed to be in the best interest of the child.”<sup>97</sup> A gender analysis conducted from the perspective of women such as Rene Ernst who seek to extract themselves from a relationship with a man, or single mothers generally as an historically disadvantaged group, was missing entirely at the Supreme Court level,<sup>98</sup> as was a recognition of women’s still gendered responsibility for children. Perhaps an underlying assumption was that Ernst was not really a single mother, since Trociuk expressed an interest in being involved as a father – that is, his own intentionality (however theoretical in nature) may have been prioritized. The Court refused to change the triplets’ surnames (they were now 7 years old), since legislative amendments introduced during the case allowed Trociuk to apply for that remedy directly, in a forum in which the best interests of the child would be considered. Although the laws on registration and naming have not yet been substantially altered, commentators suggest that the precedent potentially carries broad implications for the use of equality guarantees by biological fathers to

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<sup>91</sup> *Trociuk* (C.A.), *supra* note 90 at para. 172 (Newbury J.A. quoting from the mother’s disposition). *Kreklewetz v. Scopel* (2001), 52 O.R. (3d) 172 (S.C.J.); *aff’d* (2002) 60 O.R. (3d) 87 (CA), a naming case from Ontario, affirmed the custodial parent’s ability to choose a surname since it reflected the child’s family unit.

<sup>92</sup> Gilbert, *supra* note 19; Hester Lessard, “Mothers, Fathers, and Naming: Reflections on the Law Equality Framework and *Trociuk v. British Columbia (Attorney General)*” (2004) 16 C.J.W.L. 165; Carol J. Rogerson, “Developments in Family Law: The 2002-2003 Term” (2003) 22 S.C.L.R. (2d) 273; Colleen Sheppard, “Inclusive Equality and New Forms of Social Governance” (2004) 24 S.C.L.R. (2d) 45.

<sup>93</sup> *Trociuk* SCC, *supra* note 15, para 16. This notion that the birth certificate recorded biological facts was challenged in the *Gill* human rights decision, *supra* note 13.

<sup>94</sup> For a more complex approach to naming, see Lessard, *supra* note 92.

<sup>95</sup> *Trociuk* SCC, *supra* note 15 at para. 25.

<sup>96</sup> Lessard, *supra* note 92.

<sup>97</sup> *Trociuk* (SCC), *supra* note 15 at para. 31.

<sup>98</sup> Though not at the B.C.C.A., which also offered a fascinating legislative history: *supra* note 90.

pursue parental rights in other contexts, such as custody and access.<sup>99</sup> In that field, the best interests of the child are crucial, and may not always correspond to affirmation of the rights of “both” genetic parents.

#### 4. Father Figures and Access

The above cases dealt primarily with establishing legal parentage, and showed some emphasis on bio-genetic ties, especially those of fathers. Two cases focusing more on access claims, and involving unusual fact scenarios, raise the spectre of judges feeling pressured to find fathers, or father figures, for children in female headed families. In *Johnston-Steeves v. Lee*,<sup>100</sup> a Calgary woman asked a former male friend from her university years, who lived in Toronto, to act as a sperm donor so she could conceive a child. They agreed orally that he would either donate sperm or father the child, provide financial support for the child, and not interfere in the health and welfare issues of the child. The child, Nigel, was conceived as a result of sexual intercourse. Although he was not listed on the birth registration, the genetic father entered a maintenance agreement acknowledging he was the child’s father and agreeing to pay support. He visited the child during the first year of the child’s life, but thereafter was prohibited from seeing the child. The mother argued unsuccessfully that her intention about the type of family within which she would raise her child should be respected, and that a distinction should be drawn between a purely biological parent and a social parent. Both the trial judge and the Court of Appeal emphasized that this was not “a sperm donor case”, mainly because of the father’s agreement to financially support the child.<sup>101</sup> The Court of Appeal added: “The suggestion that the respondent agreed to provide financial support for the child without having any opportunity to develop a relationship with the child is incomprehensible to us.”<sup>102</sup> It was found to be in Nigel’s best interests to have a relationship with his father. The trial judge added that “[t]his in no way detracts from the mother’s primary role in Nigel’s life or the roles played by so many other members of the extended family.”<sup>103</sup>

*G.E.S. v. D.L.C.*<sup>104</sup> involved a man who applied for joint custody and access rights in relation to children to whom he was not genetically related and against the will of the genetic/birth mother, a platonic friend.<sup>105</sup> The two adults had, in his words, a “special friendship” over approximately 12 years. The genetic/birth mother conceived twins through IVF using an anonymous sperm donor. She had asked G.E.S. at least three times to be the sperm donor, but he refused. He had paid for some IVF treatments, attended pre-natal classes with the mother, and was present in the delivery room. G.E.S. was involved in the twins’ lives, at some points

<sup>99</sup> Rogerson, *supra* note 92 at 326.

<sup>100</sup> *Johnston-Steeves v. Lee* (1997), 29 R.F.L. (4<sup>th</sup>) 126 (Alta. Q.B.); aff’d (1997), 33 R.F.L. (4<sup>th</sup>) 278 (C.A.).

<sup>101</sup> *Johnston-Steeves v. Lee* (Alta CA), *ibid.* at para. 16.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Johnston-Steeves v. Lee* (QB) at para 55, Kenny J.

<sup>104</sup> *G.E.S. v. D.L.C.* (2005), 264 Sask. R. 173, 2005 SKQB 246; rev’d [2006] S.J. No. 419 (Sask. C.A.) QL.

<sup>105</sup> This case raises a distinction between parentage and parenthood. Canadian law distinguishes between (a) defining a person to be the legal parent of a child and (b) determining rights and responsibilities of adults in relation to a child such as access. Some authors use the terms parentage versus parenthood to distinguish between these two concepts. Stuart Bridge, “Assisted Reproduction and the Legal Definition of Parentage” in Andrew Bainham, Shelley Day Sclater, & Martin Richards, eds., *What is a Parent? A Socio-Legal Analysis* (Oxford & Portland, Oregon: Hart Publishing, 1999) 73 at 75. Bainham offers a tripartite distinction between parentage, parenthood and parental responsibility: “Parentage, Parenthood and Parental Responsibility: Subtle, Elusive yet Important Distinctions” in Andrew Bainham, Shelley Day Sclater, & Martin Richards, eds., *What is a Parent? A Socio-Legal Analysis* (Oxford & Portland, Oregon: Hart Publishing, 1999), 25.

babysitting when he was unemployed and D.L.C. was working; his level of involvement was in dispute but he did contribute financial support to the mother. He was the twins' godfather, and considered himself a "father figure". Eventually the mother denied G.E.S. access to the children, saying she wanted nothing to do with him, that he was controlling, etcetera. It appears that he had a history of depression and that relations worsened after the twins were born. The mother left Regina in December 2002, after which G.E.S. did not see the children regularly.

Access rights can arise in Canada independently of being defined as a legal parent.<sup>106</sup> A non-parent or non-biological relative such as G.E.S. can apply for custody or access in Saskatchewan if they have some connection or "sufficient interest" in the child, as was found in this case. In a judgement that has now been overruled, the trial judge gave great weight to the psychologist's finding that the relationship was a "non-traditional family unit". It was also found that G.E.S.'s role was similar to that of a stepparent, and that "a significant relationship has been established between the petitioner and the children and that there is an emotional benefit to the children in maintaining that relationship."<sup>107</sup> The trial judge granted G.E.S. access in the name of the best interests of the child.

The trial judgement in *G.E.S. v. D.L.C.* could be viewed as a case in which, like the sperm donor cases in the United States, the judge tried to insert a father figure into an otherwise female headed family.<sup>108</sup> When read with other cases such as *Trociuk* and *Johnston-Steeves* that affirm paternal rights in the face of maternal resistance, one might legitimately worry that room for autonomous female parenting has diminished.

However, the Saskatchewan Court of Appeal tempered this trend, at least in relation to non-genetic father figures. The Court of Appeal overruled the trial judgement, finding that G.E.S. was more than a babysitter but "much less than a parent in that, at almost every step of the way, he limited his commitment to Ms. D.L.C. and the children."<sup>109</sup> Looking at the best interests of the child, the Court of Appeal found that the conflict between the adults can negatively affect a child "by undermining the position of the custodial parent, developing divided loyalties between the [parties] and impairing the ability of the custodial parent to develop new relationships."<sup>110</sup> While not doubting that G.E.S. cared for the twins, the Court of Appeal found that this was not enough to warrant an access order in the circumstances.

#### IV. MAPPING THE TRENDS: BIO-GENETICS, INTENTIONALITY, AND RESPONSIBILITY

What, then, do the recent Canadian cases tell us about the fragmentation of legal parenthood, its gendered nature, and the relative emphasis on biogenetics versus intentionality? Judges are clearly being faced with the challenge of selecting which of sometimes several adults should be named as legal parents, or assigned some rights of parenthood, illustrating the fragmentation of

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<sup>106</sup> For instance, any person can apply for custody or access under the *Family Relations Act*, *supra* note 16, or even the *Divorce Act*, although leave of the court must be obtained for such an application to proceed under the *Divorce Act* if the person is not a "spouse": *Divorce Act*, RSC 1985, c. 3 (2<sup>nd</sup> Supp.), s. 16(3). The situation appears to be different in some American States, e.g. in the *Thomas S. v. Robin Y.* case in New York State, *supra* note 2, as well as *Michael H. v. Gerald D.*, 491 U.S. 100 (1989).

<sup>107</sup> *G.E.S.* *supra* note 104 at para 264.

<sup>108</sup> Arnup & Boyd, *supra* note 2. One wonders what the result would have been had the mother had a male partner at the time of decision, or if the claim had been made by a close female friend who shared caregiving.

<sup>109</sup> *G.E.S.* Sask CA, *supra* note 104 at para 66.

<sup>110</sup> *Ibid.* at para. 68.

parenthood. Intentionality concerning family form and who should be a named parent seems to carry increasing importance – but not just any kind of intentionality. The privileged form of intention is that which is formed before birth either by an existing, acknowledged genetic parent, or, increasingly, by a genetic father after birth. Intention does not tend to prevail when a female headed family attempts to exclude a known genetic father from claims to legal parenthood – especially one who has had some financial relationship with the children.

Thus, it has been relatively easy for lesbian birth mothers (usually the genetic mother) to have their female partners named as co-parent on the birth registration, if they have excluded the possibility of a known genetic father before the child's birth by using anonymous sperm.<sup>111</sup> Similarly, the surrogacy cases affirmed the parenthood of the intended parents, at least one of whom was also the genetic parent. Here too the intention was articulated before birth. In the admittedly uncontested gestational surrogacy cases, judges were willing to permit genetic parents who used a gestational surrogate mother (a heterosexual couple in one case and a gay man in another) to register their names on the birth certificate and to obliterate the status of the birth mother. In these cases, genetic ties and intentionality come together.<sup>112</sup>

More contested scenarios are bound to produce more ambivalent results. In the contested surrogacy case, male genetic ties won out in the interim application, combined with the intention of the male progenitor to parent a child with his wife. The failed attempt to take the benefit of the presumption of “paternity” by a lesbian who had cohabited with the biological mother when she gave birth may have been complicated by the fact that the genetic father was known and conception occurred as a result of sexual intercourse. Moreover, the birth/genetic mother contested the claim, muddying the question of whether mutual intentionality existed at the point of the child's birth. In *K.G.T.*, where a lesbian co-mother who no longer cohabited with the birth/genetic mother won rights of guardianship and access – but not a clear declaration she was a legal parent<sup>113</sup> – the judge found that mutual intention existed at the time of birth, when the adult relationship was intact.

Until the recent Ontario Court of Appeal decision in *A.A. v. B.B.*, the key limitation on intention formed by genetic parents was that only two legal parents could be named in total.<sup>114</sup> The exclusive nature of legal parenthood<sup>115</sup> was reinforced to this extent, even though the traditional heterosexuality of the exclusive family form has been challenged in some cases. In particular, the exclusive, heterosexual nuclear family can be said to be preserved in “traditional” surrogacy cases, which enable a heterosexual couple to carry out their reproductive role despite the impediment of infertility.

Notably, these trends in relation to the weight accorded to bio-genetics and intentionality play out in ways that reveal differences for women and men, with parenthood fragmenting in significantly gendered ways. Pregnancy and childbirth as indicia of biological maternity and

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<sup>111</sup> The sperm donor too has indicated intention not to be legally involved with the child by donating anonymously.

<sup>112</sup> In the (in)famous *Johnson v. Calvert*, (1993) 5 Cal. 84 (Supreme Ct California), although both the genetic and gestational mothers met the relevant statutory definition of mother, it was found that there could be only one “natural” mother. The tie was broken by the intention of the genetic provider to raise the child. It could be argued that this approach diminishes the contribution of the gestational and birth mother. Other jurisdictions such as the U.K. take a contrary approach that vests maternity in the gestational/birth mother.

<sup>113</sup> However, s. 1 of the *Family Relations Act* defines “parent” as including “a guardian”.

<sup>114</sup> *A.A. v. B.B.*, *supra* note 77. See Harrison's analysis of *Thomas S. v. Robin Y.*, suggesting that the court overlooked the sex of the two parents out of respect for the higher value of a “coupled” approach to the family, *supra* note 2 at 190-191.

<sup>115</sup> Harvison Young, *supra* note 78.

parenthood are sometimes diminished, for example when gestational surrogates are written out of legal parenthood in favour of recognition of one or two genetic parents. If a parent must be sacrificed in order to preserve the dyadic or exclusive parenting model, it seems to be either the gestational/birth mother in surrogacy arrangements, or a lesbian non-biological mother. The earlier radical feminist critique of surrogate motherhood undermining significant aspects of motherhood and over-emphasizing the (male) genetic tie is borne out to this extent.<sup>116</sup>

The Supreme Court decision in *Trociuk* offers insight into these trends. Clearly, male genetic ties to a child carry considerable weight in relation to establishing parentage and its attendant rights and responsibilities.<sup>117</sup> In the lesbian birth registration cases, no genetic father was known, so it was easy for the tribunal to affirm two women as legal parents. *Trociuk* affirms the power that a known genetic father holds when he chooses to assert his genetic ties against a mother's wishes – including in circumstances where they are not in a conjugal relationship. Indeed, it has been suggested that a unanimous Supreme Court appears to have endorsed the importance of fathers in children's lives even in the presence of conflict between the parents, which can be detrimental to children.<sup>118</sup> When read alongside cases such as *Johnston-Steeves v. Lee*, it seems that judges are reluctant to allow female headed families to exclude known genetic fathers from their definition. In *Trociuk*, intentions compete, with it being unclear whether the genetic/birth mother and the genetic father ever shared mutual intention to parent, and the father expressing a desire to dictate his role in a family against the desire of the mother, who was responsible for the children. The father's intentionality in combination with his bio-genetic tie wins out over the birth mother's bio-genetic tie and contrary intention. The optimism that Sheldon detected in the U.K. judiciary that affirming the identity of a genetic father may not disturb, but rather strengthen, the integrity of the social family,<sup>119</sup> is not borne out in the *Trociuk* scenario, given *Trociuk*'s determination to assign his surname to the children against the mother's will.

The Supreme Court decision in *Trociuk*, being unanimous, can be seen as support for a model of formally equal paternal and maternal rights in relation to parenting claims, which may in turn exacerbate conflict and litigation between estranged parents. As Carol Rogerson says, *Trociuk* emphasizes “the formal rather than the functional aspects of parental status – the biological connection and blood lines of kinship” rather than “the reality of connection to and care for children”.<sup>120</sup> For Rogerson, this development is part of a larger trend in family law to adopt a formal vision of family relationships, and she worries that parenting law issues will become heavily constitutionalized. A man's intention to parent – and perhaps a woman's intention to involve a man in her child's life at some (limited) point in time – may be (over)valued in a manner that in turn diminishes the roles of women in gestation and childbirth, as well as the important social role of women's caregiving. Rogerson also worries that children's rights and interests may be sacrificed under such a paradigm.

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<sup>116</sup> One of the most trenchant feminist critiques of surrogacy contracts was offered by Somer Brodribb, “Delivering Babies: Contracts and Contradictions” in Christine Overall, ed., *The Future of Human Reproduction* (Toronto: The Women's Press, 1989) 139. She suggested that “to emphasize the genetic is to adopt a masculine consciousness of birth” (at 141).

<sup>117</sup> That said, genetic fathers do not necessarily succeed in vetoing adoption into a nuclear family at the birth mother's instigation: E.g. *In the Matter of a Female Infant*, British Columbia Registration No. 99-00733, [2000] B.C.J. No. 251 (C.A.) (QL). Arguably, however, the patriarchal family unit prevails in this case.

<sup>118</sup> Rogerson, *supra* note 92 at 336, 340.

<sup>119</sup> Sheldon, *supra* note 27.

<sup>120</sup> Rogerson, *supra* note 92 at 340.

The *Trociuk* decision illustrates that the power that mothers accrue through their own genetic tie is by no means determinative, even when they are responsible for a child's care and wellbeing. If a mother is perceived as acting arbitrarily in relation to a paternal claim, her genetic tie combined with her intention about the form of her family unit may not prevail. Deschamps J. described a mother's possible decision to unacknowledge a father as "arbitrary" several times, and also referred to the possibility of a woman having no reason for that exclusion. It seems, then, that mothers must articulate a highly persuasive reason for excluding a man from their family – for instance, that rape or incest produced the child. As in child custody law, it no longer seems possible for women who become mothers to form autonomous decisions about their family units if a known father who has not engaged in criminal conduct asserts a claim.<sup>121</sup> The huge emphasis on contact between children and fathers that has emerged over the past two decades precludes such female autonomy when there is a known father. While the new interest of men in fatherhood is notable, even laudable in many cases, the way in which family law deals with it needs to be attentive to the complexity of family forms.

It may seem counterintuitive, given mothers' historic role in childbearing and rearing, to suggest that maternal ties are more fragile than paternal ties. However, Rothman suggests why this might be so: "Motherhood in a patriarchal society is what mothers and babies signify to men. ...In a patriarchal system, when people talk about blood ties, they are talking about a genetic tie or a connection by 'seed'."<sup>122</sup> The modern legal system may not yet have shaken this vestige of traditional patriarchy from its assessment of legal parenthood. In fact, in *P.C. v. S.L.*, the judge stated that extending the paternity presumptions to the non-biological mother in a lesbian couple would be impossible "simply because a woman could not have provided the seed."<sup>123</sup> Moreover, the fragility of maternal ties is exacerbated in the current context of formal equality for fathers, gender neutrality, and erasure of women's caregiving responsibilities. As Mykitiuk says, "gender neutrality treats parents as fungible and risks marginalizing the gendered aspects of legal norms that continue to influence legal reasoning"<sup>124</sup>:

Whereas paternity is a construction allowing fatherhood to be *established* in a variety of ways – including choice – maternity is a unitary construction where women can be *deprived* of the status if both the biological and social roles are not fulfilled. This naturalization of maternity by law has precluded legal thinking about the *distribution* of maternity in a manner similar to determinations of paternity.<sup>125</sup>

Perhaps because of men's historically more fragile social ties to children and the now diminished capacity of the marriage tie to provide them, the legal system bends over backwards at times, in a form of affirmative action, to guarantee their legal role. Moreover, paternal claims can now be bolstered because it is possible to prove their genetic ties with children, rather than relying on presumptions. Given the way that patriarchal ideologies still inform what weight should be accorded to genes, and the increased uncertainty concerning motherhood (with the possibility of more than one woman being biologically related to a child and/or willing to care for a child),

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<sup>121</sup> Susan B. Boyd, "Is There an Ideology of Motherhood in (Post) Modern Child Custody Law?" (1996) 4 *Social & Legal Studies* 495; Susan B. Boyd, "Child Custody, Relocation, and the Post-Divorce Family Unit: *Goertz v. Gordon* at the Supreme Court of Canada" (1997) 9 *C.J.W.L.* 457.

<sup>122</sup> Rothman "*Recreating*", *supra* note 41 at 14 & 19.

<sup>123</sup> *Supra* note 83 at para. 17

<sup>124</sup> Mykitiuk, *supra* note 7 at 790.

<sup>125</sup> *Ibid.* at 790.

maternal claims are arguably more fragile than ever. Fathers can choose whether or not to claim parenthood, by and large, but once they lay claim to it, their ability to succeed based on being a biological progenitor seems relatively clear. The only difference between women and men, in some people's eyes, is now gestation, since both men and women can nurture and care for infants (even if women still carry this responsibility more than men, for various complex social and economic reasons). Yet as we have seen, gestation is not valued in the gestational surrogacy cases, with judges apparently willing to remove evidence of a birth mother. Moreover many feminists are reluctant to over-valorize the female roles of gestation and birth, for fear of essentializing motherhood.<sup>126</sup>

## V. CHALLENGING DEFINITIONAL BOUNDARIES: SHOULD FATHERHOOD BE LEGALLY LIMITED?

As the judge in *M.D.R.*, the Ontario birth registration case said, “[r]edefining the legal concept of parent...is a job for the legislature, not the court.”<sup>127</sup> Given the current state of flux in the law, the moment is opportune to consider both the extent to which factors such as bio-genetic ties, intent to parent, and relationship with a biological parent should be weighted when determining legal parentage, and to what extent mothers and fathers can or should be treated the same in this determination. Empirical studies of “alternative families” are instructive, and point to the gap between the ways in which law defines parenthood or family and the lived realities of actual family practices. Alison Diduck has expressed this gap as the difference between the families we live *by* (e.g. the norms embedded within family law) and the families we live *with* (actual family practices).<sup>128</sup> It is difficult to escape the conclusion that legal definitions of who constitutes a “parent” often do not accord with personal understandings of familial relations. Moreover, these definitions may actually “disable people legally from pursuing their own preferred options about where to draw their ‘family’ boundaries in everyday life”.<sup>129</sup>

The emphasis on (especially male) genetic ties identified above generates difficulties when family forms that do not accord with the traditional nuclear heterosexual family are taken into account. Even in relation to opposite sex step-families, legal policies emphasizing bio-genetic ties, such as the trend to promote shared parenting across households and contact with (presumed) biological fathers, overlook “the significance to children of their lives in their newly formed step-families”.<sup>130</sup> In other words, arguments for shared parenting/joint custody and enhanced contact between genetic fathers and children overlook the social relationship that a step-parent forges with a child in defiance of genetic links.

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<sup>126</sup> Linda J. Lacey, “‘O Wind, Remind Him that I Have No Child’: Infertility and Feminist Jurisprudence” (1998) 5 Mich. J. Gender & L. 163; Michelle Stanworth, “Reproductive Technologies and the Deconstruction of Motherhood” in Michelle Stanworth, ed., *Reproductive Technologies: Gender, Motherhood and Medicine* (Minneapolis: U of Minnesota Press, 1987) 10.

<sup>127</sup> *M.D.R.*, *supra* note 65 at para. 116.

<sup>128</sup> Alison Diduck, *Law's Families* (London: LexisNexis Butterworths, 2003), drawing on John R. Gillis, *A World of Their Own Making: Myth, Ritual, and the Quest for Family Values* (New York: Basic Books, 1996).

<sup>129</sup> Rosalind Edwards, Val Gillies & Jane Ribbens McCarthy, “Biological Parents and Social Families: Legal Discourses and Everyday Understandings of the Position of Step-Parents” (1999) 13 Int'l J. L. Pol'y & Fam. 78 at 80.

<sup>130</sup> *Ibid.* at 79. These authors also found that middle class parents in their study were more concerned with biological ties, whereas working class interviewees tended to be more focused on the position of children needing social families and stability, regardless of biological links. Most of the step-couples were skeptical about the possibilities of shared parenting across households.

Cultural anthropologists have drawn a distinction between *kinship* and *relationships* that may be helpful in finding a way for the legal system to differentiate between genetic ties and legal status in relation to children. Marilyn Strathern suggests that although information (facts) about being kin, or genetically related to another person, cannot be either selected or rejected, one can always choose not to have a relationship with someone who is kin.<sup>131</sup> Similarly, Dolgin has said: “Genes suggest nothing about social relationships. They are simply data. As such they neither represent nor demand particular *moral* links among the people they describe.”<sup>132</sup> Strathern notes, drawing on Dolgin, that “[t]he construct of the genetic family precludes choice and is indifferent to the character of family life.”<sup>133</sup> Drawing on Strathern and Dolgin, we might suggest what already may seem obvious from some of the cases: that emphasizing genetics is never enough as we strive towards definitions of legal parenthood; rather we must also look at the character of social relationships that emerge around children.

Questioning the emphasis on genetic ties returns us to the theme of intentionality, and the way that non-traditional families may deal with genetic ties and kinship through a considerable degree of forward planning. Maureen Sullivan’s study of 34 San Francisco families headed by lesbian mothers whose children were conceived via donor insemination (not necessarily anonymous) points to two types of intentionality: first, the intention to involve a female partner as a parent; and second, intention in relation to a sperm donor and his kinship network. Sullivan found, on the one hand, that the mothers valued the female biological tie and birth role as important precisely because the birth mother had physically gestated, carried, and given birth to the child, as well as typically having a genetic tie to her.<sup>134</sup> On the other hand, the mothers also felt it very important to *compensate* for the bio-genetic tie that only one mother had. That is, the mothers made careful, conscious decisions to be involved equally in parenting, reflecting a high level of intentionality.<sup>135</sup> They would carefully “tie in” the non-biological mother, using various mechanisms, which might include inseminating at home, using the non-biological mother’s surname for the child, sharing tasks of infant care and feeding to the extent possible, and/or securing second-parent adoption. Most wanted a legal mechanism by which to recognize the co-mother.

Most of the lesbian mothers (85 percent) were, on the other hand, careful to sever any legal claims that a sperm donor might be able to make on the basis of his bio-genetic credential by using an anonymous donor.<sup>136</sup> However the San Francisco mothers had the option of choosing a “yes” anonymous donor – a donor who agrees to allow children to learn his identity when they reach eighteen years of age, and to contact him if they so choose. Twenty-eight out of 29 of Sullivan’s couples that used anonymous donors chose a “yes” donor. This option offers the best of both worlds: “couples are protected during the child-raising years from external threats to

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<sup>131</sup> Marilyn Strathern, *Kinship, Law and the Unexpected: Relatives Are Always a Surprise* (Cambridge: Cambridge University Press, 2005) at 69-72.

<sup>132</sup> Janet Dolgin, “Choice, tradition, and the new genetics: The fragmentation of the ideology of family” (2000) 32 Conn. L. Rev. 523 at 544 [emphasis in original].

<sup>133</sup> Strathern, *supra* note 131 at 73.

<sup>134</sup> Sullivan, *supra* note 6 at 67.

<sup>135</sup> *Ibid.* at 59, 78.

<sup>136</sup> *Ibid.* at 53. Efforts also appear to be made by heterosexual couples to compensate for a social father not being the genetic father in donor insemination scenarios. However, the compensatory technique in these cases appears to relate less to caregiving and more to generating, or retaining, uncertainty about whether the social father is or is not the genetic father, in order to fit the myth of the traditional heterosexual nuclear family. Rachel Cook, “Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation” in Andrew Bainham, Sclater, & Richards, eds., *What is a Parent?* *supra* note 105, 121 at 130.



their family sovereignty, and once they reach majority, children may pursue the officially suppressed knowledge of the identity of their progenitor if they so desire.”<sup>137</sup>

A few lesbian mothers in Sullivan’s study chose a known donor and some also recognized as “family” *his* family members.<sup>138</sup> Importantly, however, “[t]his donor-extended kinship structure becomes manifest only to the extent that mothers choose to act upon knowledge of their children’s biological relatedness to others via the donor.”<sup>139</sup> Even more notably, for our purposes, knowledge about a donor’s identity was clearly distinguished from legal rights. In fact, none of the known donors had legal custody or other rights, but rather played roles varying from a *symbolic father* of whom no-one had parental expectations to a *nonfather figure* (“a flexibly defined male figure with whom the child has a relationship but to whom no parental status is imputed”) to a *quasi-multiparenting* arrangement where a donor played both the symbolic role as “father” and also was an active, involved parent.<sup>140</sup> In all three categories, donors were transformed from a conveyor of genetic material into a person who would have some sort of *social* relationship with a child, but the missing element was *de jure* paternity or legal custody. The mothers were very clear in drawing this line. Even where the children had known donors who were also called “father”, the lesbian mothers were regarded by everyone involved as the “parents”. What would occur if the donor challenged his lack of legal rights is, of course, another question.<sup>141</sup>

Gillian Dunne’s study of lesbian co-mothers in England also revealed quite a high degree of intentionality and innovation concerning the “kin” of their children. Dunne refers to “subversive kinship arrangements”, suggesting that despite being “generally hostile to the idea of the privatized nuclear family, the mothers were keen to establish more extended family networks of friends and kin.”<sup>142</sup> These included a wide circle of friends (e.g. lesbian “aunties”, gay “uncles”, as well as heterosexual friends). Notably, the men present in the lives of most of the children were chosen *not* out of concern that children need fathers or father figures, but rather out of a desire to counteract dominant stereotypes of masculinity. The donors were often gay: “Respondents believed that the gay men in their lives represented a more acceptable, positive form of masculinity.”<sup>143</sup> Usually the degree of involvement of donors was as a “kindly uncle”, although in three households a sperm donor/genetic father actively co-parented. In all three cases, he was gay. The mothers were of the view that if a dispute should arise, a heterosexual donor, especially if married, would be better able to mobilize formal power to change custody/access arrangements. Another form of intentionality was identified in the above-mentioned study of heterosexual step-parents. The researchers noted that inequities of biology within a family (i.e. the fact that one adult may not be biologically related to a child, or that an adult might be related to one child but not others) could be overcome through rational planning and that “a form of personalized social engineering or construction can lead to the formation of a

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<sup>137</sup> Sullivan, *supra* note 6 at 54

<sup>138</sup> Interestingly, some lesbians also recognized as “family” other lesbian co-parent families whose children shared a donor (sometimes anonymous) with theirs.

<sup>139</sup> Sullivan, *supra* note 6 at 16.

<sup>140</sup> Sullivan, *supra* note 6 at pp. 49-52.

<sup>141</sup> *Thomas S. v. Robin Y.*, *supra* note 2.

<sup>142</sup> Gillian A. Dunne, “Balancing Acts: On the Salience of Sexuality and Sexual Identity for Understanding the Gendering of Work and Family-Life Opportunities” in Liz Spearling & Mairead Owen, eds., *Women and Work: The age of post-feminism?* (Aldershot: Ashgate Publishing Ltd., 2000) 109 at 118.

<sup>143</sup> *Ibid.* at 117.

new social (family) unit that will meet children's needs."<sup>144</sup> This approach, also reflecting some degree of intentionality and planning as to how adults and children would relate to one another, was geared in part towards ensuring equity among children, regardless of their status as biological or step-children.

These empirical studies reveal a complexity in adult/child relationships that law has to date not accommodated. Some tentative suggestions have been made about how to overcome the overly narrow options that law offers in relation to defining parenthood. For instance, Edwards et al. draw on literature suggesting that law should provide "a number of flexible ways in which the adults and children concerned can seek to recognize and provide for all the sets of important relationships involved."<sup>145</sup> Issues such as birth registration, surnames, access/contact, consent to adoption, support, and decision-making could be disaggregated, rather than being treated all in one package related to being defined as a legal parent. Somewhat similarly, Harvison Young suggests that although children might need a core [legal] family unit for reasons of child support, decision-making and succession, other adults might play supplementary roles.<sup>146</sup> This recalls the findings of the lesbian mother studies, where the mothers creatively and with a high degree of intentionality choose the adults with whom their children would develop relationships – importantly though, these other adults did not necessarily have legal rights. The best interests of children might be better served through a similarly more complex approach to determining parental rights and responsibilities in relation to children.

This approach also recalls the words of the mother in the *Trociuk* case – while recognizing that Darrell Trociuk was the biological father of her children, Rene Ernst did not see why he should be given any greater legal recognition than that in relation to children she carried responsibility for and a family in which she did not see a role for him.<sup>147</sup> Similarly, in *Johnston-Steeves v. Lee*, the mother (who had clearly intended to parent on her own) argued for a distinction between Mr. Lee being declared to be the biological father (which she acknowledged) and his being declared as a legal parent. In her view, a legal distinction should be maintained between biological and social fathers. The former do not necessarily act as a *parent* to a child and where there is not already a relationship between the father and the child, or between the mother and father, the court should not create one.<sup>148</sup> Unfortunately for the mother in this case, Mr. Lee was paying financial support, as agreed at conception. The Alberta courts could not understand why anyone would financially support a child without intending a relationship with the child.<sup>149</sup> Financial support has arguably provided a significant backdrop to cases that reflect expanding legal recognition of men as fathers.<sup>150</sup> This sort of approach detracts from an emphasis on the child's lived familial realities, and arguably his best interests.

The words of these mothers, who wished to parent autonomously from the genetic fathers of their children, read alongside the suggestions of legal academics to disaggregate aspects of legal parenthood, point towards the need to think more carefully about circumstances when parents (maybe especially fathers) should be given full parenthood rights. Kate Harrison suggested some time ago that the concept of the "limited father" was being generated as more and more lesbian

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<sup>144</sup> Edwards et al., *supra* note 129 at 89.

<sup>145</sup> Edwards et al., *supra* note 129 at 101-2.

<sup>146</sup> Harvison Young, *supra* note 78 at 518.

<sup>147</sup> *Supra* notes 91-100 and accompanying text.

<sup>148</sup> See Mykitiuk, *supra* note 7 at 797-8.

<sup>149</sup> Arguably this factor was influential also in *G.E.S.* at the trial level, and in *Trociuk*.

<sup>150</sup> *Johnston-Steeves v. Lee*, *supra* note 100; *Chartier*, *supra* note 47; *Cossmann*, *supra* note 47; *Sheldon*, *supra* note 27.

mothers entered into agreements with donors that circumscribed the nature and extent of the donor's involvement with the child and attempted to restrict his legal rights.<sup>151</sup> She felt the women were effectively – and intentionally – creating a new type of family structure:<sup>152</sup> “[t]he essence of the position of the ‘limited father’ is that it is an attempt to allow for some participation by an involved donor in the child’s life, which stops short of granting or imposing on the donor the rights and responsibilities that normally attach to biological parents.”<sup>153</sup> Harrison further noted the relevance of the timing of intention. Many heterosexual fathers who cohabit with mothers fit the description of the limited father, in the sense that they spend limited time with their children and leave many decisions up to the mother.<sup>154</sup> The difference, suggests Harrison, is that in lesbian headed families (and perhaps in families such as *Johnston-Steeves v. Lee*), “the role of limited father is devised as such, is determined before the act of insemination, is articulated openly and understood as such by both parties, and is a predicate for the act of insemination to occur.”<sup>155</sup> As well, the agreement is clear that the mother (or mothers) will be the primary parent(s) with custody, and that the genetic father has a secondary role. While the proposal may appear to be focused less on the best interests of children and more on parental interests, the logic is that children benefit from clearly defined familial ties, and to the extent that conflict is diminished, this too is beneficial.

To the extent that these arrangements are organized through negotiated agreements, Harrison’s distinction is important and points to a high level of intentionality at the outset of a child’s life. It echoes reform proposals that Nancy Polikoff has made regarding both lesbian and heterosexual mothers who wish to construct families without fathers.<sup>156</sup> What should happen when an agreement has not been so clearly articulated is of course more problematic. In this case, Polikoff suggests that there should be a presumption that sperm donors do not have rights or responsibilities of legal parenthood and that a written contract to the contrary would be necessary to override the presumption.<sup>157</sup>

The legal system does not, however, seem to have moved in the direction of distinguishing genetic ties from legal relationships as yet – in fact the trend may be in the opposite direction. Harrison’s 1995 insight that the law sees parental status as an all-or-nothing phenomenon still carries weight, although possibly the fragmentation of fatherhood identified by Sheldon holds out hope that legal nuance will follow. The problem is that the legal system still seems tempted to impose a father figure on families that are headed, and sometimes carefully designed, by women. Moreover, contractual arrangements are typically frowned upon or disallowed in relation to children in family law, in the name of their best interests.

There is also the important question of how intentionality would relate to the legal status of a non-biological lesbian co-mother. The emphasis I have placed on intentionality recalls law

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<sup>151</sup> Sheldon, too, suggests that knowledge of one’s genetic paternity need not disrupt one’s social family and relationship with one’s social parents, “Fragmenting”, *supra* note 27 at 518.

<sup>152</sup> Harrison, *supra* note 2 at 170, 172.

<sup>153</sup> Harrison, *supra* note 2 at 179.

<sup>154</sup> A recent study confirms that this phenomenon is not one of the past: Lewis and Walsh, *supra* note 23.

<sup>155</sup> Harrison, *supra* note 2 at 179.

<sup>156</sup> Nancy Polikoff, “The Deliberate Construction of Families without Fathers: Is it an Option for Lesbian and Heterosexual Mothers?” (1996) 36 Santa Clara L. Rev. 375.

<sup>157</sup> Polikoff “Breaking”, *supra* note 2. See also Adiva Sifris, “Known semen donors: To be or not to be a parent” (2005) 13 J. of L. & Med. 230 at 242. Sifris problematically suggests that when a child is born through sexual intercourse (as was the case in *Johnston-Steeves v. Lee*), the presumption should be that the donor is the legal father. Sifris has told me that she is revisiting this position. Personal communication via email, May 30, 2006 (on file with author).

reform proposals made by American feminist legal scholars such as Nancy Polikoff and Martha Fineman, which give considerable power to birth mothers. Fineman's proposal focuses on, and would give legal priority to, the vertical caregiving or nurturing tie between mother and child (or whoever stands in for mother, e.g. perhaps the gay father in *K.G.D.*), rather than horizontal ties between adults who are sexually intimate.<sup>158</sup> Her argument is that the welfare of children is normally imbricated with the welfare of the caregiver. These proposals pose clear problems to non-biological lesbian co-mothers who are cut out of a child's life by an arbitrary decision of the birth mother. One solution may be to develop a system whereby a woman who cohabits with a birth mother and participates in the decision to conceive a child (as in *K.G.T. v. P.D.*) should be regarded as having legal status as a parent. Indeed, the legal system already appears to be moving in this direction. Polikoff proposed a functional test whereby: in lesbian co-mother situations, non-biological mothers would gain parental status if they acted as a parent to the child and the child saw them as a parent, in a context in which the biological mothers intended that they develop a parental relationship with the child.<sup>159</sup> In these proposals, the birth mother's power to define her family is diminished once she takes steps to involve a partner in her decisions and in the care of a child. The benefit is that these proposals enhance the autonomy of women who wish to take control over the conditions under which they parent a child – still a right that is contested. As well, they could empower single mothers, perhaps the most disempowered group of mothers.

## VI. CONCLUSION

I have argued that thinking about ways to move forward in the field of legal parenthood must be attentive to gender and power differentials and to social relations around parenting. Women and men are differentially situated in relation to parenthood, even now that motherhood and fatherhood are fragmented into various possible components. In order to take such differences into account, analysis, legal frameworks, and dispute resolution must carefully consider the social context and circumstances of each parenting dispute. Roberts suggests that “[w]e would not necessarily privilege claims based on genetic relatedness nor reject them altogether. Rather, we should be guided by a particular concern for the relational bond between less powerful parents and their children....”<sup>160</sup> Roberts is particularly concerned that vigilance be exercised in relation to policies that value (or, presumably, de-value) genetic ties on the basis of race, and argues for the privileging of the genetic bond between Black parents and their children.

In the context of parenting by single women and lesbians, who are also situated on the less powerful segment of the continuum, we might suggest that the social bonds between mothers and their children should be privileged in relation to the genetic ties of a sperm donor – who carries the heavy cultural power of a father. Whilst in some circumstances the sperm donor would be intentionally included in a family circle by lesbian mothers, a system could be structured whereby the hurdle to the donor being recognized as a legal parent was higher than for a lesbian

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<sup>158</sup> Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (New York: Routledge, 1995).

<sup>159</sup> Nancy Polikoff, “This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families” (1990) 78 *Geo. L.J.* 459. A good example of this test working in practice was in *Thomas S. v. Robin Y.*, as the child, Ry, clearly viewed the two mothers as her parents. The sperm donor was known to her, but was not regarded by her as a parent figure in her daily life.

<sup>160</sup> Roberts, *supra* note 7 at 273.

co-mother.<sup>161</sup> Ultimately, as Roberts suggests, drawing on the tradition of Black women caring for other women's children, the genetic tie could be seen as "a bond, among others, that forms the basis of a more important relationship developed in love and caring. This second view will guide us to a more just vision of the family"<sup>162</sup> – one that emphasizes responsibilities rather than rights. An approach that gives some weight to the intentions of a birth mother – particularly one who intends to parent without the influence of a man – might also enable what has been called the radical potential of insemination – that it destroys the centrality of the (hetero)sexed couple and re-centres women.<sup>163</sup> This 'thick' concept of intentionality is worthy of further exploration – so long as it can be detached from its roots in a liberal individualism that strips intention of its social, political, and gendered contexts.

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<sup>161</sup> The Victorian Law Reform Commission, *supra* note 11, suggested a system like this. A sperm donor can opt into legal parenthood, but only via adoption with the consent of the birth mother being key to his ability to adopt, and before the child turns one year old.

<sup>162</sup> Roberts, *supra* note 7 at 273.

<sup>163</sup> Harrison, *supra* note 2 at 168.