Canadian Journal of Family Law

Volume 26
Number 1 *Rethinking Assisted Conception*

2010

An Alternative Conception: the Legality of Home Insemination Under Canada's *Assisted Reproduction Act*

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AN ALTERNATIVE CONCEPTION: THE LEGALITY OF HOME INSEMINATION UNDER CANADA'S *ASSISTED HUMAN REPRODUCTION ACT*

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Abstract: *Despite access to fertility clinics, at-home self-insemination with the sperm of a known donor is a common practice amongst lesbian and single women. Home insemination is understood to provide several advantages over conception at a fertility clinic, particularly given the federal prohibition on sperm donation by donors who have had sex with other men. Despite the prevalence of the practice, there is some doubt in Canada as to whether home insemination is legal. While the Assisted Human Reproduction Act ("AHRA") does not explicitly address home insemination, it could be interpreted as outlawing the practice. This article addresses the legality of at-home insemination under the AHRA and argues that, despite what it might suggest about its legality, the practice should be protected by law.*

INTRODUCTION

Long before fertility clinics and sperm banks opened their doors, lesbian women have been conceiving children through self-insemination at home using the sperm of a known donor, typically a gay male friend. Though it is difficult to know for certain when lesbians first started using home insemination to conceive, references to the practice can be found in lesbian

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pulp fiction novels as far back as the 1950s.[1] With the emergence of the women's and gay liberation movements in the 1970s and 1980s, lesbian parenting became more common, giving rise to what Kath Weston has described as a lesbian "babyboom".[2] However, because lesbian women were routinely barred from accessing fertility clinics,[3] conception via home insemination remained common. Even after most clinics lifted their ban on service provision for lesbians in the 1990s, many women continued to favour home insemination. Inseminating at home avoids the often homophobic medical establishment, allows women to use the sperm of gay donors who are currently banned from donating through fertility clinics, and is essentially free.

We do not know exactly what percentage of children born to lesbian couples are conceived via home insemination. However, a review of research on lesbian parenting from Australia,[4] the United States,[5] and Canada[6] suggests that

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1 For example, see Ann Bannon, *The Beebo Brinker Chronicles: Women in the Shadows* (New York: Quality Paperback Book Club, 1995) 547-48 and Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (New York: Columbia University Press, 1991) 97-8.

2. Kath Weston, *Families We Choose: Lesbians, Gays, Kinship* (New York: Columbia University Press, 1991) at 29. Weston was the first scholar to refer to the lesbian and gay "babyboom".

3 This practice continued across Canadian clinics into the early 1990s. See Fiona Nelson, *Lesbian Motherhood: An Exploration of Canadian Lesbian Families* (Toronto: University of Toronto Press, 1996) at 43-44.

4 Jenni Millbank, *Meet the Parents: A Review of the Research on Lesbian and Gay Families*, prepared for the Gay and Lesbian Rights Lobby (NSW) Inc., January 2002.

5 Maureen Sullivan, *The Family of Woman: Lesbian Mothers, Their Children, and the Undoing of Gender* (Berkeley: University of California Press, 2004).

between 20-30% of couples conceive using the sperm of a known donor and in most of these cases inseminations occur at home. Some lesbian women also conceive through home insemination using the sperm of anonymous donors. In such cases, the sperm is shipped by the sperm bank directly to the women. Single women also use home insemination to conceive, though given that single mothers by choice are a fairly new phenomenon, far less is known about the frequency of the practice within that community.[7]

While home insemination is practiced widely by lesbian and single women, there is some doubt about its legality in Canada. Section 10(3) of the federal *AHRA*, which prohibits "obtaining" or "transferring" human gametes without a licence, could be interpreted as criminalizing the practice.[8] Breaching s. 10(3) carries criminal penalties, including incarceration. When the *AHRA* was passed, home insemination was never explicitly discussed, making it difficult to determine whether the practice was intended to be caught by the provision. Recent verbal statements from Health Canada indicate that it was not the government's intention to outlaw the practice.[9] However, despite numerous attempts to secure

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6 Fiona Kelly, "(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families" (2009) 40(2) Ottawa Law Review 117; Nelson, *supra* note 3.

7 For a discussion of the trends within the single mother by choice (SMC) community see Rosanna Hertz, *Single by Chance, Mothers by Choice*: *How Women are Choosing Parenthood Without Marriage and Creating the New American Family* (New York: Oxford University Press, 2006).

8 *Assisted Human Reproduction* Act, S.C. 2004, c.2 [*AHRA*].

9 Rachel Epstein, *The Assisted Human Reproduction Act and LGBTQ Communities*, a paper submitted by the AHRA/LGBTQ Working Group, March 2008. Available online: https://webmail/exchange .ubc.ca/exchange/fkelly/AHRA%20LEAF/FW:%20AHRA%20Sub committee.EML/1_multipart_xF8FF_2_AHRA%20-%20LGBTQ%

such a statement in writing, written confirmation of this position has never been obtained.[10] Given the prevalence of the practice within the lesbian and single mothering communities, the significant advantages it can provide to women, and the possibility that a new government or Health Minister may interpret the provision differently, it is important that the legislation be clarified.

In this article, I address both the legality of at-home insemination in Canada and why the practice should be legally protected. First, I describe how home insemination is carried out. Then, I discuss why the practice is important to lesbian and single women, focusing on the ways in which insemination in a clinical environment can often be unresponsive to the needs of these two groups. Next, I consider whether home insemination is legal under the *AHRA*, focusing on both the legislative text and the Hansard debates. The article concludes by considering what reforms need to be made to both protect the practice of home insemination and to ensure that those who conceive through home insemination can access the same parentage laws as those who conceive in a clinical setting.

WHAT IS AT-HOME SELF-INSEMINATION?

Home insemination involves a woman self-inseminating with either fresh or frozen sperm in the comfort of her own home. A woman who self-inseminates typically uses a 3cc needleless syringe to insert the sperm into her vagina. The procedure is straightforward and easy to conduct without any assistance. Instructions as to how to perform home insemination are provided in numerous books and on websites directed at

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20Paper.pdf/C58EA28C-18C0-4a97-9AF2-036E93DDAFB3/AHRA%20-%20LGBTQ%20Paper.pdf?attach=1.

10 *Ibid*. at 6.

prospective queer parents.[11] A very small number of women choose to self-inseminate using intra-uterine insemination ("IUI") which involves inserting a small catheter into the cervix. While the equipment needed to conduct an IUI is available for purchase online, it is not recommended that the practice be undertaken without medical assistance.

Most women self-inseminate alone or with the help of a female partner or friend. It is not, however, necessary to have any assistance as the procedure can be performed easily alone. Anecdotal evidence suggests that some Canadian midwives perform inseminations at home. However, because it is not clear whether they are legally entitled to engage in the practice they do not advertise their services. Medical personnel are not otherwise involved in the inseminations themselves, though their services may be utilized prior to insemination to screen sperm donors for diseases or conduct sperm count testing. In such cases, they are rarely made aware of the fact that the donor intends to take part in an at-home insemination.

Home insemination is used almost exclusively by lesbian and single women. In most instances, the donor is known and the sperm being used is fresh. However, in some instances women will self-inseminate using frozen sperm purchased from a sperm bank and shipped to their home or doctor's office.[12] This practice is far less common and is

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11 See, for example Stephanie Brill, *The New Essential Guide to Lesbian Conception, Pregnancy, and Birth* (New York: Alyson Publications, 2006). Toronto Family Services has produced a detailed brochure on self-insemination at home using fresh or frozen sperm. It is directed at lesbian women: <http://www.familyservicetoronto.org/programs/lgbt/inseminationMarch2007.pdf>.

12 Repromed, one of only two sperm banks in Canada, now offers a home insemination program. Available online, <http://www.repromed.ca/home_insemination.html>. The program was introduced because "some [Repromed] patients are not necessarily looking for fertility treatment but are mainly seeking access to safe and compliant

usually done only when the woman wishes to use anonymous donor sperm but cannot access a fertility clinic or wishes to conceive outside of a clinical environment.

Why Use at-home Insemination?

Lesbian and single women who engage in at-home insemination do so for a number of reasons.[13] The first and most common reason is that it allows the woman to use a known donor. While the majority of lesbian and single women favour using anonymous donor sperm to conceive their children, a significant minority (perhaps 20-30% in the lesbian community)[14] prefer known donors. In their qualitative research on planned lesbian families, both Sullivan and Kelly found that donors are typically close friends of the women, identify as gay, and are open to playing some minimal avuncular-type role in the child's life.[15] In far fewer instances, the parties intend the man to play a parental role. Known donors are often chosen by lesbian and single women because they view it as advantageous for the child to have access to his

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donor semen samples. In addition, others may be looking to have the insemination performed in a comfortable and intimate setting". Each cycle costs $1240. Repromed indicates that the program complies with the *AHRA*, suggesting that it does not believe home insemination is limited by the *Act*.

13 For an overview of the reasons why lesbian women choose at-home insemination see Ruth McNair *et al*., "Lesbian Parenting: Issues, Strengths and Challenges" (2002) 63 *Family Matters* 40. See also Victorian Law Reform Commission (VLRC), *Assisted Reproductive Technology & Adoption: Final Report*, Melbourne, 2007, Ch 6 (Self-insemination).

14 See, Millbank, *supra* note 4; Sullivan, *supra* note 5; Kelly, *supra* note 6.

15 Sullivan, *supra* note 5 at 49-54; Kelly, *supra* note 6.

or her other biological progenitor.[16] Others choose known donors because their sperm is free, because they want the donor to play a role in the child's life, or because they wish to deliberately disrupt the nuclear family norm.[17]

While a lesbian or single woman could be inseminated with the sperm of a known donor at a fertility clinic, a number of barriers exist. First, a woman who wishes to be inseminated at a clinic with the sperm of a known donor who is not her sexual partner faces rigorous donor screening under the *Processing and Distribution of Semen for Assisted Conception Regulations* ("*Regulations*").[18] The *Regulations* define "assisted conception" as a "reproductive technique performed on a woman for the purpose of conception, using semen from a donor who is not her spouse or sexual partner".[19] In cases of "assisted conception", donors must undergo substantial screening and testing,[20] while some men are barred from donating at all.[21] By virtue of the definition of "assisted conception", the regime only applies to women who are not using the sperm of their spouse or sexual partner. A lesbian woman who uses the sperm of a man who is *known* to her, but who is not her sexual partner, is therefore subject to the *Regulations*. The challenge for lesbian and single women is that the *Regulations* exclude certain men from donating sperm, including "men who have had sex with another man, even once

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16 Sullivan, *supra* note 5 at 47-54.

17 *Ibid*.

18 *Processing and Distribution of Semen for Assisted Conception Regulations* SOR/96-254 ["Assisted Conception Regulations"].

19 *Ibid*. at s. 1.

20 *Assisted Conception Regulations*, *supra* note 18, ss. 9-14.

21 *Technical Requirements for Therapeutic Donor Insemination* (Health Canada, July 2000), para 2.1 ["Technical Requirements"].

since 1977", and men over the age of 40.[22] These restrictions were initially designed to protect the health of women who were being inseminated with anonymous donor sperm within a clinical setting.[23] However, by virtue of the definition of "assisted conception" they also apply to lesbian or single women using the sperm of a known donor.

The *Regulations* have a significant effect on lesbian and single women who wish to conceive in at a fertility clinic using the sperm of a known donor. First, lesbian and single women are always subject to the *Regulations* given that their donors are rarely, if ever, their sexual partners. Second, because donors to lesbian women are more often than not gay, they face automatic exclusion. The exclusion from donor eligibility of men who have had sex with other men has been recently challenged and upheld in both *Jane Doe v. Attorney-General of Canada*[24] and *Susan Doe v. Attorney-General of Canada*,[25] in part because the federal government introduced the *Guidance on the Processing and Distribution of Sperm for Assisted Conception Regulations*[26] under which men falling

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22 *Ibid*, para 2.1(b) & 2.1(c)(i).

23 Men who have had sex with men are deemed to be at higher risk of carrying certain infectious diseases, such as HIV, and the sperm of men over the age of 40 is believed to have higher rates of "spontaneous genetic mutations" than the sperm of younger men. *Susan Doe v Attorney General of Canada*, 2007 ONCA 11 at para. 42.

24 *Jane Doe v Attorney General of Canada* (2003), 68 O.R. (3d) 9 (S.C.J.). Jane Doe's case was dismissed on the basis that the issue was moot, since, by the time the application was heard, Doe had become pregnant through home insemination.

25 *Susan Doe v Attorney General of Canada*, *supra* note 24.

26 *Guidance on the Processing and Distribution of Sperm for Assisted Conception Regulations* (GUIDE-0041, 1 September 2004), online: http://www.hc-sc.gc.ca/dhp-mps/alt_formats/hpfb-dgpsa/pdf/compli-conform/gui_41-eng.pdf.

into the excluded categories can now donate, provided that they go through a "special access" program. The special access program permits the use of semen from a donor who would otherwise be excluded by the *Regulations*, provided that he and the recipient follow the rules outlined in the *Guidance on Donor Semen Special Access*.[27] It requires the donor's semen to be tested for infectious diseases, quarantined for 6 months, and then retested. If all the tests are negative, the woman's physician may apply to Health Canada for a special access authorization. The physician must indicate that he or she has explained and indentified any health risks to the recipient woman. Health Canada must then review the application and either approve or reject it. There is no certainty that a donor will be approved by virtue of going through the process.

Given that many donors to lesbian and single women are gay, and at least some are over 40, using clinical facilities to inseminate with a known donor presents numerous challenges. While the special access program does make it possible for women to use a gay known donor and undergo inseminations at a clinic, the length of the process, the involvement of the federal government, and the potential offensiveness of the process to the individuals involved, may make it an unpalatable option. As the *Jane Doe* and *Susan Doe* cases suggest, some women and their donors simply do not want to go through such an intrusive process.[28] The obvious

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[27] Guidance on Donor Semen Special Access Programme: Donor Semen Eligible for Special Access (Nov 27, 2002), online: http://www.hc-sc.gc.ca/dhp-mps/alt_formats/hpfb-dgpsa/pdf/prodpharma/dssap-passd_eligiblesemen_spermedonneur-eng.pdf.

[28] Interestingly, many known donors are happy to undertake testing themselves and it is not uncommon for them to do so. This would suggest that the objection donors and recipients have to the special access program lies in the government involvement and the singling out of men who have had sex with other men as particularly "dangerous" donors.

alternative to the special access process is to inseminate at home. By inseminating at home, women whose donors would be excluded from donating by virtue of their sexual practices or age can circumvent the government regulations and proceed unhindered with their chosen donor.

The second reason lesbian and single women use home-insemination is that it avoids the medicalization of conception and allows women to control their own fertility.[29] Fertility clinics are designed to "treat" women with fertility problems. Lesbian and single women who turn to fertility clinics rarely have a diagnosed medical issue when they first seek assistance. Yet, they are often treated as if they do. Fertility clinics require all women to undergo extensive and sometimes invasive medical testing before IUIs can begin and frequently encourage the use of fertility drugs or even IVF after only a few months of unsuccessful inseminations. The health risks associated with using fertility drugs are not yet fully established, but there is significant debate within the medical community about their potential long-term dangers.[30] The insemination procedures undertaken at a fertility clinic are themselves very clinical, requiring the woman to place her legs in stirrups while the doctor or nurse inserts the sperm. In Sullivan's study of lesbian mothers living in the San Francisco Bay Area, fertility clinics were routinely described as "exploitative", "mundane", "clinical", "unromantic", and "a business".[31]

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29 Sullivan, *supra* note 5 at 54-59.

30 See, for example, E. Ricci, F. Parazzini, & E. Negri, E. *et al*. "Fertility drugs and the risk of breast cancer" (1999) 14 Human Reproduction 1653; L. Brinton, B. Scoccia, K. Moghissi, C. Westhoff, M. Althuis, J. Mabie, & E. J. Lamb, "Breast cancer risk associated with ovulation-stimulating drugs" check caps (2004) 19(9) *Human Reproduction* 2005.

31 Sullivan, *supra* note 5 at 54-58.

Not surprisingly, many lesbian and single women wish to avoid the medicalization of the conception process. Home insemination presents a more palatable option. The environment is more intimate and a partner can conduct the insemination, a feature that some of the couples in Sullivan's study saw as a way of "tying in" the non-biological mother.[32] Both lesbian and single women have also indicated that not all fertility clinics are respectful of their families. While attitudes towards lesbian and single women are becoming increasingly inclusive, some non-biological mothers have felt excluded by fertility clinics, while single women have been questioned about their ability to care for a child. Home insemination avoids these issues.

Finally, home insemination is an inexpensive alternative to a fertility clinic. For low income lesbian and single women, it may be the only feasible route to conception. Conceiving using anonymous donor sperm costs approximately $800-$1400 per attempt, with most women taking at least six attempts to conceive. By contrast, home insemination with fresh sperm is essentially free.

While women who inseminate at home with the sperm of a known donor do take some health risks in doing so, the risks can be alleviated by having the donor tested for HIV and other sexually transmitted diseases prior to insemination. It is not uncommon for donors to undertake testing and to agree to practice safer sex or even abstain from sexual activity during the insemination period. While testing cannot alleviate all risk due to the time some diseases take to incubate, those who self-inseminate appear willing to take that risk in order to reap the benefits associated with inseminating at home.

Because of the many advantages of home insemination for both lesbian and single women it is of vital importance that

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32 *Ibid*. at 59.

the practice be explicitly legal. Without legal protection, lesbian and single women will find their options for family creation severely limited. Protection should come in two forms. First, the practice itself should be legal and this fact should be clarified within the *AHRA*. Second, any legal protections that extend to same-sex couples or single women who conceive at a fertility clinic using anonymous donor sperm, such as presumptions of parentage, should apply equally to those who self-inseminate at home using the sperm of known donors. That is, the law should not distinguish for the purpose of legal parentage between at-home and clinical conception.

THE LEGALITY AND/OR REGULATION OF AT-HOME INSEMINATION

The legality of home insemination has never been expressly addressed or even debated within Canadian law. In fact, a review of the more than 800 pages of Hansard discussions of the *AHRA* did not find a single reference to the practice. Previous reports on assisted human reproduction in Canada, including those of the Royal Commission on New Reproductive Technologies[33] and the House of Commons Standing Committee on Health: Assisted Human Reproduction,[34] also failed to address home insemination. While the lack of reference to home insemination might encourage those who engage in the practice to presume its legality, the *AHRA* contains some troubling provisions. In fact, it is possible that one could interpret the *AHRA* as implicitly prohibiting the practice.

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33 Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Minister of Government Services Canada, 1993).

34 House of Commons Standing Committee on Health, "Assisted Human Reproduction: Building Families" (December 2001).

Sections 10-13 of the *AHRA* list a number of activities that are "controlled" and it could be argued that self-insemination at home is caught within these provisions. Section 10(3) of *AHRA* states:

> (3) No person shall, except in accordance with the regulations and a licence, *obtain*, *store*, *transfer*, destroy, import or export
> (*a*) a sperm or ovum, or any part of one, for the purpose of creating an embryo; or
> (*b*) an in vitro embryo, for any purpose [emphasis added].[35]

As noted above, while there is no evidence in the Hansard debates that this provision was intended to have any impact on home insemination, it is possible to argue that home insemination involves the "obtaining", "storing", and "transfer" of sperm without a licence and is thus contrary to *AHRA*. In other words, the process of "obtaining" the sperm from the donor, "storing" it in a container, and "transferring" it to a woman's vagina might technically fall under s. 10(3). Because such acts are conducted without a licence, those engaged in them could be subject to criminal penalties. The controlling provisions of the *AHRA* were supposed to be expanded upon via regulations, but none have been promulgated at this point. The *AHRA* has also not been judicially interpreted, making it difficult to know how s. 10(3) should be interpreted. In fact, the only judicial comment on the *AHRA* is via a reference called by the province of Quebec challenging the constitutionality of certain sections of the statute, including the controlling sections, on federalism grounds.[36] If the Quebec challenge is

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35 *AHRA*, *supra* note 8 at s. 10(3).

36 In the matter of a Reference by the Government of Quebec pursuant to the *Court of Appeal Reference Act*, R.S.Q., c. R-23, concerning the constitutional validity of sections 8 to 19, 40 to 53, 60, 61, and 68 of

successful, the regulatory scheme, including s. 10(3), will be overturned and thus no longer available to prohibit (if it does) home insemination.

Section 10 must be considered in its broader legislative context. Section 3 of the *AHRA*, which addresses definitions, defines an "assisted reproductive procedure" as "any controlled activity referred to in s. 10 that is performed for the purpose of creating a human being".[37] In other words, any procedure described in s.10 that is performed for the purpose of creating a human being is an "assisted reproductive procedure". While at-home insemination is often "unassisted", the fact that it involves activities described in s.10(3) and is performed to create a human being, suggests that if it is undertaken without a licence it may be in violation of the *AHRA*. Thus, while the drafters of the *AHRA* never explicitly contemplated at-home insemination, and may never have intended to capture it within s. 10(3), the *AHRA* appears on its face to prohibit the activity.
A second section which has some bearing on the legality of home insemination is s. 8 which addresses the issue of consent. Section 8(1) states that, "[n]o person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose".[38] While the section is designed to protect donors who donate their sperm to sperm banks, it appears to apply to anyone who donates reproductive material for the purpose of creating an embryo.[39] Women who conceive at home rarely receive the

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the *Assisted Human Reproduction Act*, S.C. 2004, c. 2, 2008 QCCA 1167.

37 *AHRA*, *supra* note 8 at s. 3. A review of the Hansard debates failed to find any explicit discussion of what the phrase was intended to cover.

38 *AHRA*, *supra* note 8, s. 8.

39 "Embryo" is defined in s. 3 of the *AHRA* as "a human organism during the first 56 days of its development following fertilization or

written consent of their donors to use their sperm and thus may also be in violation of s. 8.

While the interpretation of ss. 8 and 10(3) remains unresolved, the very existence of the sections are concerning. First, if they might at some point be interpreted as prohibiting home insemination they present a significant barrier to conception for lesbian and single women. Given that most lesbian women who use known donors choose gay donors, the federal prohibition on sperm donation by gay men, combined with a ban on at-home insemination, would have the practical effect of outlawing known donors (unless they are willing to go through the special access program). Second, a prohibition on at-home insemination would require that lesbian and single women conceive through fertility clinics, thus imposing upon them an expensive, medicalized model that is not always respectful of their family choices. Third, contravention of both s. 8 and s. 10 carries a criminal punishment: a prison sentence of up to five years, a fine of up to $250,000, or both.[40] There is no doubt that even if a prohibition existed, lesbian and single women would continue to conceive at home. However, the penalties imposed by the *AHRA* would make it an extremely dangerous practice. When at-home insemination was outlawed in the state of Victoria, Australia, there was some suggestion that lesbian women took additional health risks out of fear of being caught, such as failing to have their donors tested for HIV and other sexually transmitted diseases because it would involve dealing with a medical professional who might report them for self-inseminating.[41] Doctors also feared repercussions

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creation, excluding any time during which its development has been suspended, and includes any cell derived from such an organism that is used for the purpose of creating a human being". Sperm donated by a known donor is therefore "human reproductive material for the purpose of creating an embryo".

40 *AHRA*, *supra* note 8 at s. 61.

41 VLRC, *supra* note 13 at 77.

for assisting lesbian women to self-inseminate through the provision of advice or sperm testing and were thus reluctant to provide those basic services.[42]

Fourth, a potential ban on at-home insemination means that more lesbian women will conceive with the sperm of anonymous donors, a practice that has increasingly come under attack in legal, medical, and ethical circles.[43] In fact, a class action brought in British Columbia, *Pratten v. Attorney-General of British Columbia*, seeks to outlaw the use of anonymous donor gametes entirely.[44] The main arguments against donor anonymity, raised in *Pratten* and elsewhere, are that the practice denies donor conceived individuals access to a part of their identity as well as their medical history. In response to these critiques, some sperm banks have introduced

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42 *Ibid*.

43 See, for example, Jadva, V., Freeman, T., Kramer, W., & Golombok, S. "The experiences of adolescents and adults conceived by sperm donation: Comparisons by age of disclosure and family type" (2009) 24 Human Reproduction, 1909; Michelle Dennison, Revealing your sources: the case for non-anonymous gamete donation check caps (2007) 21 Journal of Law and Health 1.

44 A class action lawsuit was filed on October 24, 2008, by Olivia Pratten, the representative plaintiff, on behalf of all people in the province of British Columbia conceived via anonymous sperm, egg, and embryo donation. Pratten argues that the use of anonymous gametes violate the equality (s. 15) and security of the person (s. 7) rights guaranteed in the *Canadian Charter of Rights and Freedoms*. On October 28, 2008, Brenner C.J. of the British Columbia Supreme Court issued an injunction directed to all persons in B.C., whether medical personnel or otherwise, preventing the destruction or transfer of any records that have been created or maintained by persons who administered artificial insemination. The remainder of the case is pending. See *Pratten v. Attorney-General of British Columbia and College of Physicians and Surgeons of British Columbia*, No. S-087449, 28 October 2008, online: http://www.arvay finlay.com/news/Order%20of%20Brenner%20CJ.pdf).

"ID release" donors who are men who are willing to have their identities revealed to their donor offspring when those offspring reach the age of majority. However, only a small number of men are open to participating in ID release programs, leaving the majority of donations completely anonymous. While the ethics of anonymous sperm donation remain a contentious issue, there does appear to be an international trend away from the practice. A number of jurisdictions have outlawed it altogether[45] and cases such as *Pratten* suggest that others may be forced to follow. If one takes the view that children conceived via anonymous sperm donation may be harmed by the practice then a prohibition on home insemination, which usually involves using the sperm of a *known* donor, will only increase the number of children born into potentially harmful situations.

A final concern arising out of a possible ban on at-home insemination is that it has the potential to further complicate the designation of legal parentage under provincial law. At present, a number of provinces address, through legislation, the legal parentage of children born via alternative conception methods, such as donor insemination.[46] Underlying the provincial statutes tends to be the assumption that conception is "assisted" by medical professionals and takes

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45 Sweden, the United Kingdom, and a number of Australian states have banned anonymous sperm donation. In these jurisdictions, all donors must agree to have their identities released to donor offspring when they reach the age of majority.

46 In Quebec, Newfoundland, Alberta, Nova Scotia, and the Yukon the male partner of a woman inseminated with donor sperm is deemed to be the legal father of the child if he consented to the insemination. *Civil Code of Quebec*, S.Q. 1991, c. 64, arts. 538-542; *Children's Law Act*, R.S.N.L. 1990, c. C-13, s. 12; *Children's Act*, R.S.Y.T. 1986, c. 31, s. 13; *Family Law Act*, R.S.A., 2003, c. F-45, s. 13(2); *Birth Registration Regulations*, N.S. Reg. 390/2007, s. 3(1).

place at a fertility clinic.[47] Where such legislation exists, the donor's legal rights and responsibilities are severed and the birth mother's male partner is presumed to be the child's second legal parent. In Quebec and Alberta, similar provisions apply to a birth mother's female partner.[48] At present, it is not clear whether home insemination or known donors are captured by the existing provincial legislation. The only insight we have is provided by a limited amount of case law which has tended to treat known donors as legal parents or to at least provide them with access rights to the child.[49] However, at least some of these cases have occurred in provinces that do not have legislation addressing parentage in situations of assisted conception.

While parentage laws and the legality of home insemination appear to be separate issues, the lack of legal clarity around the practice of home insemination has the potential to work against lesbian and single women who seek to argue that known donors are not legal parents. Ideally, at-

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47 For example, most of the legislation refers to the children as "children born via assisted human reproduction" or "assisted procreation".

48 *Civil Code of Quebec*, S.Q. 1991, c. 64, arts. 538-542; A successful challenge to Alberta's *Family Law Act*, means that the parentage presumptions applicable in instances of assisted reproduction that applied only to the male partner of the birth mother now extend to the female partner of a birth mother. The legislation itself has not yet been amended: *Fraess v Alberta (Minister of Justice and Attorney General)*, (2005) A.J. No. 1665 (Q.B.). British Columbia is currently considering a parentage presumption that would extend legal parentage to a same-sex female partner at the time of the child's birth. See Ministry of Attorney General Justice Services Branch, *White Paper on Family Relations Act Reform – Proposals for a new Family Law Act* (July 2010), online: <http://www.ag.gov.bc.ca/legislation /pdf/Family-Law-White-Paper.pdf >.

49 See for example,, *S.G. v L.C.* [2004] R.D.F. 517 (Sup Ct); *A v. B, C and X,* [2007] R.D.F. 217; *M.A.C. v. M.K*, 2009 ONCJ 18.

home and clinical insemination would be treated identically for the purpose of legal parentage laws. In others words, the rights and responsibilities of donors would be severed independent of the physical setting in which conception took place. Any doubt about the legality of home insemination poses a threat to this position as it appears to take home insemination outside of the realm of existing provincial laws. Because at-home insemination is practiced almost exclusively by lesbian couples and single women, the impact of potential illegality will be felt disproportionately by those groups.

RECOMMENDATIONS FOR REFORM

Given the frequency of home insemination within the lesbian and single mothering communities and the many benefits it provides to these communities, it is imperative that the legality of the practice be clarified. This can be achieved through a number of legislative amendments. First, the *AHRA* should be amended to indicate that at-home insemination is not a "controlled activity" under s. 10. In particular, it should be made clear that it is not an offence for a woman to carry out self-insemination at home, whether using fresh or frozen sperm. Nor should it be an offence for a spouse, partner, friend or donor to assist her in carrying out self-insemination. While Health Canada has provided verbal assurances that the *AHRA* does not criminalize home insemination,[50] absent some written verification or legislative amendment, the situation remains dangerously unclear. It is also necessary to clarify whether known donors must give written consent to the use of their sperm, as required under s. 8. While there would be little harm in requiring written consent, and it may give known donors peace of mind that their donations will only be used by the intended recipient, given the informal and unregulated nature of many home insemination arrangements, it is likely that compliance would be low. It might therefore be most

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50 Epstein, *supra* note 9.

appropriate to remove the requirement in cases of home insemination.

The second reform that needs to be made pertains to the ban on gay sperm donors. As noted above, it is very difficult in Canada for a gay sperm donor to engage in directed donation through a clinic. As a result, some women and their donors forgo the extensive health screening of sperm that fertility clinics provide. While most of this screening can be conducted through a family doctor, only a fertility clinic can freeze the sperm and retest it six months later for diseases such as HIV. Failing to do this extensive testing does increase the chances of a woman self-inseminating with sperm that contains the AIDS virus and/or various sexually transmitted diseases.

Until the ban on gay sperm donors is lifted, those engaged in home insemination are denied full choice with regard to the level of risk they are willing to take in the process of insemination. The lack of clarity around the legality of home insemination further exacerbates the risk as it discourages lesbian and single women from seeking medical screening for their donors. Doctors may also be reluctant to assist women who seek their screening services out of fear that they will be caught by the provisions of the *AHRA*. Thus, as part of the overall clarification of the legality of home insemination, the government should lift the ban on gay sperm donors. As noted above, gay donors are the first choice for many lesbian women who want their donor to be known. Limiting the ability of gay men to donate sperm will thus have a disproportionate impact on the lesbian parenting community. When coupled with the lack of clarity around the legality of home insemination, it is likely to increase the number of women taking unnecessary health risks in order to conceive.

The final area for reform relates to legal parentage laws. As noted above, existing legal parentage laws that pertain to alternative conception appear to presume that conception has

occurred at a fertility clinic and has been "assisted" in some way by a medical professional. It is thus not clear whether provincial parentage laws applicable to "assisted" or "artificial" conception actually apply to home insemination. The lack of clarity around the legality of home insemination further clouds the situation. If home insemination is prohibited under the *AHRA*, or even if there is any *doubt* about its legality, it becomes difficult to argue that it was intended to fall under the purview of the various provincial laws. It is thus necessary that at the same time that the *AHRA* is amended to confirm that home insemination is legal, provincial parentage laws are amended to clarify that the law does not distinguish with regard to parentage between children conceived via home insemination and those conceived at a fertility clinic. In both instances, there should be a legislative presumption that the donor is not a legal parent and that the birth mother's partner, if she has one, is the child's second legal parent. These presumptions should apply equally to heterosexual and same-sex couples, as they do in Quebec and Alberta.

An excellent example of the kind of legislative amendments that could be introduced is offered by the state of Victoria, Australia. In response to concerns about the legality of home insemination and its implications for lesbian women in particular, the new *Assisted Reproductive Treatment Act* 2008 (Vic) (the "*Act*") addresses the issue explicitly.[51] While s. 8 of the *Act* establishes that only doctors in compliance with the provisions of the *Act* can carry out artificial insemination procedures, s. 9 indicates that s. 8 does not apply to a woman, or a woman's partner, relative, or friend, carrying out self-insemination at home.[52] In other words, while s. 8 ensures that commercial fertility services are regulated, s. 9 explicitly preserves the legality of home insemination. The *Act* then goes

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51 *Assisted Reproductive Treatment Act 2008* (Vic).

52 *Ibid*. at ss. 8 & 9.

on to address legal parentage, drawing no distinction between the parentage of children conceived at a fertility clinic and those conceived through at-home insemination. In both instances, donors are not legal parents, whether the child is born to an opposite-sex couple, a same-sex couple, or a single woman.[53] The Victorian legislation demonstrates what can be achieved when home insemination and legal parentage are addressed in tandem. While the Canadian situation is complicated by the federal/provincial division of powers, it is imperative that the two arms of government work together to ensure that children conceived via home insemination have the same legal certainty around their parentage as those conceived at a fertility clinic.

CONCLUSION

Despite having access to fertility clinics, a significant number of lesbian and single women continue to self-inseminate at home. The practice is understood to have many advantages, particularly for women who wish to conceive with gay known donors. Yet, Canadian law remains unclear as to the legality of the practice. The *AHRA* can be interpreted to prohibit home insemination, and while the verbal assurances by Health Canada as to the practice's legality are a step in the right direction, absent legislative change women who engage in home insemination continue to take a significant legal risk. It is thus imperative that the federal government review ss. 8 and 10(3) of the *AHRA* and clarify that home insemination is indeed legal.

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53 *Ibid*. at s. 147.