

## **GLBT Families and Assisted Reproductive Technologies**

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The GLBT (gay, lesbian, bisexual and transgendered) community has always included parents, whether from prior different-sex relationships or within the context of same-sex relationships. Experts estimate that, currently, at least 30% of lesbians and one-tenth of gay men are parents, but the percentages are rising dramatically. We are in the midst of what many describe as a "gayby boom" -- so many gay and lesbian families are choosing to have children.

Since other papers address the topic of assisted reproductive technologies ("ART") generally, this paper canvasses family law issues unique to GLBT people using "assisted reproduction," with or without medical involvement.<sup>2</sup> The paper begins with a brief cultural primer to enhance awareness of GLBT families. I then go on to deal with cases involving GLBT parents in the process of family formation, recognition and separation. The paper concludes that the law has failed to keep pace with the realities of GLBT families. Legislative amendments are necessary to respect the equality rights of GLBT people and our children.

### ***Cultural Primer***

Lawyers need to be culturally competent, to have knowledge of, and sensitivity to, the needs and concerns of GLBT communities to properly serve GLBT clients. As much as knowing the law, counsel must also seriously address his or her own prejudices. We live in a culture in which most people presume that every person is heterosexual, and that every person is male or female and that their gender identification corresponds to their gender assigned at birth. Our society profoundly valorizes and rewards heterosexuality and stigmatizes and punishes gender and sexual orientation non-compliance. Members of the legal profession are not immune from discriminatory views regarding GLBT people. This means that lawyers should not make assumptions about a client's sexual orientation or gender identity. It also requires every lawyer to engage in continuing education and

reflection on gender issues and his/her heterosexual privilege or internalized homophobia. Intake forms and interview questions should avoid assuming male/female relationships or a two-parent model. This is an essential element of competent, professional service.

There is significant diversity and creativity in GLBT families. As any experienced family lawyer will attest, heterosexuals are highly diverse in their familial arrangements, but I suggest that the GLBT community has particularly celebrated family diversity as a source of community pride and a site of cultural dialogue. Many in the GLBT community have been willing to explore and create new family forms.

Some GLBT people are single parents, others parent with a spouse (or spouses in polyamorous relationships), or act as co-parents with multiple people, some or all of whom do not have a spousal relationship. Other GLBT people play significant roles in children's lives in non-parental capacities, in creatively defined roles for which we are just developing a language.

Research suggests that most lesbians parent in a two-parent relationship with a same-sex spouse, most often choosing an unknown donor through a sperm bank to ensure family autonomy and avoid health risks. Other female couples use a known sperm donor who agrees to no or limited involvement with the child, without parental status. Still other lesbian couples fully involve the donor as the father of the child, and when he has a spouse, together they are often the fathers of the child. Other gay men become parents through surrogacy or by adoption.

Perhaps because so many GLBT people have compromised relations with our families of biological origin, many GLBT people place great value on our friendship networks — known as “the families we choose.” This cultural dynamic creates openness to moving beyond biology in understanding the central connections of our lives. A common GLBT slogan is “love makes a family.” For many, genetic relations are not significant — meaningful bonds are formed through relations of care for the child. Capper Nichols,

who has participated in four pregnancies, explains, "I do not consider my genetic material sacred, or even particularly important." Susan and Rocki asked for some help; I said sure, I am all for babies, And after all, I had plenty of sperm."<sup>3</sup> Other GLBT people highly value biological ties and devise non-traditional family structures that allow children to have relationships with their blood kin, even when those who provided the egg and sperm for the resultant child are not spouses.

Having already rejected heterosexuality as an unquestioned social norm, some GLBT people are willing to question whether a two-parent family is in children's best interests. Since "it takes a village to raise a child," some favour broader, multiple relations of caring. One lesbian couple writes about their experience with their son, "Eli had no trouble adjusting to the concept of queer family: of two mamas, of a spuncle [sperm provider-uncle] and spaunty [his partner], of various uncles, of people yet unclassified but intrinsically important. It is all he has ever known."<sup>4</sup>

These myriad family relations are poorly contemplated by our language, let alone law, and challenge all of us to address fundamental questions. What makes a parent? Does/should biology count at all, or if it does, when and how? How many parents can/should a child have? What parenting arrangements/forms of recognition are in children's best interests? We have only just begun to address ART in the case law; the answers to these bigger questions remain to be determined.

### ***Getting Pregnant***

For lesbians, unknown donor sperm is available through hospitals, private clinics, some midwives and doctors. A provider who refuses services on the basis of the sexual orientation of the intended mother is acting contrary to provincial human rights legislation.<sup>5</sup> The *Assisted Human Reproduction Act* also establishes the principle that parties who undergo ART procedures should not be discriminated against on the basis of sexual orientation or marital status.<sup>6</sup>

Unknown donor sperm is often seen as desirable because it allows lesbians to parent with autonomy and security. It also avoids the risk of transmissible infectious diseases. However, it is costly and considered less effective at achieving pregnancy than fresh sperm. There is also a problematic shortage of ethnically diverse and identity-release donors (who agree to release identifying information to the child at age 18). Accessing unknown donor sperm often requires interaction with infertility specialists who are accustomed to taking an interventionist, technological approach to conception, when most lesbians simply need to access sperm.

Other lesbians wish to use a known donor, but do not want him involved in any way, other than as a gratuitous provider of semen. Using a known donor does not provide any security to a lesbian family who wish to parent independently nor does it offer security to a sperm donor who does not wish to pay child support. While we routinely prepare donor contracts providing that there will be no access and no child support, these are unenforceable and really only function as statements of intent. Access and child support are the rights of the child and cannot be bargained away.<sup>7</sup>

Another challenge with known donor semen is that it potentially exposes lesbians to health risks. Although it is possible to freeze and test donated semen for transmissible infectious diseases, gay and bisexual men are excluded from donating semen in Canada, subject to special application by their doctor, a medical screen, and dispensation from the Minister of Health.<sup>8</sup> This exclusion was unsuccessfully challenged as discrimination on the basis of sexual orientation.<sup>9</sup>

The situation encourages lesbians to self-inseminate at home. Some have argued that self-insemination is illegal as it falls under the rubric of a controlled activity under the AHRA requiring a licence.<sup>10</sup> Health Canada states, however, "The *Assisted Human Reproduction Act* applies to any procedure where gametes are manipulated for the purpose of creating an embryo. The intention of the Act is to address assisted human reproduction procedures that take place in a health care setting and are performed by a professional. It is not the intention of the Government to become involved in the private

matter of home insemination. Regulations to be developed under the *Assisted Human Reproduction Act* will serve to further clarify this position.<sup>11</sup>

Other lesbians wish to use a known donor in the child's life in some capacity ranging from "friend" to "father." They value the child's contact with his or her male progenitor and/or an additional set of hands in the raising of a child. At the same time, specifying the nature and degree of a known donor's involvement in advance is highly problematic. Applications by known and involved donors for increased access and decision-making responsibilities are becoming more common and will be discussed later in this paper.

Most lesbian couples who wish to parent together will have one mother conceive and carry the child. The term "co-mother" is used throughout this paper to describe lesbian non-birth mothers since it is a more positive articulation of their status, rather than non-biological or non-birth mother, which frames their identity as a negative, as "not" biological mother.

Still other lesbian couples will use IVF so that one mother is the genetic mother and the other is the birth mother. Eggs are harvested from the genetic mother, fertilized externally, and the resultant embryo(s) implanted in the birth mother. Many are motivated by the romantic desire to physically create a child together but are also encouraged by hopes of enhanced legal and social recognition of their joint parentage.<sup>12</sup>

Gay men typically adopt or work with surrogates to achieve pregnancies when they seek single-parent or two-parent autonomy. Others work with lesbian singles or couples in co-parenting arrangements. The issues raised by surrogacy are the same for gay men as for other intended parents, except that gay men face additional restrictions on their sperm donation to the surrogate. As discussed by the other authors, paying consideration to a surrogate is prohibited by the AHRA. Surrogacy contracts are likely unenforceable and are specifically not enforceable in Alberta, and in Quebec, where they are "absolutely null."<sup>13</sup>

### ***Birth Registration for Gay Men Using Surrogates***

To ensure recognition of their parentage, GLBT parents often face legal barriers, since birth registration statutes largely assume male-female, two-parent families. In the 2004 case of *D. (K.G.) v. P. (C.A.)*,<sup>14</sup> the court recognized the inadequacy of the birth registration system of the Ontario *Vital Statistics Act*.<sup>15</sup> A gay male father of a child born to a gestational carrier was unable, as a single father, to register the birth of his daughter without first obtaining a court order. By application to the Superior Court of Justice, he was able to register his child's birth in his name alone and obtain a declaration of parentage. The court acknowledged the legislative gap in the Act and noted that it has not kept pace with assisted reproductive technologies. As a result, the government was ordered to shoulder some of the costs incurred by the applicant. Still, there was no comprehensive remedy ordered by the court, nor was any legislative action undertaken.

### ***Birth Registration for Lesbian Couples***

Lesbian co-mothers may be recognized as parents without having to engage the courts in British Columbia, New Brunswick, Manitoba, Alberta, Quebec, and Ontario, at least in some circumstances.<sup>16</sup>

In 2005, four Ontario lesbian families known as the Rutherford Applicants challenged the denial of immediate recognition of their parentage on their children's birth registrations under the VSA.<sup>17</sup> Inclusion of both mothers' particulars on the Statement of Live Birth would provide the listed parents with presumptive proof of parentage. That is, the listed parents would be considered parents absent proof to the contrary. The VSA birth registration document is what most people rely on to provide evidence of parentage when dealing with daycares, schools, border crossings and with other third parties in their day-to-day lives.

The Rutherford Applicants also asked for declarations of parentage under s. 4 of the *Children's Law Reform Act*.<sup>18</sup> A declaration of parentage is a declaration *in rem* -- it is

conclusive proof for all purposes that a person is a parent of a child. Most parents have no need for CLRA declarations, but the Rutherford Applicants were concerned by the ruling of Justice Aston in *AA v. BB v. CC*,<sup>19</sup> the case of a lesbian couple who parent with an involved father, which held that declarations of parentage were not available to two mothers under principles of statutory interpretation.

The Rutherford Applicants wanted secure parental recognition for their families and for other lesbian parents and children. All the children of the Rutherford Applicant families were included as parties to the litigation and made their own s. 15 and s. 7 *Charter* claims.

The four Rutherford Applicant families included married spouses Melanie and Mel. Melanie gave birth to twins Emerson and Alexander, and Mel impregnated her wife using her fertilized ova. Both women are biological parents: Melanie is the gestational mother and Mel the genetic mother. After they started the Rutherford proceeding, the government agreed that they were both parents and allowed both to be listed on their children's Statements of Live Birth.

Rutherford Applicants Veronica and Rosemarie together decided to have a child, and are the mothers of daughter Ayoka. Only Rosemarie was recognized as Ayoka's mother on the Statement of Live Birth. Rosemarie said, "it is an insult and a lie that Veronica is non-existent as Ayoka's parent. It jeopardizes Ayoka's security."

Applicants Bonnie and Beatrice married and wished to expand their family, giving birth to a son, Samuel. After litigation commenced, Bonnie was diagnosed with breast cancer before Beatrice had any legal recognition of her parentage. If Bonnie had died without Beatrice having parental recognition, Samuel's relationship to Beatrice would have been uncertain and vulnerable. A family adoption order is not possible in the event of the death of the birth mother, or separation, as the parties are no longer spouses.

Applicants Rachel Epstein and Lois Fine are parents of Sadie Rose Epstein-Fine, now fourteen years old. While Rachel was pregnant, Lois cooked for her, tied her shoes when she could not bend over, attended the midwife appointments, was present at the birth and cut Sadie's umbilical cord. Only Rachel was recognized as Sadie's mother on the Statement of Live Birth. Sadie swore an affidavit in the Rutherford proceeding describing her worries - how Lois might not be recognized as her mother by medical staff; "faking" her signature on her passport to reflect her legal name; and remembering to lie at border crossings and say she only has one mother. Sadie deposed:

I just want both my moms recognized as my moms. Most of my friends have not had to think about things like this they take for granted that their parents are legally recognized as their parents. I would like my family recognized the same way as any other family, not treated differently because both my parents are women.

Most kids understand that I have two moms. But a few kids are mean or just do not understand. They ask who my "real" mom is. I explain that both of my moms are my real moms. Some adults do not understand either. It would help if the government and the law recognized that I have two moms. It would help more people to understand. It would make my life easier. I want my family to be accepted and included, just like everybody else's family.

Imagining winning the case, it would feel amazing. It would feel like we would not have to lie anymore. We would not have to worry about getting in trouble. Nobody could question who my mothers are anymore. I would feel more secure and safer. We could tell the truth. I could just be who I am, and sign my own signature, Sadie Rose Epstein Fine.

The government hotly contested the recognition of lesbian co-mothers on their children's Statements of Live Birth. It claimed that the VSA birth registration document was meant to capture biological particulars, although the evidence was overwhelming that straight families using donor sperm or eggs registered the particulars of the intended parents without question.

In fact, through cross-examination of the Deputy Registrar General of Ontario, we obtained an internal government document that expressly required the rejection of applications by "same-sex parents". It seems there was a conscious effort to "vet" the

gender/sexual orientation of applicants and to reject the birth registrations of lesbian mothers.

On June 6, 2006, Sadie and the other Rutherford Applicant children won their case. Justice Rivard struck down the birth registry scheme of the VSA as unconstitutionally discriminating against same-sex families. The court said:

Lesbian mothers lack even a language to identify themselves. Given this overall context of homophobia and heterosexism, it makes an even bigger difference to them for the government to recognize their parental relationships. Failure to recognize these relationships perpetuates views that there is something wrong or unnatural about their families. Rather than the law seeking to remedy their historic disadvantage, it is placing additional burdens upon them, and is therefore discriminatory. Likewise, for children of lesbian mothers, who are even more vulnerable than their parents to the lack of symbols of their families in popular culture, exclusion of their parents from birth registration furthers this vulnerability.<sup>20</sup>

Justice Rivard suspended the declaration of invalidity for 12 months to give the government time to correct the constitutional violation. The government did not appeal.

Justice Rivard also granted declarations of parentage under s. 4 of the CLRA in favour of both mothers. He relied on his *parens patriae* jurisdiction but noted that if there was no authority under *parens patriae* to grant the relief requested, then the CLRA discriminated against lesbian co-mothers in a manner that could not be justified in a free and democratic society.

It is respectfully submitted that it was not open to the court to decline a constitutional remedy. Justice Rivard specifically found that the CLRA had a discriminatory effect on lesbians, and there was no s. 1 justification. The impugned provisions of the CLRA were found unconstitutional, but Justice Rivard declined to make a specific remedial order under the *Charter*. Perhaps he wished to defer to the court of Appeal, which was to be considering the same issue in *AA v. BB v. CC*. Still, a law that is unconstitutional is, to the extent of the inconsistency, of no force and effect.<sup>21</sup>

The government's purported answer to the *Rutherford* ruling was introduced August 24, 2006. The government proclaimed a legislative amendment that had been on the books since 1994 but never proclaimed, alongside a regulation. It was the "easy fix" to the VSA, because the change could be made without debate in the Legislature.

The VSA now permits, as of January 2, 2007, that two lesbian mothers may register their child's birth as parents, but only if the father is unknown and conception is by assisted reproduction. The government has attempted to do the minimum required, and has failed to consider the equality rights of co-mothers in crafting its remedy. The violation of equality rights of lesbian families continues for those who use known donor sperm, and for families involving two biological mothers. While the Deputy Registrar claimed in *Rutherford* that it would be possible to have three legally recognized parents in circumstances of egg donation [that is, the gestational mother, the genetic mother and the biological father], the legislative amendments do not accommodate recognition of three parents on the birth registration form. The government has avoided a comprehensive examination of its exclusionary legislation, and in so doing, maintains its discrimination.

If it causes psychological distress to deny a lesbian co-mother status as her child's parent, as the government essentially admitted by its failure to appeal *Rutherford*, how is there less distress because there is a known donor or an involved father? Of course, the offence to dignity is the same. The VSA continues to discriminate against lesbian co-mothers. Non-recognition of parentage is dehumanizing and psychologically distressing. As *Rutherford* Applicant Lois Fine deposed, "When your heart overflows with aching love and devotion for your child, the failure to recognize your mothering ... invalidates your very humanity."

### ***Three Parents by Declarations of Parentage: AA v. BB v. CC***

*AA v. BB v. CC* involves lesbian moms who are spouses and the primary caregivers of their child, and who wish to acknowledge their child's father as a parent. The co-mother

was without the parental status available to the biological mother and father. An adoption order in favour of the co-mother would extinguish the parental status of the father. The parties therefore sought a declaration of parentage in favour of the co-mother under the CLRA or the court's *parens patriae* power, on consent. At first instance, they were unsuccessful.<sup>22</sup>

The parties appealed and asked to advance constitutional arguments for the first time. The parties declined to adduce evidence in support of their *Charter* claims, on the basis that the discrimination was obvious, but the Rutherford Applicants obtained status as added party interveners and provided the court with the extensive evidentiary record from their hearing.

The *amicus curiae* — an experienced family lawyer appointed by the court, the Rutherford Applicants as party interveners, and the Office of the Children's Lawyer argued the CLRA discriminated against the appellant co-mother and her child on the basis of family status and advocated a remedy that would advance the equality rights of diverse families in Ontario. The Appellant AA, and the Rutherford Applicants, also argued that the CLRA discriminated on the basis of sexual orientation and sought recognition for all same-sex families that involve a different-sex biological parent in their children's lives.

Added party intervener Alliance for Marriage and the Family -- a coalition including REAL Women and the Evangelical Fellowship -- argued that there was no discrimination. Declarations of parentage were meant to be available to biological parents only, and parents in many families were excluded from parental recognition by way of the CLRA.

The Ontario government did not participate in the appeal, despite the challenge to the constitutionality of the CLRA and the conflict over its interpretation. In *Rutherford*, the government argued that changes to the VSA were unnecessary because declarations of parentage were available to two mothers under the CLRA, contrary to the ruling in *AA v.*

*BB v. CC*. The Rutherford Applicants, now party interveners in *AA v. BB v. CC*, had to alert the Court of Appeal to the government's interpretation.

On January 2, 2007, the Ontario Court of Appeal granted the lesbian co-mother status as the parent of her child. The court ruled that the CLRA did not permit declarations in favour of two mothers as a matter of statutory interpretation and declined to rule on the constitutional arguments. Instead, the court granted the co-mother status as a parent using its *parens patriae* jurisdiction.

The court held that the drafters of the CLRA had not contemplated the realities of modern family forms. There was no intention to exclude lesbians, or other non-biological parents, from parental recognition. Rather, the legislative gap had become obvious now as a result of changing social circumstances. The court was required to use its *parens patriae* power to fill the gap, in accordance with the child's best interests, and the parentage of the co-mother was accordingly recognized.

The Alliance for Marriage and the Family, as intervener, sought standing to bring an appeal to the Supreme Court of Canada. This attempt at standing was unsuccessful.<sup>23</sup>

The Court of Appeal judgment was a great relief for the individual *AA v. BB v. CC* family. It is expected that lower courts will also exercise their *parens patriae* jurisdiction in similar circumstances for other families, but given the fact-specific, highly discretionary nature of *parens patriae* there is concern about outcomes for less traditional family formations or those resident in conservative jurisdictions not as familiar with these issues.

The ruling permits the CLRA to discriminate on its face in at least sections 1(1), 4, 8, 12 and 20(1). The statute continues to assume that all children are born from one man and one woman and these are the child's intended and actual "real" parents. The CLRA recognizes only this dominant nuclear family paradigm, excluding other family forms from respect and recognition. This is family status discrimination.

Another constitutional case, at great expense, or government action, is needed to recognize and affirm the realities of all families, rather than enforce traditional family forms as privileged. The equality guarantee of the *Charter* requires that we move past fear and rejection of what is unfamiliar, look at the effects of legal exclusion from the perspective of the rights claimant, and see the common humanity that unites us all. Children in GLBT families and their parents should not be marginalized, nor the child's best interests threatened, because their families are "different" from the culturally dominant, yet increasing statistically rare, norm of the nuclear family.

### *Custody and Access Issues on Separation of a Same-Sex Couple*

In a claim for custody or access involving the breakdown of a gay or lesbian relationship where the relationship with the child has been formalized legally, the parents should start off on an equal footing. Where only one party is the legal parent and the other a social parent, the court could still order custody or access in favour of either party. "The best interests of [the child] are, of course, what will govern any decision relating to custody... In this fundamental principle, same-sex parents seeking custody are no different from opposite-sex parents seeking custody."<sup>24</sup>

A court would be required to consider the bond between the child and each parent and each parent's parenting abilities, in addition to the biological or legal connection between parent and child. *Buist v. Greaves*<sup>25</sup> involved a lesbian co-mother who was seeking sole custody and a declaration that she was a mother of the child. The couple planned for the child's birth together and shared in all aspects of his life. After the parties separated, the co-mother moved out and had access to the child. The birth mother was offered a job in Vancouver and wished to move there with her son. Justice Benotto held that, although the co-mother was very involved in the child's care, the birth mother was the primary caregiver. It was in the child's best interest to be with the birth mother, and to maintain regular contact with the mother's former partner. The birth mother was awarded sole custody, because the conflict between the parties made joint custody unworkable.

In *H. (D.W.) v. R. (D.J.)*,<sup>26</sup> a lesbian couple and a gay male couple agreed to have two biological children together. One child would live with, and be parented by, the women and one with the men. The male couple raised the child together for three years, with some contact by the biological mother, until the separation of the gay male couple. At that point, the former gay male spouse and the lesbian couple denied access to the co-father on the basis of he was HIV positive and was making poor choices and behaving irrationally post-separation. The co-father sought access to A. The court found that the applicant had acted *in loco parentis* to the child. Absent evidence to contrary, it was in child's best interest to maintain maximum contact with each parent, including a person who stands in the place of a parent, and granted access for two three-hour periods per week.

There is an unreported Ontario decision in which interim custody was awarded to a lesbian co-mother. *Re L. and S.* involved two children, one adopted legally by the applicant and the other conceived by alternative insemination by her partner during their relationship. On consent, the court ordered that the applicant retain sole custody of the adopted child, joint legal custody of the other child, and that the children would be primarily resident with the applicant. The court relied on the CLRA, which states that the parties to an application for custody and access in respect of a child shall include a person who has demonstrated a settled intention to treat the child as a child of his or her family.

In practice, at least in Metro Toronto, there seems to be a strong tendency towards joint custody and generous time to the non-biological parent in same-sex family disputes. This is generally a welcome development. While some American courts have severed important relationships between a child and a gay or lesbian parent, Canadian courts are able to recognize that a child's love for his or her parent is not based on biological connection, but on bonds of care giving and love. Still, our desire to avoid discriminatory reasoning cannot result in a refusal to consider the facts of each individual case or the superficial application of "equality" reasoning.

Indeed, in an effort to respect the connection of the co-mother, I worry that biological mothers are sometimes being treated quite harshly, similar to the frequent disparate treatment of mothers and fathers in different-sex families. Our culture still expects and demands that women will assume primary care of children, and so relatively lesser contributions by men are often lauded as exceptional parenting. Mothers are sometimes punished for being "too focussed" on work or other pursuits, rather than their children, when the same behaviour in a man would be unremarkable and have no impact on his custody claims. Similarly, in the lesbian context, it seems mandatory that the biological mother be more involved than the co-mother in her child's life; failure to do so is perceived as her abandoning her maternal role. As well, little recognition is given to the uniqueness and potential importance of attachments arising from pregnancy or lactation.<sup>27</sup> All too often we have seen judges eager to immediately grant significant time and joint custody to co-mothers, regardless of the particular facts of the case. I suppose this is "equal opportunity." Very generous time is often accorded to fathers in a different-sex context who have been little more than sperm donors in their children's lives.

This raises important and interesting questions about what makes a relationship with a parent valuable to a child. Is it mere biological connection or psychological attachment? What quality of relationship constitutes attachment? If the adult parties live together and have a relationship, are they necessarily both parents to a child or does that require a proven relationship with the child herself?

It will also be interesting to see the judicial response to lesbian families who choose not to, or who are unable to, pursue an adoption or declaration of parentage to secure legal recognition now that such mechanisms are available. In the U.S., once co-mothers could adopt, those who did not were frequently accorded limited rights and obligations. In my view, this focus on legal status could obscure proper attention on the child's best interests and should best be avoided here.

### *Custody and Access Issues involving Disputes with Donor-Father*

In other jurisdictions, lesbian couples have had very little success in defending their vision of their child's family from intrusion by donors. It may be that the same trend develops in Canada. Certainly, there are early signs that courts are not prepared to exclude biological "fathers" from involvement in children's lives, even if the parties had agreed the donor would assume a different, lesser role. In the context of claims by donors to lesbian couples, the view appears to be that, "Even in a society that has placed affectional ties at the centre of a child's best interests, the child's biological connections remain a fundamental value."<sup>28</sup>

As noted above, in Quebec, the *Civil Code* explicitly recognizes that two women may be considered the "natural parents" of a child and the co-mother may be assigned all the rights and obligations commonly assigned by law to the father.<sup>29</sup> Nevertheless, the Quebec Court of Appeal granted temporary access to a donor without determining the parties' intentions at conception. In *L.C. v. S.G.*,<sup>30</sup> the child, M, was registered as having two mothers under the *Civil Code of Quebec*: the woman who gave birth to her and her wife. The donor sought to have his paternity recognized on the birth registration and requested an access order after the mothers stopped his visitation with M. The child was about 9 months old at the time the donor commenced the application. The court granted temporary access to S.G. without deciding whether the parties planned for S.G. to become an involved father or whether they intended him to be only a donor.

In *C. (M.A.) v. K. (M.)*,<sup>31</sup> a lesbian couple were unsuccessful in limiting the access of the sperm donor father and then unsuccessful in dispensing with his consent to an adoption by the co-mother. The lesbians were the primary caregivers and the gay male father had regular access to the child, aged 6. The parties had executed a co-parenting agreement that gave the mothers decision-making power and contemplated an adoption terminating the father's parental rights if necessary to recognize the status of the co-mother.

The lesbian couple took the position that their decision-making power, and their child's best interests, permitted them to restrict access in August 2007. The father successfully commenced a proceeding to restore his access. The mothers brought a joint application for adoption and the father refused his consent. The court held that the mothers had failed to show that an order dispensing with the donor's consent was in the child's best interests pursuant to ss. 136 and 138 of the *Child and Family Services Act*.<sup>32</sup> The court specifically found that the co-parenting agreement of 2002 between the parties was irrelevant in any decision regarding the child's best interests. The court refused the mothers' argument that the child, who had difficulty with transitions and a learning disability, required a stable and secure two-parent family, in favour of the father's contention that the child's reality was that she had three engaged parents. Justice Cohen wrote:

[I]n determining B.'s best interests, the issue for the court is not the protection of a specific family structure *ab initio*. This court sees all kinds of family structures and, absent specific statutory provisions otherwise, the nuclear family of two parents and a child enjoys no special preference when the court is assessing the best interests of a child. Indeed, a child can have more, or less, than two parents for the purposes of family law.<sup>33</sup>

The Supreme Court of Ireland granted a gay male sperm donor access to the child he assisted a lesbian couple in creating.<sup>34</sup> At the time of pregnancy, the parties entered into an agreement addressing the plan for the donor's involvement in the child's life. His role was to be akin, at most, to that of a "favourite uncle". The lesbian couple was to be fully responsible for the child's upbringing and, for all intents and purposes, be the "parents" of the child.

After the birth of the child, the donor, McD, adopted a different position regarding the child. He sought to assert rights as the father of the child, to be appointed a guardian and to have access. The lesbian couple became concerned that McD referred to himself as the child's father and then demanded increased access.

The Supreme Court held the parties' agreement to be unenforceable so as to allow for the welfare of the child to be the paramount consideration in dealing with the issues at play. The agreement was admissible for purposes of giving context.

The Supreme Court found that the lesbian couple and child did not constitute a "de facto family" and so the family rights claims under both the Irish Constitution and article 8 of the European Convention on Human Rights were not available to them. The Supreme Court added that the lesbian co-mother had no rights over the child and was to be viewed as one would a foster parent or other family member (such as a grandparent) raising the child. The Supreme Court highlighted the benefit that the child would receive from having contact with his biological father, especially since they had already formed a bond.<sup>35</sup>

These cases serve as a caution to lesbian couples who seek to use a known donor while maintaining exclusive decision-making around the nature and extent of his access. As Justice Cohen stated in *C. (M.A.) v. K. (M.)* about the lesbian couple:

When they decided to have a child, they fully understood that, although engaging a sperm donor was a biological necessity, engaging a known sperm donor was not. Thus, when they decided that they wanted their child to have a known and involved father, they knew that, if they chose well, their child would develop a relationship with a parent who was not part of their immediate family. They knew that a parent-and-child relationship gives rise to rights and responsibilities. They anticipated that a third parent would be involved with their family and had to have anticipated that this parent might disagree with, or challenge, their parenting choices, just as they must do with one another. It is likely that they also knew, since Ms. M.A.C. is a lawyer and fraternizes with family lawyers, that some day, if their relations went badly with the biological father, a mediator or an arbitrator or a judge might interpret their child's best interests to include preserving her connection with that father. Now they want to turn back the clock and make a different choice..<sup>36</sup>

While the widening of the category of parent in *AA v. BB v. CC* was a happy result for the parents and child in that case, it will also mean that gay men asked to be donors may more often insist on parental status as a condition of donating sperm since the co-mother could also receive recognition. Professor Fiona Kelly suggests that "widening the category of 'parent' so that three or more people can be included might result in men

being given additional tools with which to control women within the family, despite women remaining the primary caregivers of children in both the heterosexual and homosexual context.<sup>37</sup> Given the social currency of the father's rights movement, lesbians are vulnerable to the forced insertion of sperm donors into their families in a manner not contemplated or agreed by the parties.

The High Court of Justice in London, England, took a different approach in *Re D*, in which the donor, Mr. B, sought increased access to his daughter, D.<sup>38</sup> The respondents, Ms. A and Ms. C, resisted the increase in access on the basis that, when the parties had discussed conceiving D, they planned for the father to be acknowledged but not carry any parenting responsibilities; the mothers were to raise the child together as they saw fit.

Justice Black noted that it is usually in the child's best interest to have contact with his or her other different-sex parent. However, she refused to reduce the significance of Ms. A's role as a parent in D's life in favour of Mr. B. Justice Black also did not want to diminish the importance of Ms. A and Ms. C's relationship. She addressed this by stating:

As I said in my last judgment, D's home is with Ms A and Ms C. They, together with her sister, are her immediate family. That is where she will derive her primary security throughout her childhood. As Mr B expressly recognises, Ms A and Ms C are her day to day parents and he has no role in her day to day care, whether in relation to decision making or otherwise. He will, however, be kept informed of all major decisions taken by Ms A and Ms C in relation to her. He will thus be recognised as a parent by the grant of parental responsibility but it will be a parent of a very different sort ó no less important, just very different.<sup>39</sup>

Justice Black honoured the mothers' roles as primary security for their child, privileging the co-mother over the donor in accordance with the child's reality.

### ***Child Support***

Where a person has demonstrated a settled intention to treat a child as a child of his or her family, there is an obligation of support for the child. The parents cannot agree

otherwise. In *Jane Doe v. Alberta*,<sup>40</sup> the female spouse in a different-sex cohabiting couple had a child by unknown donor insemination without her spouse's consent. The couple wished to continue the relationship and entered into a contract providing that the man was not the father of the child and would have no obligation of child support. The couple brought an application to have contract recognized as binding. The claim was dismissed by the Alberta Court of Appeal. The spousal relationship with the child's mother would likely create a parental relationship with the child, and the nature of that relationship could not be agreed in advance. An agreement between parties cannot displace the jurisdiction of the court to pronounce upon parental rights and obligations. The Supreme Court of Canada refused leave to appeal.

While an obligation to pay child support will exist whenever a person stands *in loco parentis* in the place of a parent, the table amount of child support is not necessarily used if there is no "natural" or legal relationship. The Ontario *Guidelines* provide in section 5 that:

Where the parent is not a natural or adoptive parent of the child, the amount of the order is, in respect of that parent, such amount as the court considers appropriate, having regard to these guidelines and any other parent's legal duty to support the child.

Child support claims for same-sex families may be impacted by section 5 of the *Guidelines*. Lesbian parents using unknown donor semen will likely no longer obtain adoption orders or declarations of parentage, but will rely on their Statement of Live Birth showing both mothers' names to deal with third parties and institutions. If a co-mother who jointly planned the pregnancy is not the "natural or adoptive parent" of her child, she might seek to rely on section 5, although I expect this would be unsuccessful. Courts have, in my view rightly, held that section 5 of the *Guidelines* should have no application where child support is sought and ordered where the non-biological parent made an unconditional commitment to stand as a stepparent, and the biological parent is not before the court or the subject of a previous support order.<sup>41</sup> In *Ballmick v. Ballmick*,<sup>42</sup> Justice Maresca required child support from a non-biological father, even though he had been deceived as to paternity, writing:

Modern society has moved away from a rigid definition of the family. Illegitimacy has been abolished. Marriage is not a pre-requisite for support. Same-sex couples raise loving, healthy families. There has been a recognition both by society at large and our legal system that it is the relationship that matters, not the legality. It is the sense of family and bonding between parent and child that is important, not whose DNA is lodged in the child's cells.

The interesting question arises in cases where there is a known and uninvolved donor. Many lesbian families are unwilling to adopt their own children and will simply rely on a Statement of Live Birth showing both mothers, even where the donor is known, despite the terms of the VSA requiring that only the birth mother's particulars appear unless unknown donor sperm was used.

In my community education work, most lesbian families strongly object to differential treatment on the basis of whether they paid a sperm bank or used gratuitous sperm from an uninvolved friend. The exclusion of the lesbian co-mother offends her dignity regardless of the source of the semen. The other approach taken by lesbian families is to use two sperm donors, perhaps a gay male couple, for the same cycle of insemination. In this way, they claim, the father is "unknown".

In the event of a child support claim in these cases, who will bear primary financial responsibility for the child? Who is the "natural" parent? An uninvolved but known donor who masturbated into a vial and who has had no involvement otherwise in the child's life, or the co-mother who planned the pregnancy with the birth mother and has acted as a primary caregiver for the child? The *Guidelines* might suggest that the uninvolved donor as the "natural parent" should be obliged to pay table child support at a minimum, regardless of the parties' intentions and the child's realities, and that the lesbian co-mother ought potentially to be subject to a lesser obligation under section 5. It seems the sperm donor will be required to pay full table support. The case of *C.(K.) v. B.(S.)*<sup>43</sup> confirms, in accordance with the plain language of the section, that the biological parent cannot use section 5 to reduce his or her obligation to pay the table amount of support under the *Guidelines*. In *Wright v. Zaver*,<sup>44</sup> a father who had no contact with his son for 15 years was ordered to pay the table amount of support although the parties had

agreed, and there was a court order, that he pay only a small lump sum. Whatever the parents' intentions, child support and access are the right of the child and these rights cannot be bargained away by tying together access and support.

Section 5 of the *Guidelines* is offensive to non-biological/non-legal parents in privileging the responsibilities of a "natural" or adoptive parent, as though these relationships are inherently more important. It unfairly assumes the lesser significance and corresponding lesser obligation of a *de facto* parent. Of course, it is always open to a person who stands in the place of a parent to "do the right thing" and simply pay the table amount.

A biological father who objects to paying the full table amount, when the same is not required from non-biological fathers, has mounted a constitutional challenge claiming that section 5 discriminates against him. This approach is misguided in my view. There is no violation of the human dignity of the *biological* parent pursuant to section 5, and the applicant cannot attempt to raise the infringement of someone else's rights for his own benefit.

While the provision might offend the dignity of *de facto* parents and the children of these parents, it is settled law that a party cannot rely upon the violation of a third party's *Charter* rights to seek a constitutional remedy.<sup>45</sup> Litigation by a child directly affected by the impugned provision, or a parent receiving less support, appears to be the "reasonable and effective manner" in which one would expect an allegation of an equality rights breach to be raised with respect to section 5 of the *Guidelines*.

### ***Conclusion***

In the span of less than a decade, Canadian law has afforded new protections to GLBT families, from equal spousal status, to equal marriage, and more recently, in some jurisdictions, we are achieving equal parental status by birth registration and declaration of parentage.

Canada is a global leader in the worldwide civil rights movement for equality for same-sex families. We have achieved much for which we can be proud, but there is still work to do to advance the best interests of children in GLBT families. In *AA v. BB v. CC*, the Ontario Court of Appeal noted:

Present social conditions and attitudes have changed. Advances in our appreciation of the value of the other types of relationships and in the science of reproduction technology have created gaps in the CLRA's legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child's parents as adopting parents or "natural" parents. The CLRA, however, does not recognize these forms of parenting and thus the children of these relationships are deprived of the equality of status that declarations of parentage provide.<sup>46</sup>

There has been no effective legislative response in Ontario to the well-known inadequacies in our parenting statutes. Our laws must expand beyond outmoded ideas restricting the sex and number of adults in a family and embrace the diverse realities necessary to protect children's best interests. For years now, governments have been aware of the requirements of section 15 of the *Charter* in relation to GLBT families, yet we still await a comprehensive rewrite of parenting-related statutes. Our children deserve better.

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<sup>1</sup> Of Martha McCarthy & Company, 146 Davenport Road, Toronto ON, M5R 1J2, Tel 416.862.6226. In the interests of full and fair disclosure, I, or my firm, acted as counsel in *Rutherford v. Ontario*, counsel to the Rutherford party interveners in *AA v. BB v. CC* and counsel to the biological mother in the access proceeding *E. (E.) v. F. (F.)/ C. (M.A.) v. K. (M.)*, all discussed *infra*.

<sup>2</sup> I am considering GLBT families that require "reproductive assistance" as a result of the sexual orientation of the parties, so I do not consider same-sex couples with a trans parent who have access to all necessary genetic material within the couple or address cases involving the children of GLBT people after the breakdown of a different-sex relationship.

<sup>3</sup> C. Nichols, "Donor Man" in S. Goldberg and C. Brushwood-Rose, ed. *And Baby Makes More* (London, Ontario: Insomniac Press, 2009) at 35.

<sup>4</sup> T. Bernhardt et al., "The Spawn, the Spawnlet and the Birth of the Queer Family" in S. Goldberg and C. Brushwood-Rose, ed. *And Baby Makes More* (London, Ontario: Insomniac Press, 2009) at 116.

<sup>5</sup> *Benson v. Korn*, [1995] C.H.R.R. D/319 (4 August 1995) (B.C. Council of Human Rights).

<sup>6</sup> S.C. 2004, c. 2 [AHRA], s. 2(e)

<sup>7</sup> *Willick v. Willick*, [1994] 3 S.C.R. 670; *Richardson v. Richardson*, [1987] 1 S.C.R. 857 at 869; *Young v. Young*, [1993] 4 S.C.R. 3 at 60; see also discussion of *Doe v. Alberta*, *infra*.

<sup>8</sup> Processing and Distribution of Semen for Assisted Conception Regulations, S.O.R./96-254. ss. 19(1), 20.

<sup>9</sup> *Susan Doe v. Canada (Attorney General)*, 2006 CarswellOnt 242, 79 O.R. (3d) 586, 25 R.F.L. (6th) 384 (Ont. Sup. Ct.), aff'd 219 O.A.C. 101, 84 O.R. (3d) 81, 2007 CarswellOnt 77.

<sup>10</sup> AHRA, s. 10 states: (1) No person shall, except in accordance with the regulations and a license, alter, manipulate or treat any human reproductive material for the purpose of creating an embryo. (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.

- <sup>11</sup> Angela Cameron, "Regulating the Queer Family: *The Assisted Human Reproduction Act*" (2008) 24 Can. J. Fam. L. 101 at ftnt 38, citing Catherine Saunders, Media Relations Officer, Health Canada, cited in "Health Canada responds to questions about home insemination", LGBT Parenting Network E-News (February 2005).
- <sup>12</sup> This is discussed by Suzanne Pelka, "The Making and Unmaking of Biological Ties in Lesbian-Led Families" in R. Epstein, ed. *Who's Your Daddy? And Other Writings on Queer Parenting* (Toronto: Sumach Press, 2009).
- <sup>13</sup> Art. 541 C.C.Q.
- <sup>14</sup> [2004] O.J. No. 3508 (Ont. Sup. Ct.).
- <sup>15</sup> R.S.O. 1990, c. V-4 [öVSAö].
- <sup>16</sup> *Gill v. British Columbia (Ministry of Health)*, 2001 BCHRT 34; *A.A. v. New Brunswick (Human Rights Commission)*, 2004 CarswellNB 395 (N.B.E.S.T.D); *Fraess v. Alberta (Minister of Justice and Attorney General)*, 2005 ABQB 889; *Vital Statistics Act*, C.C.S.M. c. V60, s.3; Art. 113-115, 538-542 C.C.Q.
- <sup>17</sup> *Rutherford v. Ontario (Deputy Registrar General)* (2006), 270 D.L.R. (4th) 90, 81 O.R. (3d) 81 (S.C.J.) [öRutherford"].
- <sup>18</sup> R.S.O. 1990, c. C-12 [öCLRAö].
- <sup>19</sup> (2007), 2007 ONCA 2, 83 O.R. (3d) 561, 35 R.F.L. (6th) 1 [*AA. v. BB v. CC*].
- <sup>20</sup> *Rutherford*, *supra* note 17 at para. 205.
- <sup>21</sup> *Halpern v. Toronto (City)* (2003), 65 O.R. (3d) 161, 65 O.R. (3d) 201, (sub nom. *Halpern v. Canada (Attorney General)*) 106 C.R.R. (2d) 329, 2003 CarswellOnt 2159, (sub nom. *Halpern v. Canada (Attorney General)*) 172 O.A.C. 276, 36 R.F.L. (5th) 127, 225 D.L.R. (4th) 529 (Ont. C.A.) at paras. 149-151; *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, s. 52.
- <sup>22</sup> *A. (A.) v. B. (B.)* (2003), 225 D.L.R. (4th) 371, 38 R.F.L. (5th) 1 (Ont. Sup. Ct.)
- <sup>23</sup> 2007 SCC 40, [2007] 3 S.C.R. 124, 42 R.F.L. (6th) 1.
- <sup>24</sup> *Murphy v. Laurence*, (2002) CarswellOnt 1281 (Ont. Sup. Ct.) at para. 12.
- <sup>25</sup> [1997] O.J. No. 2646, 11 O.F.L.R. 3 (Gen. Div.).
- <sup>26</sup> 2007 ABCA 57, 280 D.L.R. (4th) 90, 2007 CarswellAlta 201.
- <sup>27</sup> See, Nom de Plum, "The Latest Lesbian Villain" and R. Pepper, "Beyond the White Picket Fence" in J. Wells, ed. *Homefronts: Controversies in Non-Traditional Parenting* (L.A.: Alyson, 2000).
- <sup>28</sup> *C. (M.A.) v. K. (M.)*, 2009 ONCJ 18, 2009 CarswellOnt 428, [2009] W.D.F.L. 1446, 63 R.F.L. (6th) 438, 94 O.R. (3d) 756 at para 66.
- <sup>29</sup> Art. 539.1 C.C.Q.
- <sup>30</sup> [2004] J.Q. no. 7060 (C.A.) (QL); Angela Campbell, "Conceiving Parents Through Law" (2007) 21 Intö J.L. Polöy & Fam. 242.
- <sup>31</sup> *C. (M.A.) v. K. (M.)*, *supra* note 28. See also, involving the same parties, *E. (E.) v. F. (F.)*, 2007 CarswellOnt 6462; 2007 ONCJ 456, [2007] W.D.F.L. 4647, [2007] W.D.F.L. 4634, 45 R.F.L. (6th) 448.
- <sup>32</sup> R.S.O. 1990, c. C-11.
- <sup>33</sup> *C. (M.A.) v. K. (M.)*, *supra* note 28 at para 36.
- <sup>34</sup> *McD. v. L. & anor* [2009] IESC 81.
- <sup>35</sup> *Guardianship of Infants Act*, (UK), 1964, s.6.
- <sup>36</sup> *C. (M.A.) v. K. (M.)*, *supra* note 28 at para 74.
- <sup>37</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 at 163.
- <sup>38</sup> *Re D* (Contact and PR: Lesbian mothers and known father) (No.2), [2006] EWHC 2 (Fam).
- <sup>39</sup> *Ibid.* at para. 93.
- <sup>40</sup> 2007 ABCA 50, 2007 CarswellAlta 144, 35 R.F.L. (6th) 265; Leave to appeal refused by *Jane Doe v. Alberta*, 433 A.R. 399 (note), 2007 CarswellAlta 941, [2007] S.C.C.A. No. 211 (S.C.C. Jul 12, 2007).
- <sup>41</sup> *Dovicin v. Dovicin* (2002) CarswellOnt 1745, 29 R.F.L. (5th) 281 at para. 27.
- <sup>42</sup> 2005 ONCJ 101, [2005] W.D.F.L. 2425, (2005) CarswellOnt 1205 at para. 21.
- <sup>43</sup> [2003] W.D.F.L. 159, 36 R.F.L. (5th) 22, [2003] O.T.C. 227 (Ont. Sup. Ct.).
- <sup>44</sup> 7 R.F.L. (5th) 212, 49 O.R. (3d) 629, (2000) CarswellOnt 2208 (Ont. Sup. Ct.).
- <sup>45</sup> *R. v. Edwards*, [1996] 1 S.C.R. 128 at 145; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 367.

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<sup>46</sup> *AA v. BB v. CC, supra* note 19 at para. 35