Equal Parents, Equal Children: Reforming Canada's Parentage Laws to Recognize the Completeness of Women-led Families

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Abstract: Lesbian couples and single women are choosing to become parents, typically via some form of assisted conception, at ever increasing rates. These two groups make up approximately thirty per cent of all clients of fertility clinics in Canada, and many more conceive at home using the sperm of known donors. Yet, when lesbian mothers and single mothers by choice (SMCs) are challenged in the courts- usually by a known donor asserting legal parentage and the rights associated with it- judges, who often have little statutory guidance, routinely undermine the stability and integrity of these women-led families in ways heterosexual couples are protected against. In this article, I argue that equality for lesbian and SMC families is best achieved via legislative reform that prioritizes intention over biology in the assisted reproduction context, akin to the recently introduced legal parentage provisions in British Columbia's Family Law Act. The introduction of legislation of this type reduces judicial discretion and provides women-led families with the same level of pre-conception certainty heterosexual families have enjoyed for decades. In addition, I argue that in circumstances where legislative presumptions are not available, or where they fail to resolve the conflict, the best interests of the child test should be interpreted in a manner that is consistent with children's section 15 Charter equality rights. This will ensure that all children enjoy the same level of family stability and security, independent of the composition of their family or their method of conception.

INTRODUCTION

Lesbian parents and single mothers by choice (SMCs) have become a permanent, and growing, component of Canada's family mosaic. Yet, the law has been slow to respond to these new forms of non-normative family. While women-led families have available to them an increasing array of legal mechanisms designed to assist in establishing parental ties,[1] substantial gaps remain. The most glaring is the absence

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[1] The two most common mechanisms for establishing legal ties between a non-biological lesbian mother and her child are second parent adoption and a gender-neutral birth certificate. Second parent adoptions permit the non-biological mother to adopt the child without the biological mother losing her parental rights. However, the adoption cannot be completed until the child is 6 months old, requires the consent of the biological mother (and biological father, if he is known), and requires legal counsel and several thousand dollars to complete. Gender-neutral birth certificates permit a non-biological mother to register

of comprehensive provincial parentage laws – presumptive laws, typically legislative in form, that establish the child's parentage at birth. Unlike custody or access orders, which require an application to the court after the child is born, can be varied by subsequent application, and have no force after the child reaches the age of majority, legal parentage operates presumptively at birth, does not require a court application, cannot be varied, and survives the child reaching the age of majority, thus enabling inheritance. Legal parentage therefore provides significantly more long-term stability and security than an order for custody or access. Legal parentage also carries significant symbolic weight, particularly for non-biological lesbian mothers who have historically been denied the status of "parent", despite actively parenting their children from birth.[2]

Only five Canadian provinces – Quebec, Alberta, British Columbia, Prince Edward Island and Manitoba – have legal parentage laws applicable in situations of assisted conception that include lesbian couples.[3] Quebec is the only province that explicitly addresses parentage where the sperm donor is known,[4] or expressly envisages a single woman being a child's sole legal parent. Several provinces have no legislation at all, leaving even heterosexual couples with little legal guidance.

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as the child's "co-parent". However, the co-parent option is not available when the child was conceived with the sperm of a known donor. In addition, birth certificates are only presumptive proof of parentage and can be rebutted by someone with a "better" claim (eg, a biological parent). Second parent adoptions are available in all Canadian provinces and territories except Prince Edward Island and Nunavut. *Re K* (1995), 15 RFL (4th) 129, (ONCJ); *Re A* (1999), 181 DLR (4th) 300, (ABQB); *Re Nova Scotia (Birth Registration No. 1999-02-00420)* (2001) ,194 NSR (2d) 362, (NSSC); *Adoption Act*, CCSM 1997, c. A2, s.10; *Adoption Act*, SNL 1998, c. A-2.1, s.20; *Adoption Act*, SS 1998, c. A-5.2, s.23; *Adoption Act*, RSBC 1996, c. 5 ss.5, 29; *Adoption Act*, SNWT 1998, c.9, s. 5. Gender neutral birth certificates are available in six Canadian provinces and were typically secured via litigation brought by lesbian couples. *Gill v Murray*, 2001 BCHRT 34; *A.A. v New Brunswick (Department of Family and Community Services*), [2004] NBHRBID No. 4; *M.D.R v Ontario (Deputy Registrar General)*, [2006] RFL 6th (25) (ONSC) [*M.D.R*]; *Fraess v Alberta (Minister of Justice and Attorney General),* 2005 ABQB 889; *Vital Statistics Act*, RSM 1997, c. V60, s. 3(6).

[2] For an overview of the many recent cases, both in Canada and internationally, in which non-biological lesbian mothers have been denied legal parentage see Jenni Millbank, "The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family" (2008) 22 *International Journal of Law, Policy and the Family* 149. For an overview of older decisions see Nancy Polikoff, "The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?"(1996) 36 *Santa Clara Law Review* 375 (1996).

[3] *Vital Statistics Act*, CCSM c V60, s. 3(6); *Civil Code of Quebec*, SQ 1992, c. 64, arts. 538-42; *Family Law Act*, SA 2003, c F-4.5, s 5.1(1)(a); *Family Law Act*, SBC 2011, c 25, s 30 (B.C.'s *Family Law Act* comes into force on 18 March, 2013); *Child Status Act*, RSPEI 1988, c C-6, ss. 9(5) & 9(6). While Nova Scotia's *Vital Statistics Act*, RSNS 1989, c 494**,** makes no mention of same-sex couples or assisted reproduction in its birth registration provisions, regulations under the *Act* permit the mother's spouse, male or female, to register as a legal parent where a child is conceived via "assisted conception", defined as "conception that occurs as a result of artificial reproductive technology, using an anonymous sperm donor." See Birth Registration Regulations, NS Reg 390/2007.

[4] It is estimated that approximately one third of lesbian women and twenty per cent of SMCs conceive using the sperm of a known donor. For statistics on lesbian mothers see: Fiona Kelly, *Transforming Law's Family: The Legal Recognition of Planned Lesbian Motherhood* (Vancouver: UBC Pr, 2011). For statistics on SMCs see: http://www.singlemothersbychoice.org/about/faq/

However, the scarcity of legislation in this area poses few issues for opposite-sex couples, as they are typically able to rely on traditional presumptions of paternity to establish the legal parentage of the mother's male partner, to the extent his parentage is even questioned.[5] Lesbian couples and single women have no such luxury.

In the absence of legislative guidance judges typically resort to biology, rather than the parties' pre-conception intentions, as the determining factor in parentage disputes between lesbian couples or single women and their donors. Drawing on traditional family law principles designed for separated opposite-sex couples engaged in custody and access disputes, most judges presume that because the donor is the child's biological father he must be a legal parent. Known donors are equated with divorcing fathers and, applying the maximum contact rule, which has come to dominate Canadian custody and access decision-making,[6] the best interests of the child is assumed to be met via a relationship with the "other parent" – the biological "father" – rather than through the preservation of the existing parental and family relationships. Lesbian couples and SMCs are even accused of acting "selfishly" for wanting to protect the boundaries of their family and, in the case of a lesbian couple, the integrity of the non-biological mother's role as a parent. As a result of the judicial preference for biology over pre-conception intention, known donors who have sought legal parentage and access rights to children being raised by lesbian couples or SMCs are frequently successful, with judges concluding the donor is a legal father and the child's best interests are served via regular access.[7]

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[5] Presumptions of paternity are included in all provincial family law statutes. *Family Relations Act*, RSBC 1996, c 128, s 95; *Children's Law Reform Act*, RSO, 1990, c 12, s 8; *Child, Youth and Family Enhancement Act*, RSA, 2000, c C-12, s 1(1)(a); *Family Law Act*, SA, 2003, c F-45, s 1(f), s 8(1); *Family Maintenance Act*, CCSM, c F20, s 23; *Family Services Act,* SNB, 1980, c F2.2, s 103; *Children's Law Act*, RSNL, 1990, c C-13, ss 7 & 10; *Children's Law Act*, SNWT, 1997, c14, s 8; *Maintenance and Custody Act,* RSNS 1989, c 160, s 2(j); *Child and Family Services Act*, RSNS, 1990 c 5, s 3(1)(r)(vii); *Custody Jurisdiction and Enforcement Act,* RSPEI 1988, c C-33, s 3(1); *Child Status Act*, RSPEI 1988, c C-6, s 9(1); *Civil Code of Quebec,* SQ 1991, c 64, art 525; *Children's Law Act,* SS 2002, c C-8.1, s 45; *Children's Act,* RSYT, 2002, c 31, s 12.

[6] In the absence of any other guiding criteria in the *Divorce Act*, the "maximum contact rule" (s 16(10)) plays an extremely influential role in custody and access decision-making. Though the rule is tempered by the child's best interests – that is, maximum contact is the goal, but only when consistent with a child's best interests – in practice, the child's best interests have become so intertwined with maintaining a relationship with both parents that the section is often interpreted as indicating that maximum contact is *always* in a child's best interests. Indeed, trial judges frequently state that there is a "presumption" that "regular access" is in a child's best interests and that access can only be denied in the event of proof of harm. *Young v Young*, [1993] 4 SCR 3 at para 204; *V.S.J. v L.J.G.* (2004), 5 RFL (6th) 319 (ONSC) at para 128; *Elwan v Al-Taher* (2009), 69 RFL (6th) 199 (ONSC) at para 76; *M.I. v M.W.*, [2011] OJ No 1685 (QL) (ONSC) at para 102; *Norman v Penney* (2010), 305 Nfl d & PEIR 241 (NLSCTD) at para 22; *Matos v Driesman* (2009), 86 WCB (2d) 27 (ONSC) at para 39.

[7] Most of the cases discussed below reflect this general trend. For a discussion of such cases from a variety of common law jurisdiction see Millbank, *supra* note 2.

As Angela Campbell has argued, judicial prioritization of biology over pre-conception intention is odd given that assisted conception necessarily de-centres biological connection:

> In circumstances involving assisted reproduction, identifying biology as a basis for [parentage] seems perplexing, given that the point of using reproductive materials or services from third parties is to acquire parental status even where one cannot rely (or chooses not to rely) on biological/'natural' methods of procreation. Thus, locating parenthood should command more than tracing a child's genetic heritage.[8]

What is perhaps at the heart of the judicial inclination to turn to biology, despite the use of assisted conception, is the perception that a woman-led family is incomplete. Thus, rather than focusing on the fact that children of lesbian couples and SMCs are being raised in stable, intact, (sometimes married) families, judges reconfigure lesbian and SMC families into heterosexual ones in which the biological parents have separated. The result is that lesbian and SMC families are denied the legal security typically afforded to intact heterosexual families who use assisted reproduction. Third parties, in the guise of "parents," are inserted into women-led families, diminishing the relationship between the child and his or her non-biological mother, and often providing the non-biological mother with no legal status at all.

In this article, I argue that lesbians and single women should be able to create families of their choice and, in the event of legal challenge, have a reasonable expectation that the courts will preserve the integrity of their family unit. To enable this, legislative reform prioritizing intention over biology in the assisted reproduction context, as it already does when the couple conceiving is heterosexual, is needed in every Canadian province. In addition to legislative reform, and especially in its absence, the article also argues that children's best interests are served by ensuring that all children enjoy the same level of family stability and security, independent of their family structure and/or method of conception. Many legal battles between lesbian couples and their donors involve not only parentage claims, but also disputes over access which turn on what is in the best interests of child. In order to prevent discrimination on the basis of method of conception and/or the structure of the family into which the child is born, the best interests test must be interpreted in a manner consistent with children's section 15 equality rights under the *Canadian Charter of Rights and Freedoms*.[9] Most importantly, a child conceived via assisted conception and born into a woman-led family should have no less a right to a secure and stable family life than a child similarly conceived and born to heterosexual parents.

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[8] Angela Campbell, "Conceiving Parents Through Law" (2007) 21(2) *International Journal of Law, Policy and the Family* 242 at 259.

[9] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15.

The article begins with an overview and critique of Canadian legal parentage disputes between lesbian or single women and their known sperm donors. It highlights the ways in which the current legal framework, which in most provinces includes an absence of modern parentage laws, results in judges applying a traditional and outdated mode of analysis in a manner that undermines the autonomy and integrity of women-led families. Recognizing that law reform in this area must be multi-pronged, the remainder of the article considers provincial statutory reform, as well as recommendations as to how judges might interpret the best interests of the child test in a manner that protects the stability and security of *all* Canadian children, not just those born into traditional heterosexual families.

1. THE EXISTING CASE LAW: A TRIUMPH OF BIOLOGY

Like most jurisdictions, Canada now has a small number of cases involving lesbian couples and SMCs that expressly address parentage in situations of assisted conception where the sperm provider is known. Despite the low numbers, clear trends have emerged. Known donors have been declared parents in all but two applications, and judges have uniformly expressed the belief that it is in a child's best interest to have access with his or her biological father, independent of the circumstances of conception or structure of the child's family. Judges have been dismissive of any suggestion that the imposition of a donor on an intact family may be damaging to the parent(s) or child. Scholars from other common law jurisdictions have demonstrated that these trends are by no means unique to Canada.[10] Nor should they be understood as separate from Canadian family law trends more generally. Finding fathers for children raised by lesbian couples or SMCs is part of a much larger trend towards prioritizing and maximizing father/child contact, even in circumstances where the father has a limited, or even quite negative,[11] relationship with the child.[12]

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[10] Millbank, *supra* note 2; Therese Callus, "A New Parenthood Paradigm for Twenty-First Century Family Law in England and Wales?" (2012) 32 *Legal Studies* 347.

[11] Fiona Kelly, "Enforcing a Parent/Child Relationship At All Cost? Supervised Access Orders in the Canadian Courts" (2011) 49 *Osgoode Hall Law Journal* 6.

[12] Susan Boyd, "Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility" (2007) 25 *Windsor Yearbook of Access to Justice* 55; Fiona Kelly, "Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family" (2009) 21 *Canadian Journal of Women and the Law* 315.

LESBIAN MOTHERS AND KNOWN DONORS: THE CASE LAW

Three of the Canadian cases between lesbian couples and their donors originate from Quebec, one of the few Canadian provinces in which the relationship between assisted reproduction and "filiation", the civil law equivalent of legal parentage,[13] is directly addressed by legislation which includes lesbian couples within its parameters.[14] The decisions may therefore not be particularly representative of how disputes would be resolved in provinces where no such legislation exists. However, the partial successes found in the Quebec cases demonstrate the potential importance of legislative reform. By explicitly defining the rules of parentage in cases of assisted reproduction, the Quebec *Civil Code* limits the discretion available to judges to reformulate a lesbian family into one in which a father exists.

The first of the Quebec the cases, *S.G. v. L.C.,* dealt with the status of a known sperm donor to a lesbian couple via an interim access application filed by the donor.[15] The decision was based largely on information contained within the donor's unopposed affidavit and was never appealed. The child in *S.G.* was conceived via donor insemination and was raised by her lesbian mothers. The two women, who had undergone a civil union ceremony a month before the child was born, were listed on the child's birth certificate as her parents. While the mothers initially allowed some contact between the donor (S.G.) and the child, when they began to limit contact, S.G. sought an order of filiation (parentage). He argued a "parental project," as defined by article 538 of Quebec's *Civil Code,* existed between himself and the biological mother (L.C.). He also argued it had always been his and the biological mother's intention that the two of them raise the child as mother and father. S.G. supported his claim with an affidavit in which he asserted that the non-biological mother had initially opposed the biological mother's decision to have a child and had suggested that she might end the relationship if the biological mother went ahead

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[13] While the civil law concept of "filiation" and the common law concept of "legal parentage" are often equated, they are not identical. As Leckey explains, in relation to the Quebec provisions, filiation is a much more expansive notion than legal parentage: "Filiation is said to be the fundamental element of family belonging, a foundation of the social order. The common law tradition, while ascribing rights and duties to parentage, has not theorized the parent-child relationship comparably." Filiation is also characterized as "an institution" and thus less open than legal parentage to amendment. As Leckey explains, "An institution is said not to be founded by contract, and its members precluded from altering its essential terms. The legislature is said to recognize institutions, *not to create them*." Filiation might therefore be understood as more resistant to change than legal parentage. Thus while Quebec is one of the few provinces that provides legislative recognition of women-led families, the nature of filiation has created interpretive nuances that are perhaps unique to a civil law system. As Leckey concludes, "The notion of filiation as institution, which connotes some immunity or at least resistance to change, jostles uneasily with the extent to which the legislature has, in recent decades, changed its recognition of that institution." Robert Leckey, "'Where the Parents are of the Same-Sex': Quebec's Reforms to Filiation" (2009) 23 *International Journal of Law, Policy and the Family* 62 at 64.

[14] *Civil Code of Quebec*, SQ 1991, c 64, arts 538-42. For an overview of the Quebec provisions, see Leckey, *ibid*.

[15] *S.G. v L.C,* [2004] RJQ 1685 (QCCS) [*SG*]. Unfortunately, a media publication ban was put on the case, making it difficult to know much about the dispute other than what is included in the interim judgment: *S.G. c. L.C.*, [2005] JQ No 7407 (QL).

with the plan.[16] Though the non-biological mother did not end the relationship, and in fact went on to co-parent the child and enter into a civil union with the biological mother, the court relied on S.G.'s assertions to suggest the non-biological mother was not a party to the parental project.

As noted above, Quebec has some of the most inclusive laws in Canada available to lesbian parents. Under the filiation provisions in the *Civil Code*, if a child is born of a "parental project" involving assisted conception, it is presumed the spouse, whether male or female, of the woman who gave birth to the child is the child's other parent.[17] A "parental project" exists "from the moment a person alone decides, or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project."[18] In the case of lesbian mothers, the parental project is typically between the members of the lesbian couple and not between the birth mother and the donor. To give effect to this reality, article 538.2 states that the contribution of genetic material does not create any automatic bond of filiation between the contributor and the child.[19] Rather, a sperm donor can only have a bond of filiation if he is a party to the parental project.

In making her decision in *S.G.*, Courteau J relied heavily on the donor's version of events, concluding that the parental project was between S.G. and L.C., not between L.C. and her spouse.[20] Unfortunately, the evidence around the parties' decision-making process was not particularly clear and, given the absence of an affidavit from S.G. and L.C., the judge had little alternative but to accept the donor's version of events. However, in the course of her judgment, Courteau J unnecessarily attacked the mothers' desire to create a women-led family. She held that the mothers' attitude to access was "totally destructive" and that they were denying their child her "rights to her father."[21] Viewing the lesbian family as inherently incomplete, Courteau J treated the imposition of a third party on the lesbian family as positive rather than destructive, ignoring the challenge it posed to the integrity of the unit the two women had created. Justice Courteau also accused the non-biological mother of having created her parental relationship with the child "artificially," particularly with regard to her appearing on the child's birth certificate.[22] It is difficult to know exactly what Courteau J is asserting with this statement, given that the non-biological mother

[16] The two mothers did not file affidavits, so their version of events is unknown.

[17] *Civil Code of Quebec*, SQ 1991, c 64, art 538.3.

[18] *Ibid* art 538.

[19] *Ibid* art 538.2.

[20] S*G, supra* note 15 at para 34.

[21] *Ibid* at para 54.

[22] *Ibid* at para 50.

parented the child from birth, the donor never indicated a desire to be on the birth certificate, and the *Civil Code* expressly permits the creation of filiation by such "artificial" means.

The second Quebec case was *L.O. v. S.J.*[23] Due to the clarity of the factual evidence in *L.O.*, the court had little choice but to follow the clear instruction of the filiation provisions in the *Civil Code*. The parties had a donor agreement specifying that the donor agreed to relinquish all rights he may have as a legal parent. The court relied on the agreement as written confirmation of the intention of the parties with regard to the "parental project." In addition, the court relied on the fact the women already had two children conceived using the sperm of a different donor to support the assertion that the donor was not intended to be part of the family. Based on these facts, the court held that the parties to the parental project were the two women and that the donor was a third-party gamete provider. The donor asserted that the parental project involved three individuals – he and the two mothers – but the court rejected the claim on the basis that Quebec law did not permit three legal parents. The donor was thus excluded from the status of father. The unusual result in *L.O.* – a victory for the lesbian couple – points to the potential advantage of statutory rules, at least where the facts indicate a clear intention on the part of the two women to form a parental project.

The third decision from Quebec is *A v. B, C and X.* Like *L.O.*, it demonstrates the potentially positive impact of the Quebec legislation where the intentions are fairly clear.[24] As with the other Quebec cases, the lesbian couple in *A v. B, C and X* conceived using the sperm of a known donor. Following the birth, the non-biological mother began the process of adopting the child. That process was stalled when the donor sought a declaration of filiation, increased access, and access alone with his other family members. The Quebec Court of Appeal refused to recognize the filiation of the donor on the basis that conception occurred via donor insemination and the donor had signed an agreement, explicitly relinquishing any rights or responsibilities he might have in relation to a child conceived via his donation.[25] While the donor had enjoyed some access with the child, it was insufficient to override the very clear agreement between the parties. The Court of Appeal also noted that while Ontario recognizes the possibility of a child having three parents, such a finding was not available under Quebec law, and the court therefore was not in a position to add the donor as a third parent.[26]

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[23] *L.O. v S.J.*, 2006 QCSC 302.

[24] *A v B, C and X*, 2007 QCCA 361.

[25] *Ibid* at paras 51- 55

[26] *Ibid* at para 55.

Outside of Quebec there have been only two cases addressing the legal status of known donors. The first, *M.A.C. v. M.K.*, arose in Ontario where there is no legislative regime addressing parentage in such situations.[27] Unlike any of the previous decisions, the parties in *M.A.C.* had a three-way co-parenting agreement entered into prior to the child's conception. During the early years of the child's life the donor played a fairly active role, both in terms of caregiving and decision-making. However, when the parties had a falling out, the mothers asserted that their nuclear family should be protected against the now unwanted intrusion of their known donor. They applied for a second-parent adoption and requested the court dispense with the donor's consent.[28] Their application was rejected on the basis that the parties had agreed the donor would be involved in the child's life and that he had in fact been involved. Given his active role in the family, the court was unwilling to dispense with the donor's consent. While the court upheld the original intention of the parties to include the donor in the child's life, the effect of the decision was the relegation of the non-biological mother (who had parented the child from birth) to the status of legal stranger, while the biologically related donor (who played a significantly smaller role in the child's life) was elevated to the status of parent. Thus, while the intentions of the parties were given weight, the law's prioritization of biology over social relationships meant that the decision's effect on the two mothers, particularly the non-biological mother, was devastating.

While the result in *M.A.C.* is likely to be understood as a defeat for lesbian parenthood, it is possible that in situations where the child and donor have a relationship and it was the pre-conception intention that they do, it might be in the child's best interest to maintain that relationship, albeit in a way that does not undermine the primary parents. However, the law treats the issue as an either/or determination: the donor is either a parent or he is not, leaving no room for the avuncular role that some sperm donors to lesbian families play.[29] While providing some legal recognition for "involved known donors"[30] should be considered cautiously, in light of what appears to be a strong desire on the part of many judges to "find fathers" for the children of lesbian mothers, having the middle-ground option available may defuse situations that give rise to cases such as *M.A.C.*

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[27] *M.A.C. v M.K.*, 2009 ONCJ 18.

[28] The donor had already successfully applied for access: *K.(M.) v. C.(M.) and D.(C.)*, 2007 ONCJ 456.

[29] In empirical research with lesbian mothers living in British Columbia and Alberta, I have found that in approximately half of the families interviewed who conceived using the sperm of known donors included the donor in the child's life. Amongst the women interviewed, whether they conceived with a known donor or not, I identified fairly strong support for a legal category designed to capture the relationship of an "involved known donor". I referred to the relationship as that of a "non-parental adult caregiver" and argued that it captured the role of an involved known donor, while clarifying that such an individual is not a legal parent. Kelly, *supra* note 4 at 155

[30] Such a proposal was first suggested by Fred Bernstein, "This Child Does Have Two Mothers…And an Involved Known Donor" (1996) 22 *New York University Review of Law and Social Change* 1.

Extending some form of legal recognition to involved donors protects the donor's interest in maintaining an access relationship with the child, while also protecting the lesbian family, particularly the non-biological mother. When the "involved known donor" and non-biological mother need no longer compete for the status of second legal parent the likelihood, as well as the intensity, of a dispute may be lessened.

The only jurisdiction to have adopted such an approach is New Zealand. Section 41 of New Zealand's *Care of Children Act*[31] acknowledges that in some families known donors play a significant, albeit non-parental, role in their child's life. It thus allows for a known donor, in a discrete set of circumstances, to opt into the family as a non-parental figure with the consent of the child's presumptive parents. It does so through the recognition of written parenting agreements. Section 41 expressly sanctions pre-conception agreements addressing the role of a known donor in a child's life, including the amount of contact the donor will have with the child.[32] The agreement itself cannot be enforced under the Act, but a court may, with the agreement of the parties, make a consent order that embodies some or all of the terms of the agreement.[33] That order, insofar as it relates to contact with the child, can be enforced under the Act as if it were a parenting order for contact.[34] Importantly, neither an agreement nor an order affects the donor's legal status with respect to the child. Neither enables him to become a legal parent or guardian. Although the terms of the agreement can be varied and the best interests of the child will always prevail, section 41 permits lesbian women and their donors to carve out a non-parental role for the donor prior to conception that will, in most cases, be respected by the courts.

Another Ontario case addressing lesbian mothering in the context of known donors is *A.A. v B.B.*, a Court of Appeal decision in which it was held that a child could have three legal parents – his two mothers and his donor father.[35] The parties in *A.A. v B.B.* were not in conflict. All agreed the child had three parents, yet only the biological mother and the donor were listed on the child's birth certificate. The parties challenged the assumption that a child can only have two legal parents and requested that the non-biological mother be added to the birth certificate without having to remove the donor. The application was ultimately successful, with the court using its *parens patriae* power to declare that the child had three legal parents. While *A.A. v B.B.* is the only decision of its kind and is heavily dependent on the individual facts of the case, it does suggest that in families in which three adults agree they are all parents, the courts may be willing to give legal recognition to the

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[31] *Care of Children Act* (NZ).

[32] *Ibid*, s. 41(2).

[33] *Ibid* s 41(3).

[34] *Ibid* s 41(4)

[35] *A.A. v B.B,* 2007 ONCA 2 [*A.A.*].

arrangement. Interestingly, British Columbia's new *Family Law Act* provides a legislative mechanism by which to achieve this same result.[36]

While *A.A.* is in some ways a groundbreaking decision, the manner in which the parties had to construct their case demonstrates the ongoing prioritization of biology. In *A.A.* it was the non-biological mother and not the donor, who had to apply to be added as the child's third parent, the donor having been listed on the child's birth certificate. The choice to include the donor on the birth certificate may seem odd given the child was being raised primarily by his two mothers, with the donor having fairly limited contact and not taking part in any of the day-to-day decision-making. However, the parties had no other option. While two women were permitted to appear on a child's birth certificate in Ontario at the time of the child's birth, the case granting that right, *M.D.R. v Ontario*, limited the new birth certificate's availability to women who conceived with the sperm of an anonymous donor.[37] The limiting of *M.D.R.* to situations of anonymous sperm donors appears to suggest that when a biological father is known and available, courts are reluctant to sever his rights. The impact of the *M.D.R.* decision on the parties in *A.A.* was that the non-biological mother – one of the child's two primary caregivers – was placed in the situation of having to assert her parental status, while the donor, who played only a limited role in the child life, was deemed a legal parent at birth.

The final Canadian case involving a dispute between a lesbian couple and a known donor is still unfolding, with a trial expected in mid 2013.[38] The dispute is between a married lesbian couple, X.X. and Y.Y., who have been together for over 15 years, and W.W., their sperm donor. X.X., the biological mother, had attended elementary school with W.W. When she and Y.Y. decided to have a baby, she approached W.W., the only gay man in town, to ask whether he would be their sperm donor. X.X. offered to pay W.W. for his services, but he declined. W.W. requested his name be put on the birth certificate, but X.X. explained that her wife Y.Y. would be named as the child's second parent. A week after the initial conversation, they signed an agreement. It stated:

> I, W.W., hereby sign over **any** and **all** parental rights to any children created by using my donated semen. I understand that by signing my rights over I will have absolutely no rights, from this day forward, to see, visit, claim, or request custody of any children resulting from use of my sperm. By signing this agreement I understand that my semen will be used to inseminate X.X., which will potentially result in children being conceived. As well as not having any rights to any children born of my donated

[36] *Family Law Act,* SBC 2011, c 25, s 30.

[37] *M.D.R., supra* note 1.

[38] *DeBlois v Lavigne*, 2012 ONSC 3949.

> semen, I will not be responsible at any time to pay support of any kind of all children conceived by using my semen. I further agree that at no time will I interact with the children without the consent of the mother. Also I will not tell any children, that I believe to be conceived with my semen, that I am their biological father. I agree that I will not interfere with the raising of children. This agreement is a legally binding contract and cannot be changed or revoked without the consent and agreement of the mother as well as the adoptive parent, if any.

Over the next 16 months W.W. provided semen samples 1-5 times a month. X.X. conceived in January 2010. After X.X. informed W.W. that she was pregnant they had no further contact. A boy (Z.Z.) was born in October 2010, and has been raised solely by his two mothers. He has never met W.W. In January 2011, W.W. served X.X. with an application seeking a declaration of parentage, to have his name added to the birth certificate, access to Z.Z., and a restraining/non-harassment order against X.X. The access schedule proposed by W.W. began with two hour access visits every second weekend in April 2011 and rapidly proceeded to entire weekends of access by December 2011. In addition, W.W. requested rotating holiday access, and half of school holidays once Z.Z. began school.

W.W. conceded he had signed the agreement, but argued he did so under duress. He claimed that when he and X.X. attended school together she bullied him, and that this past bullying intimidated him and placed him in a disadvantaged bargaining position. W.W. argued the agreement should therefore be declared void. X.X. denied W.W.'s allegations and noted he had had ample time to withdraw from the arrangement prior to Z.Z.'s conception. In April 2012, the parties participated in a settlement conference, presided over by Cornell J. The result of the conference was a consent order,[39] endorsed by Cornell J, setting aside the donor agreement for lack of consideration[40] and permitting access. The only remaining issue for trial, according to Cornell J, was what was in the best interest of Z.Z. Following the consent order W.W. brought an application for interim access.

In June 2012, X.X. and Y.Y. obtained new counsel and successfully sought to have the interim access order set aside. Karam J, the presiding judge, held that

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[39] This consent order is not available. However, details of the order are included in a subsequent challenge to it: *W.W. v X.X. and Y.Y.*, 2013 ONSC 879.

[40] While this might appear to be a logical conclusion under contract law, in the family law context it is rather unusual. First, historically courts have refused to recognize the validity of contracts related to children on the basis that they are contrary to public policy. The fear is that a contract will usurp the child's best interests, the sole criterion upon which parenting decisions should be based. Thus, to suggest that the agreement is invalid on the basis of *a lack of consideration* is an unusual choice given the existing jurisprudence. Second, if consideration had taken the form of financial compensation, which is what Cornell J. seems to imply, the parties would have been engaging in illegal activity, given that section 7(1) of the *Assisted Human Reproduction Act*, S.C. 2004, c. 2, prohibits the buying and selling of human gametes.

making an order for access in the particular circumstances of the case was problematic. First, he was concerned that with the trial just months away, an order for access would inevitably influence the outcome of the proceedings. Second, he was concerned about the negative implications for Z.Z. As he explained "despite the child's young age, it is impossible to know what disclosure of the applicant's status as his parent might mean. All circumstances considered, the risk of there being an adverse affect to the child is too great to ignore."[41] This statement is one of the few in cases such as this where a child's interest in maintaining a stable family life is given some weight. At the same time, Karam J referred throughout the judgment to W.W. as Z.Z.'s "father" and "parent", most notably while discussing what he understood to be a presumption in favour of contact with "both parents".[42]

The disagreement between X.X., Y.Y. and W.W. is emblematic of the types of disputes that occur between lesbian couples and their donors, but in no other Canadian case have the intentions of the parties been so clearly articulated in writing.[43] There is no evidence whatsoever that X.X. and Y.Y. intended to share parenting with W.W., and no evidence that W.W. wanted to be a parent beyond an initial request to appear on the birth certificate. What happens in *X.X. & Y.Y. v W.W.* will, in many ways, test the willingness of judges to permit women to create families of their own.

SINGLE MOTHERS BY CHOICE AND KNOWN DONORS

On the whole, SMCs fare worse than lesbian mothers when challenged by known donors, in large part because they have no second parent to fill the "gap" created by not having a father. While all of the cases have complex facts, many of which are in dispute, the judges deciding them have demonstrated little tolerance for the kind of autonomous motherhood SMCs envisage. The first Canadian case that might be described as involving an SMC was *Johnson-Steeves v Lee*,[44] an access dispute between the mother and the man she characterized as a sperm donor. Caroline Johnson-Steeves asked King Tak Lee, an old friend, whether he would be a sperm donor. She alleged that the parties made an oral agreement that Lee would either donate sperm or father the child via intercourse and provide some financial support, but that he would not interfere with decision-making around the health and welfare of the child.

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[41] *DeBlois v Lavigne*, 2012 ONSC 3949 at para 12.

[42] *Ibid* at paras 8-9.

[43] In most of the cases to date, parties have not entered into written agreements or have prepared agreements that do not clearly state their intentions with regard to donor access.

[44] *Johnson-Steeves v Lee* [1997] 6 WWR 608 (ABQB) [*Lee*]; *Johnson-Steeves v Lee* (1997), 209 AR 202 (ABCA) [*Lee appeal*].

Lee did not contest that he had agreed to provide financial support or that he would not play a decision-making role in the child's life. However, he submitted the parties specifically discussed his desire to see the child and Johnson-Steeves had stated "of course he could see the child and that she would never deny kids the right to see their dad."[45] It was Johnson-Steeves' assertion, however, that the parties did not discuss access, but that she had told Lee he could see the child whenever he passed through town. The child (Nigel) was conceived via intercourse. Lee was not listed on the birth certificate, but was acknowledged as Nigel's father for the purpose of providing maintenance. Lee visited with Nigel several times over the first ten months of life. However, following a series of disagreements, Johnson-Steeves prevented Lee from exercising access. The case was initiated by Lee seeking an access order. At the time of trial, Nigel was four and half years old.

In support of her request that access be denied, Johnson-Steeves argued the court must distinguish between a biological father who is not entitled to access as of right and a social father who has access rights.[46] She submitted that Lee had agreed he would not be a social father and was thus not entitled to access. Johnson-Steeves also submitted that Nigel's family was complete without a father and to suggest otherwise would "violate Nigel's understanding of his family unit"[47] and force "on her a family structure that she did not choose."[48]

From the outset the trial judge and the Court of Appeal rejected Johnson-Steeves' construction of her family. Kenny J began by stating Nigel was "conceived under circumstances that many would consider unusual and perhaps distasteful",[49] suggesting that she was somewhat uncomfortable with the idea of deliberately creating a single mother family. Kenny J then disputed Johnson-Steeves' suggestion Lee was a "sperm donor" and thus "just a biological father." Accusing her of thinking only of herself and mirroring comments made by judges in cases involving lesbian mothers, Kenny J stated that she found this construction of Lee's identity "totally selfish".[50]

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[45] *Lee, supra* note 44 at para 21.

[46] *Ibid* at para 46. Johnson-Steeves' assertion, which the court accepted, was that genetic parents do not have automatic access rights to their children. Rather, access decisions must be made in the best interests of the child. The court did not accept the mother's argument that a social parent has a right of access. Rather, the court concluded that social parents, like biological parents, are entitled to access only if it is in the child's best interests.

[47] *Ibid* at para 52.

[48] *Ibid* at para 48.

[49] *Ibid* at para. 52.

[50] *Ibid* at para. 49.

After concluding Lee was not a sperm donor, Kenny J addressed Johnson-Steeves' assertion that Nigel's family was complete without a father. Kenny J's conclusions with regard to this issue, cited with approval by the Court of Appeal,[51] drew heavily on the evidence of Dr. Kneier, a child psychologist who had not met either of the parties or Nigel. Kenny J cited with approval Dr. Kneier's assertion "that fathers are good for children" and that "although children can, and often do, achieve a healthy development without a father…it is better to have a relationship with their father than not to have one."[52] She also relied on Dr. Kneier's assertion that a "good relationship by a boy with his father helps develop intelligence and drive, improves academic achievement and helps introduce independence, empathy and social adequacy with peers."[53] In light of Dr. Kneier's evidence, Kenny J concluded that Nigel, no matter what the circumstances of his conception, had a right of access to his father[54] and that Lee would contribute to Nigel's life as "only a father could do".[55]

While the factual circumstances in *Johnson-Steeves* do not lend themselves to drawing clear conclusions as to the law's treatment of SMCs a number of insights can be gleaned. First, *Johnson-Steeves* supports – as other more traditional custody and access decisions have – a renewed emphasis on biological fatherhood as an essentialized identity, assumed to provide several defined benefits to children, particularly boys. [56] These benefits are perceived as outweighing the integrity of the SMC-created family and the child's need for a stable family life. A second point to be taken from *Johnson-Steeves* is that the circumstances of conception appear irrelevant to a determination of parentage. Though Nigel was conceived via intercourse, Kenny J states that it did not matter whether the child was conceived by artificial insemination, a one night stand, or during a long term relationship, he had a mother and a father.[57] This is a troubling conclusion given that the use of assisted conception is, in the context of heterosexual couples, presumed to sever any legal link between the child and the gamete provider.

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[51] *Lee appeal, supra* note 44 at paras. 17-18.

[52] *Lee, supra* note 44 at para 40.

[53] *Ibid* at para 41.

[54] *Ibid* at para 54.

[55] *Ibid* at para 56.

[56] For a discussion of the increasing judicial emphasis on essentialized biological fatherhood see Kelly, *supra* note 12 at 329-40.

[57] *Lee, supra* note 44 at para 54.

A 2007 decision of the Alberta Court of Queen's Bench, *Caufield v Wong*, further demonstrates the judicial reluctance to validate a woman's decision to actively choose to become a single mother.[58] Catherine Caufield and Allan Wong had a short non-cohabiting intimate relationship. When it ended, Wong agreed "as an act of friendship" to provide sperm to allow Caufield to attempt *in vitro* fertilization (IVF). [59] Caufield conceived a set of twins. Wong immediately sought to be involved in the children's lives, even following Caufield when she moved to Edmonton soon after the children's birth. Caufield was willing to accept some access – the 2007 application by Caufield was to reduce Wong's access granted by Trussler J in 2003– but insisted that she never intended him to be a *parent* and that her children did not need a father. By contrast, Wong asserted he was a legal parent and entitled to equal parenting time. Despite the extremely high level of conflict between the parties, the Court ultimately made an order for shared parenting.[60]

As in *Johnson-Steeves*, Sanderman J refused to entertain the idea that Wong was anything but a parent. Unlike *Johnson-Steeves*, conception in *Caufield* was achieved via IVF, a highly technical process involving significant medical intervention. At the time of the initial trial, Alberta lacked any legislative guidance with regard to parentage where assisted conception is used. However, in her 2007 application to reduce Wong's access, Caufield directed the court to section 13(3) of Alberta's *Family Law Act*, introduced just months after the 2003 decision, which states:

> [A] male person whose sperm is used in an assisted conception involving an egg of a female person who is neither his spouse nor a person with whom he is a relationship of interdependence of some permanence is not the father of the resulting child and acquires no parental or guardianship rights or responsibilities of any kind as a result of the use of his sperm.[61]

Caufield argued section 13(3) supported her assertion that Wong did not acquire parental rights or responsibilities by virtue of his donation. As Sanderman J himself notes, Wong had never been the spouse of Caufield, they had never lived in a relationship of interdependence of some permanence, and the children were born via assisted conception. However, the judge declared Wong was "still the father of these children."[62] Justice Sanderman's reasoning was that because the 2003 interim order established Wong was a father and granted him joint custody of the children, and since all of this preceded the legislative amendment, section 13(3) was not applicable

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[58] *Caufield v Wong*, 2007 ABQB 732 [*Caufield*]. The 2007 judgment is not the first with regard to the parties. By 2007, they had appeared before Alberta courts three times to resolve their access issues, as well as to determine the fate of four fertilized embryos that remained in storage.

[59] *C.C. v A.W,* 2005 ABQB 290 at para. 2 [*CC*].

[60] Wong was granted 11 days in a row of parenting time per month. For each of July and August, the children were with him for two uninterrupted weeks.

[61] *Family Law Act*, RSA 2003, Ch F-4.5, s 13(3).

[62] *Caufield, supra* note 58 at para 33.

and the matter was closed. Sanderman J's decision was not altogether surprising. The children had, by 2007, established a relationship with Wong and it was unlikely in their best interests to sever it. The appropriateness of Trussler J's initial decision is, however, worthy of discussion.

A second attack on single mothering by choice in *Caufield* is found in Sanderman J's extensive analysis, in both decisions, of Caufield's approach to parenting. It is difficult to read Sanderson J.'s commentary as anything other than a warning that if mothers are left to parent alone they will 'smother' their children.[63] As Sanderman J argues, while Caufield's efforts may be "well-intentioned," her attachment style of parenting has deteriorated into a form of "smothering care" characterized by "over protective controlling behavior that is not in [the children's] best interests."[64] She is criticized for "wanting to be the central figure in all aspects of [her children's] lives"[65] and for "needing to maintain close contact with the children even when they are in the care of their father."[66] These attacks on Caufield draw on the trope of the 'smothering mother:' over-protective, controlling and ultimately damaging, especially to boys. The involvement of the children's father, described in this case as 'traditional' and 'rigid', is therefore needed to balance the effects of the mother's *over*-nurturing of her children.[67] While Caufield's attachment parenting style made it somewhat easier for Sanderman J to depict her as a 'smothering mother,' underlying his critique is a suggestion that over-protected and controlled children may be a possible by-product of permitting women to parent without male interference.

The final case involving an SMC is the Quebec Court of Appeal decision of *L.B. & E.B. c. G.N.*[68] N, a single woman, decided to have a child on her own. N and G were engaged in a regular sexual relationship, but were not a couple and never resided together. N asked G if he would help her conceive a child. G already had two children and stated he did not want any additional financial responsibility. N told him she did not expect any financial support. G agreed to assist and N conceived. N and G continued their sexual relationship up until the child's birth in 2003. It was G's assertion that N had said she would put him on the birth certificate. After the birth of the child (L) he asked to see the birth certificate. N eventually showed him one which included his name, but G later learned it was a fake. As part of the

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[63] *C.C, supra* note 59 at para 9.

[64] *Caufield, supra* note 58 at para 19.

[65] *Ibid* at para 17.

[66] *Ibid* at para 7.

[67] *Ibid* at paras 7 & 9.

[68] *L.B. & E.B. c G.N.,* 2011 QCCS 348 [*L.B*].

arrangement, N gave G several financial installments totaling $1400. G testified at various times that the payments constituted a loan, a gift, and compensation for the first pregnancy (a miscarriage), but not the second.[69]

After L's birth, G visited sporadically, spending time with the little girl only in her mother's presence. N looked after all of L's needs and G knew little of her daily activities. He admitted at trial that he played no role in guiding or supervising her education, could not identify any of the daycares or schools she had attended, and that he had played no role in and knew nothing of L's considerable medical care while she was an infant. L called G by his first name, until he started insisting she address him as "daddy." When L was two, N was diagnosed with cancer. N underwent a year of treatment, but eventually passed away. G only became aware of N's illness when he was notified of her death by N's parents. In her will, N named her mother (E.B.) as L's tutor.[70] L was three and a half years old and in the care of her grandparents when G made an application for filiation, as well as a modification of L's surname to include his own. The Quebec Supreme Court granted the action in filiation and denied the name change. The decision was upheld by the Quebec Court of Appeal,[71] and leave to the Supreme Court of Canada was denied.[72]

Quebec's filiation legislation is unique in that it permits the transfer of genetic material for the purpose of a third-party parental project to take place by way of sexual intercourse. Article 538.2, which establishes that a contribution of genetic material for the purpose of a parental project does not create a bond of filiation between the contributor and the child born of the parental project, goes on to state that:

> [I]f the genetic material is provided by way of sexual intercourse, a bond of filiation may be established, *in the year following the birth*, between the contributor and the child.[73]

Thus, article 538.2 establishes that a parental project can exist even where conception occurs via sexual intercourse. When that is the case, the donor has the opportunity to establish filiation within the first year of a child's life, which the donor in *L.B.* failed to do. However, if the court concludes that there is no parental project, article 538.2 become irrelevant and the situation falls under the rules governing filiation by blood.

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[69] *Ibid* at para 14.

[70] A "tutor" is the equivalent of a common law guardian.

[71] *L.B, supra* note 68.

[72] *L.B. & E.B. c G.N.,* 2011 QCCA 1180 [*L.B appeal*].

[73] *Civil Code of Quebec*, SQ 1992, c 64, art 538.2.

The trial judge in *L.B.* held that for a parental project to exist, it is necessary for the person who provides the genetic material to voluntarily agree to limit his or her role and to avoid the legal consequences of filiation that would normally follow. It was concluded at trial that the grandparents failed to demonstrate that G had agreed to limit his role in this way. On appeal, the grandparents' challenged this factual finding, arguing that the trial judge made overriding errors in retaining G's contradictory testimony, made undue inferences from the relationship N allowed G and L to have, and failed to take into account the fact G never agreed to assume financial care of L.

While the Court of Appeal accepted it would be erroneous to assume there was no parental project involving assisted reproduction simply because the donor had a certain relationship with the child, it concluded there was not sufficient evidence to support the assertion that G had intended to just be a donor. Relying almost entirely on G's testimony, much of which the court stated "was neutral, not favouring one story or the other," it concluded there was no evidence that N told G his role would be limited to that of a sperm donor. The facts that were said to support this conclusion were that G attended N's first ultrasound, asked to appear on L's birth certificate, announced to his family that he was going to become a father, and visited somewhat regularly. In addition, N invited G to meet the baby two days after the birth and N and G continued to have sexual relations until the birth of the child. The court acknowledged that the payment by N of $1400 to G was "troublesome" and that his evidence with regard to the payment was "contradictory," but ultimately chose to overlook it. The Court of Appeal also refused to draw any adverse conclusion based on G's lack of financial contribution, stating filiation is established by law and does not follow the desire of a parent to assume the consequences that follow upon such filiation, such as the obligation to provide financial support.

There are, however, a number of factual issues that the court chose to simply ignore. For example, G knew little of L's life and exaggerated his involvement in it,[74] and failed to call a single witness, friend or family, to substantiate his evidence. The grandparents argued this last factor – G's failure to call any witnesses after initially indicating that he would – created a situation where he was the sole provider of evidence with regard to his relationship with L and N, and justified an inference that either he never represented himself to his family and friends as L's father or that their testimony would have been detrimental to his position. The grandparents also relied on the fact that G knew almost nothing of L's life as evidence of his peripheral role. He never spent any time alone with L, never attended any of her medical appointments or functions at daycare, and was not surprised or concerned that N never included him in decisions involving L's care and

[74] For example, he originally testified that he assembled L's crib, but when another witness testified that she had built the crib he later admitted he merely adjusted a leg.

education. He did not know that L was a difficult, colicky baby, when she began daycare or which daycare she attended, and remained unaware of the fact that L's mother had become seriously ill over a year prior to her death, had a mastectomy, and had undergone aggressive chemotherapy and radiation treatment. Thus, while the court stated that it should not presume the lack of a parental project simply because G had contact with L, it ignored the fact that the relationship which did exist was minimal and certainly not one characterized by the closeness of a parent. While some kind of "involved known donor" status may have assisted in this case, the donor's involvement was so minimal that it is hard to know whether he would have even met such a standard.

The existing case law suggests that when judges have some discretion, they prefer to protect biological relationships over pre-conception intention and existing family relationships. This conclusion is perplexing for a number of reasons. First, as Campbell has argued, third party gametes are used because the couple or individual cannot conceive a child without assistance and not because of any intention on the part of the couple or individual to co-parent with the gamete provider.[75] In fact, the intention of the parties is usually the complete opposite. Even when a known donor is used and some involvement is envisaged, there is rarely an intention to *parent* with the donor.[76] Thus, to identify biology as the basis for parentage seems to ignore the foundational purpose of assisted conception: to create a child for the intended parent(s) with the assistance of a third party gamete provider. The emphasis on biology in this context is particularly damaging to lesbian couples who must always rely on third party gametes for reproduction.

Second, the favouring of biology over pre-conception intention and the integrity of women-led families is contrary to legislative trends both in Canada and elsewhere.[77] The five provinces that have legislation addressing parentage in situations of assisted conception establish from the outset that donors are not, by virtue of their donations, legal parents. A typical example is section 24 of British Columbia's new *Family Law Act* provides that if a child is born as a result of assisted reproduction (defined as "a method of conceiving a child other than by sexual intercourse"), a donor is not, by reason only of the donation, the child's parent, and may not be declared by a court, by reason only of the donation, to be the child's parent. Rather, he can only be declared a parent if it is determined under the *Family*

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[75] Campbell, *supra* note 8 at 259.

[76] Kelly, *supra* note 4 at 101-108.

[77] For an excellent international example, see the *Assisted Reproductive Treatment Act* 2008 (Vic) from Victoria, Australia, which expressly protects the parentage of both lesbian couples and SMCs. The U.K.'s *Human Fertilisation and Embryology Act* 2008, c 22, is a second, albeit flawed, example of the international trend towards recognizing women-led families.

Law Act that he is one. A donor who wants to be a legal parent therefore must make more than a purely biological argument to support a parentage application. Provincial legislation also includes parenting presumptions that operate at the time of a child's birth to protect the pre-conception intention of a couple to extend legal parentage to the birth mother's partner, whether male or female. For example, section 27 of B.C.'s *Family Law Act* states that when a child is conceived using assisted reproduction, the parents of the child are the child's birth mother, and the person married to, or in a marriage-like relationship with the birth mother (whether male or female), unless there is proof that that person, before conception, either did not consent to be the child's parent or withdrew consent. Quebec, Alberta, Manitoba and P.E.I. have provisions similar to those in the *Family Law Act*, pointing to a clear statutory trend in favour of intention-based parentage rules amongst the provinces that have legislated in this area.

Finally, decisions as to custody and access in these cases suggest an interpretation of the best interests of the child test that ignores the child's interest in family stability and security, typically key considerations when courts are making access determinations. Yet, the judges in the cases described above prefer to prioritize the hypothetical benefit a child might gain from having a relationship with his or her biological father over the existing benefit of a stable and secure family. The effect of such a preference is that the child goes from living in a stable intact family, to moving between two homes, often with accompanying antagonism. At the same time, the child's legal relationship with his or her non-biological parent virtually vanishes, replaced by the parentage of the donor.

2. REFORMING PROVINCIAL PARENTAGE LAWS

While the cases discussed above demonstrate that judicial interpretation of seemingly progressive statutory provisions can undermine their benefits for women-led families, statutory presumptions designed to curtail judicial discretion are nonetheless an appropriate starting point. In circumstances where the pre-conception intention is clear, statutory presumptions make it more difficult for judges to exercise discretion in a way that favours biological relationships over other types of relationships. As noted above, five provinces already have legislation addressing parentage in instances of assisted reproduction. British Columbia's new *Family Law Act*, which came into force in March 2013 and expressly recognizes women-led families, serves as a high water mark in the field.

The key feature of each of the provincial statutes is an intention-based system of assigning legal parentage that diminishes the significance of biological connection. This is typically achieved via two statutory presumptions. First, individuals who donate gametes for the purpose of assisted reproduction are not legal

parents by virtue of the donation.[78] Such a provision prevents a judge from declaring a donor a parent solely on the basis that the donor is the child's biological father and, in the event that a donor is declared a father, requires the judge to provide some justification, beyond biology, for the decision. The second key feature present in all of the statutes is the inclusion of a parentage presumption that locates parenthood with the birth mother and her partner, whether male or female, provided that the partner has consented to the conception.[79] These provisions reinforce that, in the context of assisted conception, parentage is grounded in pre-conception intention, not biology. Any reform in this area must include these two elements as a matter of basic protection for women-led families. Beyond these basics, however, there are a number of other provisions found within the existing legislation that would greatly assist lesbian and SMC families.

The Quebec and B.C. legislation include a number of provisions that set them apart from other statutes in this area, providing better protection to women-led families. The first is that each appears to – at least implicitly – envisage a single parent family created via assisted reproduction. As noted above, the Quebec law assigns "filiation" to individuals engaged in a "parental project". A parental project involving assisted procreation "exists from the moment *a person alone* decides or spouses by mutual consent decide" to have a child using third party gametes.[80] Thus, a parental project can be a project of a sole individual, such as an SMC. When read alongside article 538.2 – "the contribution of genetic material for the purposes of a third-party parental project does not create any bond of filiation between the contributor and the child born of the parental project" – the Quebec legislation seems to suggest that a woman can become a child's sole legal parent. British Columbia's new legislation also appears to recognize the possibility of a single mother family, though it is less clear than the Quebec legislation. The B.C. *Act* refers on a number of occasions, including within the definitions section, to "intended parents" as well as an "intended *parent*," suggesting that there can be a single intended parent. Additional references to an "intended parent" occur in the surrogacy provisions, suggesting surrogacy is the area where a single intended parent is anticipated (eg, a single gay man). However, there is no reason to presume that a sole intended parent could not also be a single woman who conceives via donor insemination. In fact, it would be an odd conclusion if the prospect of a single intended parent was imagined only in the case of surrogacy.

As noted earlier, a second element of the Quebec legislation that sets it apart from other statutes in this field is that the transfer of genetic material for the purpose

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[78] *Civil Code of Quebec*, SQ 1991, c 64, art 538.2; *Family Law Act,* SBC 2011, c 25, s 24(1). Alberta's legislation does not have an explicit statement that the donor is not a legal parent, though it is implied in other provisions that positively identify the legal parents of a child conceived via assisted reproduction.

[79] *Family Law Act,* SBC 2011, c 25, s 27; *Family Law Act*, SA 2003, c F-4.5, s 8.1(5); *Civil Code of Quebec*, SQ 1991, c. 64, art 538.3.

[80] *Civil Code of Quebec*, SQ 1991, c 64, art 538.

of a parental project may take place by way of sexual intercourse.[81] Such an approach is expressly rejected in the B.C., P.E.I., Manitoba, and Alberta statutes. It should be noted, however, that even in Quebec a parental project that involves the transfer of gametes via intercourse is not treated identically to conception via assisted reproduction. In the case of the former, the donor has the opportunity to establish filiation within the first year of a child's life, while the latter bars a claim of filiation entirely. Given that conception via intercourse is a reasonably common feature of SMC cases, and occasionally present in lesbian couple cases, defining "assisted conception" to include conception via intercourse seems essential. As with conception via donor insemination or IVF, the main issue for the court should be to determine the parties' pre-conception intention. It would therefore be beneficial for legislation to encourage pre-conception written agreements, as the B.C. statute does in relation to "multiple parent" families, discussed below.

British Columbia's statute also includes a significant feature that sets it apart from other legislation in this area: it permits a child to have three legal parents, provided that there is a pre-conception written agreement to that effect.[82] This option is only available when conception occurs via assisted reproduction and was clearly designed to meet the needs of lesbian couples who wish to co-parent with a donor, or couples (same-sex or opposite-sex) who want to include a surrogate or egg donor within their legal family. For a child to have three legal parents, a number of requirements must be fulfilled. Section 30 states that a child can have three legal parents if a written agreement is made, prior to conception, between (i) an intended parent or the intended parents and a potential birth mother who agrees to be a parent together with the intended or intended parents (a surrogacy arrangement); or (ii) the potential birth mother, a person who is married to or in a marriage-like relationship with the potential birth mother, and a donor who agrees to be a parent together with the potential birth mother and her partner (a known donor scenario). Section 30 therefore has the potential to meet the needs of families in circumstances similar to the parties in *A.A. v B.B.*[83] It may also help bolster the presumption that a donor is *not* a legal parent. If a donor wishes to assert parentage, he needs to meet the requirements stipulated under section 30. Failing to do so, he must accept that a donor is not a legal parent simply by virtue of donating.

The existing provincial laws provide an excellent starting point for future legislation designed to protect the autonomy and stability of women-led families. Three essential elements can be drawn from them. First, any legislation in this area must protect *both* lesbian couples and single women, by locating parentage within

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[81] *Ibid*. at art. 538.2.

[82] *Family Law Act,* SBC 2011, c. 25, s. 30.

[83] *A.A, supra* note 1.

the intended family and by severing any legal link between the gamete donor and child. Single women are often ignored when reform in this area occurs, so particular attention must be paid to expressly including them within the legislative framework. Given the frequency with which prospective SMCs (and sometimes lesbian women) conceive via intercourse, though they do not intend to co-parent with the donor, legislation should also clarify that, in situations where a pre-conception agreement exists, conception via intercourse does not negate the intention of the lesbian couple or single woman to parent independently of the donor. Finally, in the small number of instances where women intend to co-parent with donors, legislation should permit a child to have more than two legal parents. Making this option available provides sufficient flexibility to meet the needs of the variety of lesbian family configurations that exist. However, by requiring a written agreement to this affect, it reinforces that such an arrangement is an exception to the general rule that a donor is not a legal parent.

What is not included in any of the existing statutory regimes is a legal identity designed to respond to the circumstances of the "involved known donor." While I have expressed caution above in relation to such a category, at least some of the concerns expressed by lesbian parents may be overcome by creating a legal status that recognizes the role some known donors play in children's lives, without interfering with the parentage of the non-biological mother. Whether referred to as a "non-parental adult caregiver" as Kelly suggests,[84] or simply as "an involved known donor," the existence of such a category may assist lesbian women and SMCs who consider donor involvement to be beneficial to their child, but do not intend to co-parent with the donor.

LAW REFORM IN THE SHADOW OF THE *CHARTER*

While legislation similar to that which exists in B.C., Alberta, Quebec, Manitoba and P.E.I. is likely to rectify many of the existing concerns, given the slow pace of statutory change and the possibility legislation will not always be interpreted in the best light for women-led families, it is also important to consider how to shift judicial thinking in these cases. Though judges sometimes refer to the best interests of the child, decision-making with regard to legal parentage is not subject to a best interests analysis. If a donor is declared a legal parent then the judge must determine whether custody or access is in the child's best interests. Judges have universally found in favour of the donor at this point. It is my recommendation that, in addition to the introduction of statutory provisions addressing parentage in the context of assisted reproduction, judges should be encouraged to interpret the best interests of the child test in a manner that is consistent with children's section 15 equality rights under Canada's *Charter of Rights and Freedoms*.[85]

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[84] Kelly, *supra* note 2 at 155.

[85] *Charter*, *supra* note 9.

While the judges making the decisions discussed above presumably based their conclusions on what they believed was in the best interests of the children involved, their preference for maximizing the relationship between children and their biological fathers over the preservation of the existing relationships between non-biological mothers and their children *and* the stability of the intact family, suggests they view women-led families as incomplete. The children in each of the cases discussed above lived in stable, healthy homes with loving parents, and there was no indication that their well-being was in any way compromised by not having access to their biological father. Yet, each of the judges concluded that the status quo did not meet the child's best interests, that there was something deficient about these families that meant an additional figure – a "father" – needed to be involved. This conclusion is difficult to justify for three reasons. As noted above, family security and stability is in a child's best interests, and while this needs to be balanced with other aspects of the best interests test, these cases appear to completely ignore it as an element of the analysis.[86] Second, research indicates that children raised by two lesbian mothers have psychological and educational outcomes equal to, if not better than, children raised by heterosexual parents.[87] In other words, being raised *only* by a lesbian couple does not appear to compromise in any way the best interests of children. There is thus no evidence-based reason to insert fathers into lesbian families. Finally, the insistence that children's best interests require that they have an involved "father" is a particularly ironic conclusion in a country where lesbian couples can marry. While I do not believe that married couples are any more committed to their children than unmarried couples, it is odd that in a country where stability for children was used to justify the extension of marriage rights to same-sex couples,[88] two women who have a child within a marriage cannot rely on the state to recognize them as the legal parents of that child.

The best interests of the child test – the sole consideration for judges making custody and access determinations – typically involves a balancing of a variety of statutory factors and a consideration of the particular circumstances of the child in question. It is necessarily subjective, as it is designed to respond to the needs

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[86] An extremely poignant article written by an American adult who was a child-participant in a dispute between her lesbian mothers and her sister's donor, highlights exactly how upsetting a donor's attack on the child's sense of family can be. See Cade Russo-Young, "My House on Stilts" in Susan Goldberg & Chloe Brushwood Rose (eds.), *And Baby Makes More: Known Donors, Queer Parents, and Our Unexpected Families* (London, ON: Insomniac Press, 2009) 208.

[87] Loes van Gelderen, Henny Bos, Nanette Gartrell, Jo Hermanns, Ellen Perrin, "Quality of Life of Adolescents Raised from Birth by Lesbian Mothers: The US National Longitudinal Family Study" (2012) 33(1) *Journal of Developmental & Behavioral Pediatrics* 1.

[88] For a discussion of the way in which rhetoric around the importance of marriage to children played an important role in the same-sex marriage debate in Canada see Kelly, *supra* note 12 at 54-56.

of the individual child.[89] This subjectivity can pose significant problems for women-led families. The existing case law suggests that when judges are faced with an access dispute involving a lesbian or SMC family, they rarely apply the best interests test in a manner that acknowledges or respects the completeness of the child's functional family.[90] Rather, judges tend to fall back on hetero-normativity, refashioning the existing family in a manner which undermines the integrity of the relationships within it and imposes new relationships based on the desire for an opposite-sex parental structure. The effect of this on children is unequal treatment: children conceived via assisted reproduction and raised within women-led families do not enjoy the same level of family security and stability as children similarly conceived and raised within heterosexual families.

One way in which to address the inequality experienced by children raised in women-led families is to argue that the best interests of the child test should be interpreted in a manner that is consistent with children's section 15 equality rights. In particular, children conceived via assisted reproduction and raised within women-led families should not be discriminated against on the basis of their mode of conception and/or the family structure into which they are born. In practice, this would mean that the rules of legal parentage for children born into lesbian and SMC families be clearly established (preferably by way of legislative presumption, as discussed above) and, in the absence of such legislation, the importance of the child's family integrity be acknowledged when making custody and access determinations under the best interests test.

While family law is private litigation and thus not subject to direct *Charter* scrutiny,[91] the *Charter* has nonetheless had significant impact on family law. First, the introduction of the *Charter* forced governments to review and amend legislation to ensure existing statutory provisions complied.[92] Second, direct constitutional

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[89] While necessarily subjective, the best interests test has also been criticized for its indeterminacy. The first critique was mounted in 1975 by Robert Mnookin and many others have followed. Robert M. Mnookin, "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975) 39 *Law & Contemporary Problems* 226; Katherine Bartlett, "Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project" (2002) 36(1) *Family Law Quarterly* 11 at 13-17; Martha Fineman, "Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking" (1988) 101 *Harvard Law Review* 727.

[90] As Jenni Millbank explains, functional family claims "rest on a performative aspect, that is, the parties are granted rights because of what they do in relation to one another, not because of the status of who they are or what manner of legal formality they have undertaken." Millbank has argued that while functional family claims have been a successful tool for gaining rights from the State for lesbian and gay families, the model has faltered in the context of lesbian and gay intra-family disputes. The cases discussed above support this thesis. Millbank, *supra* note 2 at 150.

[91] *Dolphin Delivery v R.W.D.S.U.*, [1986] 2 SCR 573.

[92] The most obvious effect of this first round of review was the introduction of gender-neutral language into family law legislation, enabling both men and women to apply for child support and spousal support.

challenges to statutory provisions have been brought in the courts on the basis that the laws violate *Charter* guarantees such as sex equality (section 15) or the right to "life, liberty and security of the person" (section 7).[93] As a result, family law statutes are now gender neutral, treating female and male spouses identically in relation to spousal support, child support, matrimonial property division, and child custody. The third way in which the *Charter* has influenced family law is the most controversial. The *Charter* has been invoked both by scholars and litigants to argue that, *even in the absence of state action*, judges must take into account the fundamental values enshrined in the *Charter*.[94] For family law, and the best interest of the child test in particular, this third application of the *Charter* has significant transformative potential. As Boyd explains,

> [The application of *Charter* values to family law] is important because many areas of family law involve the exercise of judicial discretion regarding concepts that originated in common law. Indeed, family law is a field that arguably involves more indeterminative normative concepts and standards than many areas of law that are embodied in statutes.[95]

In no area of family law is Boyd's argument better demonstrated than in regard to the best interests of the child test. Due to its inherent indeterminacy, the best interests test is particularly vulnerable to judicial biases associated with gender, race, class, sexual orientation, and disability.[96] However, if tempered by *Charter* values, particularly the constitutional commitment to equality, assessments of the best interests of the child are less likely to incorporate normative assumptions which are damaging to children raised in women-led families.

References to *Charter* values by the Supreme Court of Canada are now common in family law disputes, particularly with regard to economic matters. In the spousal support area, for example, the Supreme Court in *Moge v Moge*[97] relied on the *Charter's* guarantee of substantive equality to shift the analysis from a simplistic

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[93] These court challenges produced changes in the areas of adoption (eg, *Re K* (1995), 15 RFL (4th) 129 (ONSC)), spousal support for members of same-sex couples (*M v H* [1996] 132 DLR (4th) 538 (ONSC)), birth registration (see, *Gill v Murray, supra* note 1; *M.D.R. v Ontario (Deputy Registrar General), supra* note 1) and civil marriage (eg, *EGALE Canada Inc. v. A-G of Canada,* 2001 BCSC 1365**;** *Halpern v Canada (A-G)* (2002), 60 OR (3d) 321).

[94] Nicholas Bala, *The Charter of Rights and Family Law in Canada: A New Era* (2000) 18 *Canadian Family Law Quarterly* 373 at 423; Susan B Boyd, "The Impact of the *Charter of Rights and Freedoms* on Canadian Family Law (2000) 17 *Canadian Journal of Family Law* 293 at 295.

[95] Boyd, *ibid*. at 295.

[96] Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30 *Osgoode Hall Law Journal* 375; I. Thery, "'The Interest of the Child' and the Regulation of the Post-Divorce Family" (1986) 14 *International Journal of Society and the Law* 341 at 345.

[97] *Moge v Moge,* [1992] 3 SCR 813.

approach to spousal support that treated spouses as equals at marriage breakdown, regardless of whether they were actually equally positioned, to a more nuanced approach that acknowledged the reality of women's economic inequality when relationships break down. Following *Moge,* judges have continued to rely on substantive equality to introduce social context evidence that addresses the feminization of poverty and the unequal economic effects for men and women arising out of marriage or marriage-like relationships. For example, in *Willick v Willick*, another spousal support decision, L'Heureux-Dube J (McLachlin and Gonthier JJ concurring) stated that:

> Given the profound economic impact on the parties that may follow from differing interpretations of the *Divorce Act's* support provisions, it follows that in the present case, as it did in *Moge*, this Court should seek to assure itself that its preferred interpretation is consistent with *Charter* values of substantive equality rather than with the values of formal equality.[98]

Given the decisions in *Moge*, *Willick,* and other similar cases, it can be concluded that the guarantee of substantive equality found in section 15 of the *Charter*, while not applying directly to private family law matters, has facilitated the introduction of social context analysis in family law determinations, particularly in relation to economic issues.

The desirability of incorporating *Charter* values into child custody law nonetheless remains controversial. As Boyd argues, because of the primacy of the best interests of the child test in custody and access law, rights discourse is rendered problematic.[99] However, the judicial focus thus far has been on the problematic nature of incorporating the equality rights of *parents* into custody and access decision-making, something that courts have quite firmly rejected.[100] By contrast, it is my argument that the best interests of the child test should incorporate the substantial equality rights *of children*.

The relationship between the *Charter* and the best interests of the child test was first addressed in 1993 in the Supreme Court of Canada decision of *Young v Young*.[101] *Young* involved the religious freedom of a non-custodial father who, when exercising access with his children, participated in religious practices the custodial parent opposed. One of the issues to be determined by the Supreme Court was

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[98] *Willick v Willick*, [1994] 3 SCR 670 at para 52.

[99] Boyd, *supra* note 94 at 305.

[100] The refusal of judges to consider the rights of parents in custody and access decision-making is based on the primacy of the best of the child test. The best interests test requires that the sole focus be on *the child* and not on what might be the competing interests of a parent. It would therefore be difficult to sustain an argument that the best interests test should be interpreted in light of women's substantive equality rights.

[101] *Young v Young* (1993) 108 DLR (4th) 193 (SCC) [*Young*].

whether the *Charter* applied to child custody law and, in particular, to the best interests of the child test. While all of the judges in *Young* agreed that the legislative test for determining the best interests of the child was subject to *Charter* scrutiny, they did not conclude on the issue of whether the *Charter* applied to court orders made under the best interests test. Three members of the Court declined to specifically rule on the application of the *Charter*, arguing that if the best interests of the child test was interpreted properly orders arising out of the interpretation could not violate the *Charter*.[102] The remaining four judges found that once the best interests test had been found to accord with *Charter* values, the *Charter* has no direct application to private disputes between parents, or to court orders regarding custody and access matters.[103] The judges differed, however, on the manner and extent to which the *Charter* should affect the interpretation of the test. Of the various judges who favoured the incorporation of *Charter* values, Sopinka J stated it most succinctly: "while the ultimate determination in deciding issues of custody and access is 'the best interests of the child test,' it must be reconciled with the Canadian *Charter of Rights and Freedoms*."[104]

There is thus some significant precedent for interpreting the best interests test in a manner that is consistent with *Charter* values. Though concern about using *Charter* values to promote parental rights is likely to continue, incorporating within the best interests test the substantive equality rights of *children* appears far less controversial. In fact, provincial governments introducing legislation establishing parentage within women-led families in the context of assisted reproduction have stated that the very purpose of the new provisions is to protect the equality rights of children. For example, the explanatory materials produced by the B.C. Ministry of Justice for the new *Family Law Act* stated that the new legislative regime, which recognizes the parentage of both lesbian couples and SMCs, "treats children equally, regardless of the circumstances surrounding their birth, protects children's best interests and promotes *stable family relationships*."[105] Material accompanying Canada's *Uniform Child Status Act*, model legislation drafted by the Uniform Law Conference of Canada in 2010 which includes presumptions of parentage based on pre-conception intention, similarly states "[the presumptions] provide *stability for the child* and *equal treatment* for children regardless of the method of their conception."[106] Given the stated desire amongst some provincial legislators to redress inequality between children based on mode of conception and/or family type,

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[102] Justices McLachlin, Cory and Iacobucci.

[103] Justices L'Heureux-Dube, La Forest, Gonthier and Sopinka.

[104] *Young, supra* note 101 at para 263.

[105] B.C. Ministry of Justice, "The Family Law Act Explained" (2012). Available at: <http://www.ag.gov.bc.ca/legislation/family-law/pdf/part3.pdf>

[106] *Uniform Child Status Act* (2010), Uniform Law Conference of Canada. Available at: <http://www.ulcc.ca/en/us/>

it should not be particularly controversial to address these same inequalities via judicial decision-making.

Consideration of the equality interests of children in parentage and access disputes between lesbian couples or SMCs and their donors will likely expose, and hopefully rectify, the differential treatment currently occurring in the courts. The tendency of judges to award donors access or even joint custody, whatever the cost to the child's stability within his or her established family, will become difficult to sustain when viewed through the lens of children's equality. Courts will be forced to explicitly justify a disruption to the child's identity and security, indicating why such children should be treated differently from those conceived via donor insemination and raised in heterosexual families. While courts may still come to the conclusion that a donor is entitled to custody or access, it will hopefully become more difficult to minimize a child's interest in family stability.

CONCLUSION

Lesbian couples, single women, and the children they raise, are entitled to the same level of family security and autonomy as two-parent heterosexual families. This means lesbian mothers and SMCs should be able to parent independently from a male donor, if that is their pre-conception intention. However, due to the lack of legislative protection in most Canadian provinces, as well as judicial reluctance to acknowledge the completeness of a family without a father, women-led families with known donors exist in a state of legal insecurity. Legislative reform which assigns parentage on the basis of pre-conception intention, and is available to both lesbian couples and single women, will hopefully provide a base level of security for women-led families. In addition, a revisiting of the best interests of the child test in light of *Charter* values will go some way towards recognizing the equality rights of children born into women-led families. While judicial discretion will always remain a key component of family law, it is hoped that these reforms will go some way towards achieving equality for women-led families and the children raised within them.