LEGAL PARENTHOOD AND THE RECOGNITION OF ALTERNATIVE FAMILY FORMS IN CANADA

Alison Bird*

In recent decades, there has been a fundamental shift in the way that individuals organize their families. Due to important societal changes, such as the rise of divorce and remarriage, the legal recognition of cohabiting spouses, the legalization of same-sex marriage, and the advent of new reproductive technologies, there is now a multitude of family forms in Canada.[1] Family law has been slow to respond to these changes and, as a result, it does not meet the needs of existing, valid Canadian family units. The current laws pertaining to legal parenthood are premised on the underlying ideology that the nuclear, typically heterosexual, family is the ideal family unit.[2] This outdated notion fails to acknowledge present societal realities and has an adverse effect on alternative families. They are forced to fit into a legal structure that was not designed for them and, as a result, they are often denied legal recognition or are forced to settle for an outcome that does not meet their unique needs and circumstances.

Legislatures have been reluctant to amend the laws pertaining to legal parenthood to better reflect the diversity of Canadian families. Accordingly, much of the evolution of these laws has originated in the pursuit of legal recognition through litigation by private individuals. This is a significant barrier to effective change because courts must work within a legislative structure that continues to idealize the nuclear family, making it impossible in some cases to legally recognize a legitimate family form. Progress is often dependent on a judge's willingness to either interpret rigid laws more liberally or to invalidate the legislation altogether. Thus, in the absence of more inclusive legislation, the legal recognition of an alternative family is dependent on a judge's perception of the ideal family unit and the role of the courts in evolving Canadian family law.[3]

* LL.B, 2010, University of New Brunswick.

[1] Margrit Eichler & Marnie McCall,"Clarifying the Legal Dimensions of Fatherhood" (1993) 11 Can. J. Fam. L. 197 at 198.

[2] Alison Diduck & Felicity Kaganas, *Family Law, Gender and the State* (Portland: Hart, 2006) at 3.

[3] Fiona Kelly, "Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and Their Children into Canadian Family Law" (2004) 21 Can. J. Fam. L. 133 at para. 1.

It is inappropriate to continue to premise legal parenthood solely on the heterosexual nuclear family because it is no longer the only significant family unit in Canada. The preference of one unit to the exclusion of others delegitimizes alternative family models and encourages a false perception that the majority of Canadian families share one common form.[4] There is a disconnect between the law of legal parenthood and the societal reality in Canada. This must be addressed through legislative reform that uses a more inclusive and flexible family ideology to better reflect the fundamental shift in how individuals choose to structure their families. This paper will examine the state of legal parenthood in Canada and analyze the most common methods used by individuals to seek legal recognition of their alternative family form. In general, it will focus on same-sex couples and the use of reproductive technologies because this is the context for the most frequent and complex legal parenthood litigation in Canada.

HISTORY OF LEGAL PARENTHOOD

The family has historically been essential to the functioning of civilizations and its ideal form has evolved with the priorities of our society. Individual survival and the accumulation of wealth have been closely tied to the form of a family unit. Thus, there is a demonstrated connection between the economics of a time and the way people choose to order their affective relationships.[5] The current Canadian family ideology developed in feudal England, with major changes occurring during the industrial and post-industrial periods.[6] In feudal times, familial ties were grounded in guardianship rather than parenthood. The transfer of estates through male inheritance was of fundamental importance and, as such, the law reinforced the male as the head of household by restricting guardianship to men.[7] This legal emphasis on guardianship rather than biological parenthood also influenced the form of many families by promulgating the concept that the ideal family unit consisted of a moderately sized, interdependent group.[8] This reflected the demands of the feudal subsistence economy, which required a family to be self-sufficient in providing for the survival of its members.

The major economic shifts of industrial and post-industrial society led to changes in the ideal family unit. The law evolved to promote the heterosexual nuclear family because it was believed to be the most economically efficient model.[9] The rise of individualized, private work meant that it was no longer necessary to rely on

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[4] Alison Harvison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family" (1998) 6 Am. U. J. Gender & L. (currently Am. U. J. Gender Soc. Pol'y & L.) 505 at 510.

[5] Diduck & Kaganas, *supra* note 2 at 11.

[6] Judith Mason, *Principles of Family Law*, 8th ed, (London: Thomson, 2008) at 526.

[7] *Ibid.*

[8] Kris Franklin, "A Family Like Any Other Family: Alternative Methods of Defining Family in the Law" (1991) 18 N.Y.U. Rev. L. & Soc. Change 1027 at 1035.

[9] Diduck & Kaganas, *supra* note 2 at 6.

a large family group for survival. Greater proportions of wealth began to be held by individuals, and the heterosexual nuclear family allowed a man to expend less money in providing for his dependents and to directly transfer this wealth to his children upon his death.[10] Thus, it was more efficient to form smaller, nuclear units in which a man was the financial provider and a woman raised the children.[11] Current Canadian family laws have their foundation in these concepts and they continue to be highly influential because of the belief that the nuclear family supports the functioning of our post-industrial, capitalist society.[12]

DEFINING "FAMILY"

For many years, it was relatively simple to define the term "family" because only marriage conferred legal status and the right to support on the parties' children. Today, however, significant societal changes have made the task more difficult. Marriage has declined in its central importance due to the prevalence of divorce, the increased acceptance of single parents, and the recognition of common-law and same-sex couples. It is now both socially and legally permissible for a family to exist in the absence of marriage. For example, Statistics Canada found a nineteen percent rise in the number of common law families between 2001 and 2006, and a thirty-three percent rise in the number of same-sex families in the same period.[13] The 2001 Canadian census indicated that there were more than 3,000 same-sex couples raising children in Canada[14] and other sources have estimated that there are closer to half a million gay and lesbian parents raising over one million children.[15] While the majority of these children were born into a heterosexual nuclear unit that was later dissolved through divorce, same-sex couples are increasingly conceiving children through new reproductive technologies.

Despite the expansion of family forms, there has been little examination of how Canadians, as a society, define family. Most individuals generally accept that there is a consensus in the definition and do not question their underlying beliefs about the concept even when their personal family is very different from cultural understandings of the term.[16] This failure to critically examine the societal conception of family has contributed to the maintenance of the status quo and allowed the law to fall out of step with social changes. If any meaningful legal reform is to take place, the first step is

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[10] *Ibid.* at 5.

[11] Franklin, *supra* note 8 at 136.

[12] Diduck & Kaganas, *supra* note 2 at 6.

[13] Statistics Canada, "Census Snapshot of Canadian Families" (Ottawa: Canadian Social Trends, 2006).

[14] Anne-Marie Ambert, "Same Sex Couples and Same Sex Families: Relationships, Parenting and Issues of Marriage" (2005) at 7, online: The Vainer Institute of the Family <http://www.vifamily.ca/library/cft/samesex_05.pdf>.

[15] Kelly, *supra* note 3 at para. 2.

[16] Franklin, *supra* note 8 at 1032.

determine how to define a family, as this will guide the development of legislation and underlie all policy decisions.

It has been suggested that parenthood has replaced marriage as the determinative component of a family.[17] Legal parenthood has a central place in family law because it is essential to establishing a person's identity through his or her family name, nationality, and cultural heritage.[18] It also can be determinative of who may have a meaningful relationship with a child, including both affective ties and support obligations. Despite its importance both in law and to a child's personal development, there is no clear method to determine legal parenthood. While biological connections were frequently regarded as the paramount consideration in such determinations, this method is not, and arguably has never been, sufficient because it is not the sole means of creating a legitimate parental relationship. Adoption has created non-biological, legal parent-child relationships since Roman times[19] and new reproductive technologies are increasingly severing genetic factors from legal parenthood.[20]

Canadian laws currently recognize forms of parenthood that are both biological and social, but they typically restrict the inquiry to nuclear family models. These laws generally do not provide guidance on how to determine legal parenthood, and use the terms "mother" and "father" without defining their meaning.[21] As a result, the outcome of contested cases depends on judges' interpretations of the law and their conceptions of parenthood. In the absence of legislative direction, judges often prioritize evidence of biological connections in complex and novel cases.[22] Courts may consider a number of other factors, such as the parties' intentions and affective ties with the child, but the weight of each factor is left to a judge's discretion. This leads to highly contextual and often unpredictable results.

CURRENT APPROACHES TO DETERMINING LEGAL FATHERHOOD AND MOTHERHOOD

Even under current Canadian legislative regimes, biological factors are not determinative of legal fatherhood. In many cases, the most important consideration is the man's relationship with the child's mother.[23] There is a presumption that the husband, or male partner, of a child's mother is the father. To rebut this presumption of

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[17] Mason, *supra* note 6 at 1-2.

[18] Diduck & Kaganas, *supra* note 2 at 3.

[19] Paul Sachdev, *Adoption: Current Issues and Trends* (Toronto: Butterworths, 1984) at 44.

[20] Susan Boyd, "Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility" (2007) 25 Windsor Y.B. Access Just. 63 at 68.

[21] *Ibid.* at 66.

[22] Fred Bernstein, "This Child Does Have Two Mothers...and a Sperm Donor with Visitation" (1997) 22 N.Y.U. Rev. L. & Soc. Change 1 at 3.

[23] Eichler & McCall, *supra* note 1 at 197.

paternity, the man must prove not only that he is not the child's genetic father, but also that he did not consent to be the father or withdrew his consent before conception.[24] The operation of this presumption means that a woman's male partner is recognized as the father of her child even when the couple uses a sperm donor. Absent evidence that the male partner did not consent to the child's conception, biological ties in these cases will be irrelevant to a determination of legal fatherhood. This means that, even where the sperm donor has a relationship with the child, the genetic connection will not confer on him the status of a legal parent.

Until recently, it was very simple to make a determination of legal motherhood. The law provided that, in the absence of an adoption order, the woman who gave birth to a child was the legal mother. However, this principle has become much more complicated with the rise of reproductive technologies. In cases of surrogacy, it may be that, although a woman is the genetic and birth mother, she never had an intention to parent the child. It is also possible that, through ovum donation, the woman who gives birth to a child is not the genetic mother.[25] The determination of legal motherhood can also be very challenging in the context of lesbian relationships. There is no legal equivalent to the presumption of paternity that can be applied to the female partner of a child's biological mother.[26] As a result, a woman who is not the birth mother, but who planned a child's conception and intends to be a parent, will not be recognized as a legal mother without applying for an adoption or a declaration of legal parenthood.

Canadian jurisdictions have been slow to respond to advances in reproductive technologies.[27] Only three provinces, Newfoundland and Labrador, Alberta, and Quebec, have enacted legislation to address these new challenges to determinations of legal parenthood.[28] Therefore, in the event of litigation, a court may be forced to use legislation that was not created in contemplation of such technology to make a determination of legal parenthood.[29] This can mean that parties who are functionally and intentionally parents are denied legal recognition because of the prohibitive phrasing of outdated provisions. However, in uncontested cases, courts are often able to fashion a result that is favourable to the parties because all the potential parents agree on who should be recognized as legal parents. The determination of legal parenthood becomes less predictable and more complex when one of the potential parents contests

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[24] British Columbia Ministry of Attorney General, "Family Relations Act Review: Defining Legal Parenthood", Discussion Paper (2007) at 4, online: <http://www.ag.gov.bc.ca/legislation/pdf/Chapter10-DefiningLegalParenthood.pdf>

[25] Emily Doskow, "The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World" (1999) 20 J. Juv. L. 1 at 2.

[26] Angela Campbell, "Conceiving Parents Through Law" (2007) 21 Int'l J.L. Pol'y & Fam. 242 at 250.

[27] *Ibid.* at 247.

[28] British Columbia Ministry of Attorney General, *supra* note 24 at 4.

[29] Boyd, *supra* note 20 at 65.

the application because he or she wishes to retain legal rights to the child.[30] In these cases, courts must attempt to balance the claims of the parties using a legal structure that was not designed for the circumstances.

THE USE OF ADOPTION TO BECOME A LEGAL PARENT

Adoption is one of the oldest means to become the legal parent of a child to whom a person is not biologically related. An adoption order permanently transfers the legal parent-child relationship from natural parents to adoptive parents.[31] The current Canadian adoption laws fully terminate all legal ties between children and their biological parents.[32] However, this was not always the effect of an adoption order. The first adoption act in Canada was passed in New Brunswick in 1873, and nearly all the provinces had their own acts by the late 1920s.[33] These early statutes divested biological parents of ongoing legal rights and responsibilities in relation to adopted children, but permitted the children to inherit from their birth parents.[34] It was not until the 1950s that most Canadian adoption statutes were amended to completely sever all legal ties between the biological parents and children.

The primary purpose of most early adoption laws was to secure a male heir for a family and facilitate the transfer of wealth.[35] Accordingly, most adoptive parents were heterosexual couples who were not biologically related to the child they adopted. More recently, with the increase of divorces and the legal recognition of same-sex couples, there has been a significant rise in the number of second-parent, or relative, adoptions.[36] In a second-parent adoption, a person adopts his or her spouse's biological child. The spouse's legal ties to the child are not severed, but the order does terminate the other biological parent's legal relationship to the child. As a result, either this parent must consent to the adoption or the person seeking the adoption must apply to the court for an order dispensing with the requirement for consent.[37]

For many years, the legislation only permitted heterosexual married couples to apply for adoptions. This meant that if a cohabiting or same-sex couple wished to adopt a child, only one partner could be a legal parent. It was also impossible for individuals to adopt their partners' biological children without severing those parents' legal ties to the children. Today, most provincial adoption acts permit cohabiting and

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[30] Kelly, *supra* note 3 at para. 38.

[31] Katrysha Bracco, "Patriarchy and the Laws of Adoption: Beneath the Best Interests of the Child" (1997) 35 Alta. L. Rev. 1035 at 1037.

[32] Paula Barran Weiss, "The Misuse of Adoption by the Custodial Parent and Spouse" (1979) 2 Can. J. Fam. L. 141 at 144.

[33] Sachdev, *supra* note 19 at 45.

[34] *Ibid.* at 47.

[35] *Ibid.*

[36] *Ibid.* at 32.

[37] Weiss, *supra* note 32 at 143.

same-sex couples to apply for all forms of adoptions. However, cohabiting couples are not able apply for adoptions in Prince Edward Island and Nova Scotia. The Prince Edward Island *Adoption Act* limits the category of persons able to jointly apply for adoptions to married couples[38] and provides that a spouse of a biological parent may adopt his or her child. The legislation, however, does not define the term spouse. The Nova Scotia *Children and Family Services Act* provides that a husband or wife of an applicant shall join in an application for adoption, unless the husband or wife is a biological parent of the child.[39]

Same-sex couples are now able to apply for second-parent and joint adoptions in every province. British Columbia, in 1995, was the first jurisdiction to amend its legislation;[40] several provinces were much slower to respond. New Brunswick, for example, did not amend its adoption legislation to permit common-law or same-sex partners to apply for adoptions until 2008.[41] The New Brunswick legislature did not amend its adoption laws to include same-sex couples until three years after the legalization of same-sex marriage and in the face of a tribunal decision that held that the legislation violated the New Brunswick *Human Rights Act*.[42] This is a clear illustration of the failure of legislatures to meet the needs and circumstances of their citizens through the amendment of laws related to legal parenthood. As a result, individuals are forced to seek legal change through the courts.

Re K., a decision of the then Ontario Court (Provincial Division), is an example of a very successful challenge to exclusionary adoption laws.[43] It was one of the first cases in Canada to hold that the denial of a same-sex couple's right to apply for a second-parent adoption was contrary to the *Canadian Charter of Rights and Freedoms*. Just prior to the case, the Ontario legislature rejected proposed amendments to the *Child and Family Services Act* that would have permitted adoptions by homosexual persons. Nevins J. rejected concerns that a decision in favour of the applicants would constitute inappropriate judicial intervention into the legislative sphere on the basis that the denial of adoptions to same-sex couples was not a reasonable limit imposed by the legislature because it infringed a *Charter* right.[44]

In this case, four same-sex couples presented applications for adoption to the Court. In each of the applications, one of the partners was the birth mother,

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[38] *Adoption Act*, R.S.P.E.I. 1988, c. A-4.1, s. 16(1).

[39] *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 72.

[40] Martha McCarthy & Joanna Radbord, "Family Law for Same Sex Couples: Chart(er)ing the Course" (1998) 15 Can. J. Fam. L. No. 2, 101 at 107.

[41] *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 1, as am. by 2008, c. 6, s. 16.

[42] *A.A. v. New Brunswick (Department of Family and Community Services)*, [2004] N.B.H.R.B.I.D. No. 4.

[43] *K. (Re)*, (1995) 23 O.R. (3d) 679 [*Re K*].

[44] *Ibid.* at paras. 96-98.

and the parents had made a joint decision to conceive a child through artificial insemination. The legislation defined "spouse" as an opposite-sex partner, effectively denying applications for second-parent adoptions by same-sex partners. The couples challenged the Act's definition of spouse on the basis of section 15 of the *Charter*. The Court framed the issue in narrow terms as "whether there is a constitutionally valid reason why an application for adoption by a homosexual couple, living in a conjugal relationship, one of whom is the biological mother of the child, should not be accepted by the court and decided on the basis of what is in the best interests of the child." [45]

In his analysis, Nevins J. thoroughly examined expert evidence on the ability of homosexual persons to parent. He determined that there was no evidence that the sexual orientation of parents would have any greater incidence of psychiatric disturbance, emotional or behavioural problems, or intellectual impairment than is seen in children raised by heterosexual parents.[46] He further held that the traditional heterosexual nuclear family unit is now a minority among several alternative family forms.[47]

The denial of the right to adoption imposed a disadvantage on same-sex couples because it withheld a unique bundle of rights and privileges that cannot be replicated in law.[48] Nevins J. found that adoption protects a parent from the risk of intrusion by birth parents and creates a special relationship worthy of legal protection.[49] He further concluded that the absolute ban on adoption by same-sex couples was contrary to section 15 because implies that no same-sex parents in any circumstances could provide a home that was in the best interests of a child.[50] He took judicial notice of societal concerns about the effect of homosexual parents on a child and found that any such concerns could be explored in the course of an adoption hearing.[51] Having determined that the definition of spouse was contrary to section 15 and not justified under section 1, Nevins J. read in a definition of spouse that was inclusive of same-sex couples.

The decision in *Re K.* opened the doors for same-sex couples to apply for adoptions, but it did not consider the merits of the parties' applications. In the years following the judicial and legislative inclusion of same-sex couples in adoption schemes, there have been many successful applications. In fact, adoption has become one of the primary means for a same-sex couple to ensure that both partners are recognized

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[45] *Ibid.* at para. 8.
[46] *Ibid.* at para. 37.
[47] *Ibid.* at para. 30.
[48] *Ibid.* at para. 74.
[49] *Ibid.* at para. 72.
[50] *Ibid.* at para. 110.
[51] *Ibid.* at para. 105.

as the legal parents of their child.[52] However, despite the widespread success of same-sex adoptions, the process continues to pose barriers to some couples.[53] The ultimate determination of many second-parent adoption applications depends on the consent of the other biological parent. This is not an issue when a lesbian couple uses an anonymous sperm donor, but if the couple chooses to use a known donor or if the child is a product of the biological mother's previous heterosexual relationship the couple will have to obtain the father's consent. While courts have the power to dispense with requirement for consent, there is a judicial tendency to maintain the father's parental rights if he has any relationship with the child.[54]

The Ontario Court of Justice case of *M.A.C. v. M.K.* provides a current illustration of the judicial attitudes to an application to dispense with a father's consent to a second parent adoption.[55] In this case, M.A.C. and C.A.D., a lesbian couple, conceived B. with M.K., a homosexual male friend who acted as a known sperm donor. M.A.C., the biological mother, and C.A.D. were the child's primary caregivers. They jointly applied for an adoption order to make C.A.D. a legal parent. However, M.K. refused to consent to the application because he wished to maintain his status as a legal parent. M.A.C. and C.A.D. argued that the Court should dispense with M.K.'s consent because, absent an adoption order, C.A.D. would effectively be a legal stranger to her child. They also argued that the adoption order would protect their family from M.K.'s unwanted intrusion. Since B.'s birth, he exercised access in increasing amounts and the couple felt that their familial status was threatened.[56]

M.K. argued that the adoption order would sever not only his legal ties to the child, but also his practical relationship.[57] Cohen J. accepted M.K.'s evidence that, from the beginning, he and the couple had intended that he would be involved with the child.[58] For the first years of B.'s life, M.A.C., C.A.D., and M.K. acted in many ways as a functional family. They took trips together; sent joint Christmas cards; and drafted, but did not file, pleadings for a three-parent adoption. However, M.A.C. and C.A.D. argued that they were increasingly concerned by M.K.'s lack of structure, high number of partners, and his violations of a donor agreement executed by the parties.[59] Cohen J. found that M.K. was indisputably a reliable presence in B.'s life[60]

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[52] Doskow, *supra* note 25 at 5.
[53] Julie Shapiro, "A Lesbian-Centred Critique of Second Parent Adoptions" (1999) 14 Berkeley Women's L.J. 17 at 22.
[54] Boyd, *supra* note 20 at 77.
[55] *M.A.C. v. M.K.*, 2009 ONCJ 18, 94 O.R. (3d) 756 [*MAC*].
[56] *Ibid.* at para. 5.
[57] *Ibid.* at para. 6.
[58] *Ibid.* at para. 12.
[59] *Ibid.* at paras. 18-19.
[60] *Ibid.* at para. 22.

and characterized him as a vulnerable access parent whose desire to see the child was being blocked by the custodial parents.[61]

In dismissing the adoption application, Cohen J. indicated that the preservation of M.K.'s parental rights was more important than the conferral of legal parenthood on C.A.D. He held that, even in a society that holds affectional ties at the core of a child's best interests, biological connections are of fundamental value.[62] The legal severance of B.'s biological relationship with her father would undermine her sense of identity and understanding of family.[63] Cohen J. further stated that legal parenthood was not necessary to protect C.A.D.'s relationship with B. because the couple could easily obtain a custody order in her favour.[64] Moreover, if C.A.D. truly desired the status of a legal parent, the parties could have applied for a declaration that B. had two legal mothers and a legal father.[65] He also considered it unnecessary to protect M.A.C. and C.A.D.'s intentionally formed nuclear family because the nuclear family unit enjoyed no special legal status that gave it the right to protection.[66] He held that the couple ought to have understood that by electing to use a known sperm donor, they were encouraging an additional parent-child relationship that would give rise to parental rights and responsibilities. They should have known that, if the relationship with M.K. deteriorated, a court would find it in a B.'s best interests to preserve her relationship with her father.[67]

In *M.A.C. v. M.K.*, Cohen J. prioritized M.K.'s interests in maintaining his parental rights over the recognition of M.A.C. and C.A.D.'s intentionally formed family. He did so despite his characterizations of M.K. as an access parent and C.A.D. as a primary caregiver. In effect, Cohen J. found that M.K. had a greater right to be B.'s legal parent because he was biologically related to the child. He based his conclusions on the importance of the legal recognition of biological relationships to a child's self-identity but, in doing so, he failed to consider the impact of denying legal recognition of C.A.D.'s status as a parent. Of the three parents, C.A.D.'s relationship to B. is the most untraditional. As a lesbian mother with no biological ties to the child, there is a risk that society would not recognize her as a legitimate parent. Cohen J. suggested that a custody order would be sufficient to protect C.A.D.'s relationship, but this does not confer the same symbolism of the psychological and emotional bonds that B. has to her mother.[68] The denial of legal and social recognition to one of B.'s primary

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[61] *Ibid.* at para. 34.
[62] *Ibid.* at para. 66.
[63] *Ibid.* at para. 64.
[64] *Ibid.* at para. 29.
[65] *Ibid.* at para. 30.
[66] *Ibid.* at para. 36.
[67] *Ibid.* at para. 74.
[68] Weiss, *supra* note 32 at 142.

caregivers could have a significant impact on her dignity and sense of belonging in her community.[69]

M.K.'s arguments in the case seem to suggest that he withheld consent not because he wished to maintain the full bundle of rights and responsibilities of a legal parent, but because he was concerned that the adoption order would sever his relationship with B. The desire to remain involved in a child's life is one of the primary reasons why a parent will withhold consent to a second-parent adoption.[70] In many jurisdictions, an adoption order has the effect of denying the biological parent any continuing right to a relationship with a child. Even if a court found that it would be in a child's best interests to spend time with his or her biological parent, it may not have any statutory authority to award access without the adoptive parents' consent.[71] Therefore, if a biological parent is concerned that the other parent might terminate his or her relationship with the child, the only way to ensure continuing contact is to refuse to consent to an adoption.

Lesbian couples, because of decisions like *M.A.C.*, often choose anonymous sperm donors to ensure that the non-biological parent will be able to adopt the child.[72] They do so even when they would otherwise prefer their child to have a relationship with the father because they are keenly aware that this relationship can be a threat to their intentionally formed family.[73] In response to this problem, it has been suggested that the biological parent should have a presumptive right of access in a second-parent adoption.[74] This solution would be beneficial to lesbian couples who wish to use a known sperm donor because it would reduce the likelihood that they would withhold consent to an adoption. Often, the known sperm donor does not wish to deny the non-biological parent status as a legal parent. Rather, he only seeks to be certain that he can continue to be a presence in the child's life.

The presumption of access would clarify the uncertainty surrounding a biological parent's rights after a second-parent adoption, thus reducing the possibility that the parties will become adversaries.[75] It also recognizes that it is often in a child's best interests to maintain a relationship with both biological parents and confers legal parenthood on the primary caregivers. Moreover, it would enable a court to give effect to the true intentions of the parties and provide flexibility to shape a family form that best reflects the interests of the child. In the majority of cases, it would better protect

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[69] Campbell, *supra* note 26 at 261.
[70] Harvison Young, *supra* note 4 at 519.
[71] Weiss, *supra* note 32 at 146.
[72] Bracco, *supra* note 31 at 1041.
[73] Bernstein, *supra* note 22 at 8.
[74] Harvison Young, *supra* note 4 at 532.
[75] Harvison Young, *ibid.* at 22.

the actual interests of all the possible parents and reduce the amount of litigation in second-parent adoptions.

Adoption was one of the first areas of law to expand to include non-traditional family forms. It continues to be a key method for alternative families to obtain legal recognition, but it is not an ideal structure. The failure of legislatures to amend adoption laws to reflect new trends in reproductive technology has caused much uncertainty and inconsistency in contested cases.[76] The current adoption laws in Canada limit parental relationships to two persons and exclude the opportunity for the recognition of a third parent, regardless of the parties' intentions and the interests of the child in maintaining as many healthy, affective parental relationships as possible. Legal reform is necessary to adapt adoption laws to the needs of the diverse family forms present in Canada.

VITAL STATISTICS REGIMES

Every Canadian province has a vital statistics regime that provides for the registration of the particulars of a child's birth, including his or her parents. These statutes have traditionally limited the categories of potential parents to one mother and one father. However, in recent years, there have been a number of successful challenges by lesbian couples to the heterosexual constructs of vital statistics regimes across the country. These cases have held that a mother may register her same-sex partner as a parent on her child's birth record. They provide important statements about the nature of parenthood and recognize that the heterosexual nuclear unit is not the only valid family form in Canada. Three of these key cases will be discussed below.

Lesbian partners have sought the right to register as co-mothers on their child's birth record for symbolic, legal, and other reasons. The registration as a parent on a birth record does not create a legal parenting relationship and does not legally confer parental rights and responsibilities onto the persons registered as parents, but it does provide presumptive proof about the child's parentage.[77] Proof of parenthood is required for numerous social activities and a child's birth record is generally sufficient evidence. Therefore, although the non-biological parent does not have official status as a legal parent, she will be able to function without difficulty as the child's legal parent in most situations. Registration may also provide crucial evidence of the parties' intentions in the event that a court is asked to make a determination of legal parenthood.

The 2001 case of *Gill v. Murray* was the first successful Canadian challenge to the exclusion of same-sex couples under vital statistics regimes.[78] In this case, two

[76] Bracco, *supra* note 31 at 1041.
[77] Boyd, *supra* note 20 at 70.
[78] *Gill v. Murray*, [2001] B.C.H.R.T.D. No. 34 [*Gill*].

lesbian couples applied to the British Columbia Human Rights Tribunal (BCHRT) for a declaration that the Vital Statistics Agency (VSA) had discriminated against them by denying them the right to register the non-biological parents on their children's birth records without first adopting them. Following a second parent adoption, the VSA would amend a child's birth record to indicate the non-biological mother's status as a parent, but they would not do so without an adoption order.[79] The couples argued that the right to register both mothers on their child's birth record was significant because it is necessary for a number of purposes, such as day care, school registration and travel. One non-biological mother indicated that she could not travel with her child outside of Canada because she was afraid that they would not be permitted to re-enter the country without a birth record that established her parental rights.[80]

The complainants argued that the legislation was discriminatory on the grounds of sex, family status and sexual orientation.[81] If a heterosexual couple used an anonymous sperm donor, the male partner would be registered as the father without question, despite the fact that he was not the biological father. They further contended that the requirement that a same-sex partner adopt a child before being permitted to register as a parent was discriminatory and without bona fide justification. The VSA argued that it expected a mother to always record the biological father as a parent. If it became aware that the person registered was not a biological parent, it would refer the parties to the adoption process, as they do with same-sex couples.[82] However, it conceded that it takes no steps to verify information and it presumes that the man identified is a biological parent.[83] It asserted that its service was intended to create accurate medical records, and presumptions of paternity are reasonable because they are based on biological realities.[84]

The BCHRT found that, while the purpose of the *Vital Statistics Act* was to gather and record facts about important events, there was nothing in the legislation that suggested an ancillary purpose was to collect information about biological parenthood.[85] It also held that the right to register as a parent on a birth certificate provided distinct advantages because it is prima facie proof of a parental relationship.[86] The Tribunal held that the legislative scheme discriminated against both the couples and their children because it denied them the benefit of documentation of their parent/child relationships.[87] Accordingly, it ordered the VSA to amend its forms to permit the

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[79] *Ibid* at para 19.
[80] *Ibid* at para 12.
[81] *Ibid* at paras 29-32.
[82] *Ibid* at para 46.
[83] *Ibid* at para 24.
[84] *Ibid* at paras 47-50.
[85] *Ibid* at para 74.
[86] *Ibid* at para 76.
[87] *Ibid* at para 83.

registration of a non-biological co-parent in a way that does not discriminate against same-sex couples.

In 2004, the New Brunswick Board of Inquiry considered a similar complaint and found that the Government of New Brunswick violated the *Human Rights Act* in the delivery of birth registration and adoption services to a lesbian couple. In this case, A.A. and B.B., cohabiting partners of more than five years, planned and conceived a child through artificial insemination. When B.B., the biological mother, registered her daughter's birth, she included A.A.'s particulars and indicated that the child would take A.A.'s surname.[88] The Department of Health and Wellness (DHW) rejected the birth registration form and informed the complainants that the legislation did not permit a child to have two parents of the same sex because its purpose was record biological facts.[89] It further indicated that the child could only be given A.A.'s last name if B.B. complied with the provisions of the *Change of Name Act.* A.A. then applied to adopt her daughter, but her application was denied because the New Brunswick *Adoption Act* did not permit second parent adoptions by a same-sex couple.

Similar to the British Columbia legislation, the New Brunswick *Vital Statistics Act* permitted the registration of a mother's husband as a parent regardless of his biological paternity.[90] However, it did not allow an unmarried woman to give her child her male partner's surname if that man was not also the biological father.[91] The Board relied heavily on the BCHRT reasoning in *Gill v. Murray,* and emphasized the importance of a parent's meaningful participation in a child's birth registration. It concluded that the DHW discriminated against the complainants by rejecting the birth registration form that listed A.A. as a parent and showed the child's surname as A. In considering the adoption complaint, the Board found that the reasoning in *Re K* was directly applicable to the circumstances of the case. Accordingly, it concluded that the denial of adoption services was discriminatory.[92] In the result, the Board awarded the couple $11,500 in compensatory damages and declared that the Government violated section 5(1) of the *Human Rights Act* in the delivery of birth registration and adoption services to A.A. and B.B. The Board further ordered the Government to refrain from discriminating against similarly situated persons, but it did not have the authority to invalidate the statutes.

The case of *Rutherford v. Ontario (Deputy Registrar General)* is the most recent challenge to a vital statistics regime.[93] It is noteworthy because it is the first case on the issue to be heard in a superior court. Accordingly, the parties, four lesbian

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[88] *A.A. v. New Brunswick, supra* note 42, at para 6.
[89] *Ibid* at para 6.
[90] *Ibid* at para 13.
[91] *Ibid* at para 38.
[92] *Ibid* at para 43.
[93] *Rutherford v. Ontario (Deputy Registrar General),* 81 O.R. (3d) 81 (Sup. Ct.) [*Rutherford*].

couples who conceived their children through anonymous sperm donors, were able to use the *Charter* to successfully challenge the legislation. The Court then used its authority to strike down the legislation, a much stronger and more effective remedy than the declaration of discrimination imposed by the tribunals in British Columbia and New Brunswick. A major challenge in the case was that the legislation was quite old and out of step with advances in reproductive technology.[94] As a result, Rivard J. found that it was incapable of accommodating the new circumstances of same-sex families.

Rivard J. held that the purpose of the Act included recording social parenting, but noted that the provisions limited the possible parents, whether biological or social, to one mother and one father.[95] He found that he could not interpret the term "father" in a way that could include a co-mother because it would be too great a strain on the words.[96] Further, he declined to use the court's *parens patriae* jurisdiction to allow two lesbian co-mothers to register as a child's parents because there was no gap in the legislation.[97] The Ontario legislature had established a comprehensive scheme for birth registrations and the recognition of parentage. In doing so, it evinced a clear intent to limit the category of possible parents to one man and one woman. The Attorney General suggested that the appropriate solution was for same-sex parents to apply for a declaration of parenthood under the *Children's Law Reform Act*, but Rivard J rejected this option as being too unpredictable.[98]

The operation of the Ontario *Vital Statistics Act* discriminated against same-sex couples by denying them the benefits of participation in their children's lives conferred through birth registration.[99] More specifically, birth registration permits a parent to obtain key documents for the child, such as a health card or social insurance number, ensures that the parent's consent will be required for an adoption, and allows the parent to participate in naming the child.[100] The legislation could not be justified under Section 1 because the exclusion of lesbian co-mothers was not rationally connected to the legislative purpose. Moreover, there were alternatives available to maintain a biological record of parentage that would more minimally impair the couples' rights. Therefore, Rivard J. declared that the legislation was invalid, but suspended the effect of the decision for 12 months to allow the legislature to enact a new, more inclusive, scheme.[101]

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[94] *Ibid* at para. 31.
[95] *Ibid* at para. 35.
[96] *Ibid* at para. 71.
[97] *Ibid* at para. 97.
[98] *Ibid* at para. 31.
[99] *Ibid* at para. 112.
[100] *Ibid* at para. 38.
[101] *Ibid* at para. 251.

There has been a consistent message from courts and tribunals that the exclusion of same-sex couples from vital statistics regimes is unjustifiably discriminatory, but provincial legislatures have been slow to amend their legislation. In the five years since *Gill v. Murray,* British Columbia has made no change to the birth registration provisions in its *Vital Statistics Act.*[102] However, the BC Vital Statistics Agency website provides that a "co-parent" may be registered on a child's birth record where the father is unknown or unacknowledged by the mother, or if the father has refused to acknowledge the child. It defines a co-parent as a person married to, or living in a marriage-like relationship with the mother.[103] The Vital Statistics Agency also changed the form of its birth certificates to use the term "parent" instead of mother and father.[104] As of June 1, 2007, the British Columbia Vital Statistics Agency had registered 134 births to female same-sex couples.[105]

The decision in *A.A. v. New Brunswick* evinced no legislative response from the Government of New Brunswick, despite the tribunal's order that it refrain from discriminating against similarly situated persons. The birth registration provisions in the New Brunswick *Vital Statistics Act*, and the birth registration guide published by Service New Brunswick continue to use the exclusionary terms "mother" and "father".[106] In Ontario, the legislature modified the general regulations of its *Vital Statistics Act* to provide that the mother and "other parent" of the child may register its birth.[107] The actual provisions of the Act, however, have not been amended and continue to use the terms "father" and "mother."

Provincial governments have not made anything more than the minimum changes mandated by tribunals and courts to their vital statistics regimes, and some have failed to respond altogether. Despite the consistent rejection of the argument that the purpose of vital statistics regimes is to record biological facts, governments continue to use such assertions to justify their legislation. This indicates that provincial governments still conceive of parenthood primarily as a biological reality rather than an intentionally formed, psychological relationship. This legislative refusal to acknowledge the changing societal realities denies same-sex couples crucial presumptive proof of their parenthood and reinforces the heterosexual biological norm.

The Supreme Court of Canada's characterization of vital statistics regimes in *Trociuk v. British Columbia (Attorney General)* appears to support the biological

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[102] *Vital Statistics Act,* R.S.B.C. 1996, c. 479, s. 3.

[103] http://www.vs.gov.bc.ca/births/breg.html

[104] http://www.vs.gov.bc.ca/questions-birth.html

[105] British Columbia Ministry of Attorney General, *supra* note 24 at 5.

[106] *Vital Statistics Act,* S.N.B. 1979, c. V-3, s. 7; http://www.snb.ca/e/1000/1000-01/pdf/P06-06152-Naming-Baby.pdf

[107] *General,* R.R.O. 1990, Reg. 1094, s. 1.

conception of parenthood.[108] In the case, the Court unanimously held that the provisions of British Columbia's *Vital Statistics Act* which permitted a mother to exclude a father from a child's birth registration and unilaterally determine the child's surname, constituted an unjustified infringement of the father's right to equality under Section 15 of the *Charter*. It found that the participation in naming a child is a significant interest to a father and his exclusion from the process infringes his dignity. In coming to its decision, the Court asserted that a purpose of the *Vital Statistics Act* was to affirm biological ties between a parent and child. Deschamps, for the Court, stated,

> A birth registration is not only an instrument of prompt recording. It evidences the biological ties between parent and child, and including one's particulars on the registration is a means of affirming these ties. Such ties do not exhaustively define the parent-child relationship. However, they are a significant feature of that relationship for many in our society, and affirming them is a significant means by which some parents participate in a child's life.[109]

Hester Lessard has argued that the Court's decision has the effect of constitutionally entrenching biological and heterosexual notions of parenthood.[110] The decision is premised on the assumption that the acknowledgment of genetic ties provides a meaningful link between a parent and child, even where the father has had little involvement in the child's life.[111] Such a precedent could be used by governments to support the exclusion of same-sex parents from vital statistics regimes. In *Rutherford v. Ontario*, however, Rivard J refused to accept such a conception of the case. He emphasized that the Court was analyzing the *Vital Statistics Act* in the context of a dispute between a biological mother and a biological father. While the registration of biological information was a relevant purpose in this context, the exclusion of non-biological parents does not logically flow from the Court's conclusions.[112] Therefore, while it is possible that a government could use *Trociuk* to support biological justifications for exclusionary legislation, when the decision is placed in its context, it becomes less persuasive. The Court did not purport to place a limitation on forms of parent-child relationships, but rather specifically stated that biological ties do not exhaustively define such relationships.

A greater concern may be the effect of the decision on other forms of legal parenthood litigation. *Trociuk* is the Supreme Court of Canada's most recent statement on parenthood, and it unanimously affirmed the importance of biological ties. While

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[108] *Trociuk v. British Columbia (A.G.)*, [2003] 1 S.C.R. 835 [*Trociuk*].

[109] *Ibid.* at para 16.

[110] Hester Lessard, "Mothers, Fathers and Naming: Reflections on the *Law* Equality Framework and *Troicuk v. British Columbia (Attorney General)*" (2004) 16 Can. J. Women & L. 167 at 188.

[111] *Ibid.* at 198.

[112] *Rutherford, supra* note 93 at para. 46.

the decision did not exclude the potential for alternative family forms, it reinforced the significance of heterosexual genetic norms in family law. Further, it held that a biological father has considerable power to assert his rights, and may do so even when he is not in conjugal relationship with the mother.[113] In the absence of legislative guidance on how to determine of legal parenthood, such a statement from Canada's highest court could be used to justify the denial of recognition to a non-biological parent. The traditional limitation that a child can only have two legal parents, combined with a precedent from the Supreme Court of Canada that appears to favour biological ties would seem to lead to the conclusion that, in a contested case, it is the non-biological parent who should be excluded. This result is of particular concern in cases of conflict between lesbian co-parents and their known sperm donor.[114] It is possible that the biological father could use the Supreme Court's affirmation of a genetic father's rights to maintain his legal parenthood to the exclusion of a child's primary caregiver who lacks biological ties.

CUSTODY AND ACCESS

Legal parenthood has become an increasing concern in custody and access disputes between former female same-sex couples. While it will likely also become an issue between male partners, there has not yet been a reported case involving such a dispute. On relationship breakdown, unless the couple has taken steps to confer legal parenthood on the non-biological mother, only the biological mother has a legal right to a child.[115] If the non-biological parent has successfully adopted the child, both former spouses will have equal legal rights and the proceedings will operate in the same manner as a custody dispute between two heterosexual biological parents. However, absent an adoption order, the court will likely consider the non-biological parent to be a legal stranger to the child.[116] This places the parties in unequal positions, and gives the biological mother an almost insurmountable advantage over her former partner. In these situations, it is rare for the non-biological parent to be awarded custody, and there is a risk that the biological mother may able to prevent her former partner from having any continuing contact with their child[117]

A judge's underlying perceptions of family models can have a significant influence on the outcome of a custody dispute between former same-sex partners. The non-biological mother is frequently denied status as a legal parent, despite her manifested intent to be a mother, both through her participation in planning the conception and her daily involvement in the child's life. In the cases below, the courts held lesbian co-mothers to a higher standard than they would a male partner, often

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[113] Boyd, *supra* note 20 at 77.
[114] *Ibid.* at 65.
[115] Ambert, *supra* note 11 at 17.
[116] Shapiro, *supra* note 53 at 23.
[117] Doskow, *supra* note 25 at 9.

requiring her to be a primary caregiver before they would consider recognizing her as a legal parent.

In *Buist v. Greaves*, the Ontario Court of Justice considered an application by Buist, a non-biological mother, for sole or joint custody of her former partner's biological child, as well as a declaration of parenthood.[118] The parties, who cohabited for seven years, jointly planned the conception of their son, Simon, through artificial insemination. There was ample evidence that Buist participated greatly in the child's care and that she shared in decisions about Simon's life.[119] However, Benotto J found that, although Buist was very involved in Simon's upbringing, she was not his primary caregiver.[120] Greaves was clearly the child's psychological parent, and there was no doubt that Simon should reside with her.[121] On this basis, Benotto J dismissed Buist's request for sole custody. He also denied her application for joint custody, despite the recommendation of an assessor,[122] because the level of conflict between the parties made it impossible for them to cooperate.[123]

When Simon was two years old, Buist ended the relationship because she was in love with another woman.[124] It appears that Benotto J used this as evidence against Buist's application for a declaration of parenthood. He repeatedly made statements to the effect that Buist's decision to leave the relationship indicated that she placed her interests above Simon's.[125] Further, in listing his reasons why he did not believe that Buist was a mother to Simon, he stated that she had not been in a committed relationship with Greaves. He ultimately found that Buist had failed to establish a parent-child relationship on a balance of probabilities.[126] Nevertheless, even if she had been able to persuade the court that she was functionally Simon's mother, Benotto J would have denied the application. Even before engaging in an examination of the relationship, he held that the relevant provisions of the Ontario *Children's Law Reform Act* did not permit a court to declare that a child had more than one mother.[127] In the result, Benotto J awarded Buist access on the terms proposed by Greaves, which he characterized as "extensive".[128] He also ordered Buist to pay $450 per month in child support, including a retroactive order from the date of the claim, even though Greaves' had initially refused Buist's offer to pay support.

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[118] *Buist v. Greaves*, [1997] O.J. No. 2646 (Ct. J.) [*Buist*].
[119] *Ibid.* at para. 8.
[120] *Ibid.*
[121] *Ibid.* at para. 20.
[122] *Ibid.* at para. 21-22.
[123] *Ibid.* at para. 23.
[124] *Ibid.* at para. 11.
[125] *Ibid.* at para. 11.
[126] *Ibid.* at para. 35.
[127] *Ibid.*
[128] *Ibid.* at para. 31.

In *K.G.T. v. P.D.*, the British Columbia Supreme Court considered K.G.T.'s applications for joint custody, guardianship, and adoption of J.T.D, her former lesbian partner's biological daughter.[129] P.D. opposed the applications and claimed that K.G.T. was not a parent of the child.[130] The parties cohabited for seven years, during which time P.D., with the support of K.G.T., conceived a child through artificial insemination. Both women cared for J.T.D. until their separation in 2001, when the child was three years of age. Wilson J accepted that the parties had intended to be co-parents even before conception.[131] They had also originally planned for K.G.T. to adopt J.T.D, but they did not file an application because they did not feel that their joint parenthood was in question.[132] The women held themselves out to the public as co-mothers and the child viewed them both as her parents.[133] However, Wilson J found that P.D. was the primary caregiver and that KGT was "more social", often spending time away from the home as a volunteer firefighter and on police training.[134] Following their separation, K.G.T. exercised regular and frequent access to J.T.D., but P.D. prevented her from participating in decision making about the child's life. P.D. entered into a new relationship, and began to take steps to diminish K.G.T.'s role as a parent, such as removing her as J.T.D.'s guardian in her will and unilaterally scheduling extra-curricular activities in K.G.T.'s access time.

Regarding the adoption application, Wilson J found that the legislation did not contemplate adoption by same-sex partners where the birth mother did not consent to the application. He declined to use his *parens patriae* jurisdiction to allow the application because there was no legislative gap.[135] He further held that even if such an application was possible, it was unnecessary because it would not provide any substantial benefit to J.T.D.[136] He did not accept that it was in the child's best interests for K.G.T. to have permanent parental rights. He also dismissed K.G.T.'s application for joint custody on the basis that it would provide no benefit to J.T.D. However, he ordered P.D. to discuss any significant decisions concerning J.T.D.'s health, education, religion and general welfare with K.G.T. Finally, Wilson J allowed the application for joint guardianship and provided that, in the event of the death of either parent, the other would be the sole guardian.

In both of the above cases, the applicants demonstrated a clear intent to parent the child in question. They participated in the conception to the extent of their ability, took an active role in childcare until the relationship breakdown, exercised regular access post-separation, and continually advocated to maintain a parental relationship

[129] *K.G.T. v. P.D.*, 2005 BCSC 1659 [*KGT*].
[130] *Ibid.* at para. 5.
[131] *Ibid.* at para. 22.
[132] *Ibid.* at para. 27.
[133] *Ibid.* at para. 30.
[134] *Ibid.* at para. 35.
[135] *Ibid.* at para. 67.
[136] *Ibid.* at para. 78.

with the children. Each applicant was one of two parents the children had ever known, and had never been absent from their lives. However, because they were neither the biological mother nor the primary caregiver, they were denied any legal recognition as a parent. In effect, the decisions hold that, absent biological ties, a woman cannot be a mother unless she fulfills the requirements of the societal construct of motherhood and acts as a primary caregiver.

These cases indicate that courts impose a heavier burden on lesbian co-mothers to prove their connection to a child than on fathers. Men are not expected to be primary caregivers in order have their contributions as parents recognized. More importantly, they also are not required to have biological ties to a child before they will be considered a legal parent. The presumption of paternity presumes that a birth mother's male partner is the legal father of her child even if the couple uses a sperm donor.[137] Historically, is has been very difficult for a man to rebut the presumption and prove that he did not consent to be a parent when the child was conceived.[138] Therefore, the law operates differently depending on whether it is a heterosexual or same-sex relationship. In heterosexual relationships, the presumption is that the non-biological partner is a legal parent, and the onus is on them to disprove parenthood. In same-sex relationships, the law presumes that the non-biological partner is a legal stranger to the child, and the partner must overcome this barrier to obtain any legal recognition. Some cases have raised the possibility of the use a presumption of parenthood in same-sex relationships, but there has not yet has been any judicial acceptance of the proposition.[139]

In *P.C. v. S.L.*, a former lesbian partner brought an unsuccessful *Charter* challenge against the presumption of paternity provisions in the Saskatchewan *Children's Law Reform Act*.[140] She alleged that the legislation violated Section 15 by denying her a benefit in law on the basis of her sex or sexual orientation.[141] The Attorney General argued that the provisions were not discriminatory because a woman could not possibility be the biological parent of her female partner's child.[142] Wilkinson J agreed with this reasoning and found that the presumption of paternity is not based on societal stereotypes. Its purpose, rather, is to facilitate proof of parentage through the use of assumptions about human behaviour. In coming to his decision, he noted that parenthood is not merely based on biological connections and that reproductive technologies will continue to shift our understanding of what it means to be a parent.[143] However, he dismissed the application because, "the Court cannot aspire to affect the fundamentals of biology that underlie the presumption purely in the interests of equal

[137] Campbell, *supra* note 26, at 248.
[138] *Ibid.*
[139] Boyd, *supra* note 20 at 72.
[140] *P.C. v. S.L.*, 2005 SKQB 502 [*PC*].
[141] *Ibid.* at para. 4.
[142] *Ibid.* at para. 17.
[143] *Ibid.* at para. 22.

treatment before the law."[144] Wilkinson J, in spite of his recognition that there are other forms of parenthood, favoured a biological analysis and did not attempt to fashion a more inclusive law.

In the cases discussed above, legislative barriers and judicial attitudes were prohibitive to the recognition of the non-biological mothers as legal parents. If both the courts and the legislatures are content to maintain the status quo, then non-biological mothers have little hope for recognition as legal parents post-separation and children are denied a form of acceptance of their alternative family unit. These children may feel particularly ostracized because not only do they have same-sex parents, but they are also are no longer part of a nuclear family unit. Despite this vulnerability, courts have ignored the symbolic importance of legal recognition to a child's sense of identity. The judicial and legislative barriers also put children's relationships with their non-biological parent in jeopardy. Absent the permanence of a legal parent/child relationship, the non-biological parent has little or no say in where the child moves, or whether he or she is adopted. As a result, there is always a possibility that the legal parent may unilaterally act to sever the relationship.

CONTRACTS RESPECTING PARENTHOOD

In the current atmosphere of uncertainty surrounding the definition of parenthood, individuals are increasingly seeking to protect their alternative family through domestic agreements. The judicial response to such agreements has been hostile, and courts have widely refused to uphold contracts that purport to determine legal parenthood. At best, these contracts may be used as evidence of the parties' intentions. However, a court always retains its jurisdiction to come to a different determination based on the best interests of the child.

Doe v. Alberta is one of the leading Canadian cases on the validity of domestic parenthood agreements.[145] The parties, a cohabiting heterosexual couple, sought a declaration that their domestic agreement, which purported to divest the mother's partner of any parental rights or obligations to her child, was binding on themselves and any third party. During the course of their cohabitation, Jane Doe expressed her desire to have a child. However, John Doe did not wish to father a child, to stand in the place of a parent, to act as a guardian or to incur any support obligations. Jane Doe conceived a child through artificial insemination and the parties agreed that, although they would continue their relationship, John Doe would have no obligations to the child.

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[144] *Ibid.* at para. 20.
[145] *Doe v. Alberta,* 2007 ABCA 50 [*Doe*].

The Court found that, because John Doe had not consented to be the father, the presumption of paternity would not operate to make him a parent.[146] However, his decision to remain in an interdependent relationship with Jane Doe meant that a court would likely find that he was standing in the place of a parent. The parties argued that their agreement should be an overriding indicator of his intent to not act as a parent, but the Court held that John Doe's subjective intent would inevitably yield to the needs of the child.[147] Moreover, no agreement could oust the Court's jurisdiction to determine issues of parental rights and child support.[148] If John Doe manifested an implicit intention to have a relationship with the child, his stated intention in the agreement could not oust the resulting obligations.

The case of *M.A.C. v. M.K.*, discussed above, also considered the effect of the parties' donor contract which set out their agreements regarding their respective parental rights and obligations. Cohen J began his analysis by stating that it was a "well-established principle that, in custody and access cases, a court is not bound by domestic contracts."[149] The parties argued that the donor contract should be upheld because it represented what they believed was in the child's best interests and articulated their intentions when they formed their non-traditional family.[150] However, Cohen J found that he was free to accord little or no weight to the terms of the agreement because a child's best interests cannot be pre-determined by a contract.[151] He held that, while the agreement may generally reflect the parties' intentions regarding child support and custody, he would not use it as evidence that M.K. consented to C.A.D.'s adoption of the child. However relevant M.K.'s possible agreement to consent may have been when the contract was executed, it was totally irrelevant in the proceedings because he was not presently consenting.[152]

The use of domestic contracts to determine legal parenthood raises conflicting concerns. One may argue that the courts' refusal to uphold contracts respecting parenthood effectively denies individuals the freedom to create a family in the form that best meets their needs and desires. Legislatures have largely failed to respond to societal changes, and the outcome of litigation is unpredictable and often dependent on judicial attitudes. If individuals cannot act autonomously to protect their families through domestic contracts, then they may be denied legal recognition of their valid, intentionally created family. However, there is also a legitimate concern that complete deference to contractual expressions of intent may result in a decision that is contrary to the best interests of the child. Additionally, absolute deference would have the effect of privatizing determinations of legal parenthood. This would undermine the importance

[146] *Ibid.* at para. 12.
[147] *Ibid.* at para. 23.
[148] *Ibid.* at para. 26.
[149] *MAC, supra* note 55 at para. 44.
[150] *Ibid.* at para. 48.
[151] *Ibid.* at para. 58.
[152] *Ibid.* at para. 53.

of parenthood as a societal construct that forms the basis of our understanding of family.[153]

MULTIPLE LEGAL PARENTS

Due to advances in reproductive technologies, the number of persons with a potential claim to status as a legal parent of a child has expanded past the traditional understanding of parenthood. Today, through sperm and ovum donation, surrogacy and artificial insemination, there are a myriad of possible methods and persons involved in a child's conception. For example, a child could have a genetic mother (an ovum donor), a gestational mother (a surrogate), one or more intentional mothers (the women who plan to be the child's primary caregivers), a genetic father (a sperm donor), and one or more intentional fathers. However, legislation continues to limit the categories of possible parents to "the mother" and "the father." This often leads to the judicial interpretation that a child can have only one mother and one father. This disconnect between the law and people's lived reality can cause significant problems for families in which more than two persons have chosen to jointly parent a child conceived through reproductive technologies. The law has largely denied legal recognition to more than two of those individuals, despite their manifested intention to be multiple parents, and regardless of their level of involvement in the child's life. In the wake of numerous cases that held that a child's legal parents could only be one man and one woman, many believed that the law was incapable of recognizing multiple legal parents without legal reform.[154]

The 2007 case of *A.A. v. B.B.* has signalled what may be the beginning of a new trend of inclusion in Canadian family law.[155] In this landmark decision, the Ontario Court of Appeal held that a child, D.D., had three legal parents: B.B., his biological father; C.C., his biological mother; and A.A., his biological mother's same-sex partner. The facts of the case were similar to many legal narratives concerning families formed using reproductive technologies. A.A. and C.C., long-term same-sex partners, decided to start a family and approached their friend, B.B., to be a sperm donor. The parties all agreed that the couple would be the child's primary caregivers, and that it was in D.D.'s best interests to have a relationship with his father. All three individuals were very involved in D.D.'s life and believed that each had equal status as a parent. As a result, A.A. felt that she could not apply for an adoption order because it would remove B.B.'s status as a legal parent.[156] When the child was two years old, A.A. unsuccessfully applied for a declaration that, in addition to C.C. and B.B., she was a legal parent to D.D. Aston J. held that, although she was a fully committed parent, he could not make a declaration of parenthood because the legislation prohibited the recognition of more than two legal parents.

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[153] Campbell, *supra* note 26 at 261.
[154] Kelly, *supra* note 3, at 134.
[155] *A.A. v. B.B.*, (2007) 83 O.R. (3d) 561 (C.A.) [*A.A. v. B.B.*].
[156] *Ibid.* at para. 13.

A.A., with the support of B.B. and C.C., appealed the decision to the Court of Appeal. She alleged, for the first time, that the legislation violated sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*. Notably, the Attorney General of Ontario chose not to intervene in support of the legislation. The Court of Appeal declined to consider the *Charter* issues, but allowed the appeal on the basis that the order could properly be made through the exercise of its *parens patriae* jurisdiction. Rosenberg J.A., for the unanimous Court, found that a declaration of parenthood has both practical and symbolic importance in a parent-child relationship. It legitimizes the family structure in the eyes of society and forces institutions to acknowledge the non-biological mother as a parent. More importantly, it demonstrates to a child that his family is valued and accepted.[157] Further, it ensures the security of the parent-child relationship in the event of the birth mother's death,[158] and confers several other distinct advantages; namely,

- the declaration of parentage is a lifelong immutable declaration of status;
- it allows the parent to fully participate in the child's life;
- the declared parent's consent is required for any future adoption;
- the declaration determines lineage;
- the declaration ensures that the child will inherit on intestacy;
- the declared parent may obtain a health card, a social insurance number, airline tickets, and passports for the child;
- the child of a Canadian citizen is a Canadian citizen, even if born outside of Canada;
- the declared parent may register the child in school; and
- the declared parent may assert her rights under various laws such as the *Health Care Consent Act*.[159]

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[157] *Ibid.* at para. 16.
[158] *Ibid.* at para. 15.
[159] *Ibid.* at para. 14.

The Court held that the trial judge was correct in finding that he had no jurisdiction under the *Children's Law Reform Act* to make a declaration of parenthood in favour of a second legal mother. The provisions were unambiguous and the Act clearly contemplated that a child may have only one mother and one father. However, when the legislature enacted the *Children's Law Reform Act*, the possibility of same-sex unions and multiple parenthood through reproductive technologies did not form part of the social conditions of the time.[160] Therefore, the Act's exclusive consideration of children born inside heterosexual nuclear unions was not an intentional statement on the biological nature of parenthood.[161] As a result of technological advances and changes in societal attitudes, children are now born to parents who do not fit the traditional mould. The *Children's Law Reform Act*'s failure to recognize these forms of parenting through a declaration of parenthood deprives these children of the equality of status that the legislature intended the Act to provide. [162] Rosenberg J.A. found that this constituted a gap in the legislative scheme and that it was in D.D.'s best interests to remedy the problem. Accordingly, it was an appropriate situation for the Court to exercise its *parens patriae* jurisdiction and issue an order declaring A.A. to be a legal parent in addition to B.B. and C.C.[163]

The Court's reasoning in *A.A. v. B.B.* represents a shift in judicial attitudes regarding the determination of legal parenthood in non-traditional cases. Rather than dismiss a complex and novel case because the legislation was prohibitive, the Court examined what would be in the best interests of the child and used its jurisdiction to fashion the appropriate remedy. Although many cases have paid lip service to the changing social reality and evolving nature of parenthood, *A.A. v. B.B.* is the first decision to use this context to justify the use of a court's *parens patriae* jurisdiction to accord legal status to all of a child's parents. Rosenberg JA acknowledged that legislation enacted thirty years ago could not have foreseen our current social conditions and refused to allow an outdated statute to operate contrary to a child's best interests.

Critics of the decision argue that the Court engaged in judicial activism by making a decision that was more appropriately in the realm of the legislature.[164] In order to minimize the importance of the case, they assert that it was a highly contextual decision of little precedential value.[165] Others have argued that the Court's use of its *parens patriae* jurisdiction can be construed as an implicit recognition of multiple parents, making it a decision of significant precedential value. In response to allegations of judicial activism, it is important to note that the purpose of a court's

[160] *Ibid.* at para. 21.
[161] *Ibid.* at para. 34.
[162] *Ibid.* at para. 35.
[163] *Ibid.* at para. 37.
[164] Donna Bouchard,"The Three-Parent Decision: A Case Commentary on *A.A. v. B.B.*" (2007), 70 Sask. L. Rev. 459 at para. 1.
[165] *Ibid.* at para. 11.

parens patriae jurisdiction is to protect children.[166] If legislatures allow their family laws to fall out of step with social conditions, then it is appropriate for a court to act in children's best interests by according their parents legal status.

The case signals that courts are increasingly willing to acknowledge that it is in a child's best interests to take an inclusive approach to legal parenthood. As an appellate level decision, the case is not binding in other provinces, and its influence remains to be seen. It has been two years since the Ontario Court of Appeal handed down its judgment, but there have not yet been any analogous cases and legislatures have been silent on the issue. *M.A.C. v. M.K.*, a decision of the Ontario Court of Justice, was decided two years after *A.A. v. B.B.* However, the parties chose to apply for an adoption order, which would sever M.K.'s status as a legal parent in favour of C.A.D., rather than a declaration of parenthood, which may have allowed all three parties to be legal parents. In his reasons, Cohen J. suggested that a M.A.C. and C.A.D. should have applied for a declaration of parenthood that would have recognized that B. had three legal parents. This comment may suggest an increasing judicial attitude that declarations of parenthood are a more suitable means to reconcile issues of legal parenthood arising from alternative family forms. However, it remains difficult to predict the result of a future application for a declaration of parenthood for multiple parents, particularly in a contested case which would present a very different situation from that of *A.A. v. B.B.*

THE IMPACT OF THE FATHERS' RIGHTS MOVEMENT

There is a growing concern that the prevalence of the fathers' rights movement in Canadian family law poses a direct threat to families intentionally formed by women to the exclusion of men. Many fathers' rights advocates use the importance of biological ties as the centrepiece of their legal reform proposals, and feminist scholars argue that their influence on family law is making a man's actual relationship with a child increasingly irrelevant to determinations of legal parenthood.[167] As is demonstrated in cases like *M.A.C. v. M.K*; a child's perceived need for a father often supersedes all other considerations, including the legal recognition of another, more involved parent.[168] If a biological father decides that he wants to become involved in his child's life, the parties' agreed-upon intentions often become irrelevant.

Courts may respond positively to fathers' rights-based arguments because they frame parenthood in traditional terms that do not challenge existing legislation and established precedents. It allows them to come to a decision that they believe is in children's best interests without risking exposure to claims of judicial activism. However, while it will often be in children's interests to know their father, such

[166] *E.(Mrs.) v. Eve*, [1986] 2 S.C.R. 388.

[167] Boyd, *supra* note 20 at 66.

[168] Dawn M. Bourque, "Reconstructing the Patriarchal Nuclear Family: Recent Developments in Child Custody and Access in Canada" (1995) 10 Can. J.L. & Soc. 1 at 6.

arguments could undermine the legitimacy of female-headed households. There is a risk that, because of the widespread success of the father's rights movement, a father will be viewed as the producer of normalcy in a family unit.[169]

EXCLUSIVITY AND LAWS RELATED TO LEGAL PARENTHOOD

One of the fundamental barriers to legal recognition of alternative family forms is the notion of exclusivity that pervades Canadian family laws.[170] With the notable exception of the *A.A. v. B.B.* decision, a child may only have two parents, and, in contested cases, courts typically find that those parents must be one male and one female. Further, if a family changes forms though adoption or divorce and remarriage, the new model legally extinguishes the previous family. Regardless of what is in the child's best interests, there is no room in family law for the overlapping recognition of both the former parents and the new legal parents.[171]

While social norms have evolved to value and encourage the involvement of persons who have a meaningful relationship with a child, legal ideologies have been slower to respond.[172] As a result, parenthood is an all-or-nothing proposition.[173] Either a person has the full bundle of parental rights and responsibilities, or he or she is a legal stranger to the child in almost all respects. This is a significant problem for families that include more than two parents who could claim legal status. In this context, the law operates contrary to children's best interests by denying them the legal recognition of the valuable role that each person plays in their lives. It can also cause conflict between the parents, particularly where a biological parent refuses to relinquish his or her legal status in favour of a primary caregiver. This can create an incentive for the primary caregivers to completely exclude the biological parent from the child's life so that the non-biological parent may obtain legal recognition. In a legal system based on the best interests of the child, one must wonder how the exclusionary nature of these laws facilitates an outcome that is the most likely to benefit a child.

PROPOSALS FOR LEGAL REFORM

One of the essential questions about the direction of legal parenthood in Canada is whether the law should protect the nuclear family unit and or use a multiple parent model. It is now largely accepted that either two opposite sex or two same-sex persons may be the legal parents of a child. This expansion of the nuclear family has allowed many Canadians to obtain legal recognition, but it does not assist all non-traditional families. In contested cases in which a biological parent refuses to relinquish his or her legal status, courts often deny recognition to the non-biological parent because a child

[169] Kelly, *supra* note 3 at para. 52.
[170] Harvison Young, *supra* note 4 at 506.
[171] *Ibid.* at 507.
[172] *Ibid.* at 509.
[173] Bernstein, *supra* note 22 at 24.

can only have two legal parents. The maintenance of the nuclear family model is also of no assistance to families comprised of more than two parents who jointly seek legal recognition. Today, therefore, the key issue is whether a third person with strong and legitimate ties to a child should be recognized as a legal parent.

Proponents of the nuclear family model argue that it is the most efficient way for a family to meet a child's needs. However, this does not explain why the model must be prescriptive. The protection of the nuclear family to the exclusion of other legitimate forms ignores the major societal changes that have occurred in recent decades. Furthermore, it devalues the way people have chosen to order their families and creates the perception that children raised in these units do not enjoy status equal to those born into a traditional family.[174]

The multiple parent model is frequently proposed as a solution to the current difficulties in determining legal parenthood. This may be the optimal legal structure for cases involving three or more parents who each acknowledge the equal and legitimate status of the others. However, it is less desirable when the parents do not agree on who should be a legal parent. In this situation, it may not be in the best interests of the child to recognize more than two legal parents, as this would introduce a high level of conflict into his or her life. It may be that, while all the parties may have something to offer the child, they do not necessarily all merit status as a legal parent. There is also concern that, due to the prevalence of the fathers' rights movement and the notion that it is in a child's best interests to know his or her biological father, the multiple parent model could allow courts to insert a male sperm donor into a lesbian family that did not intend for him to enjoy equal parental authority.[175]

Any successful reform of laws regarding legal parenthood will have to be based on the best interests of the child in today's social conditions. A one-size-fits-all solution is no longer appropriate because there is not a uniform context in which a determination of legal parenthood can be made. There may need to be several possible remedies in order to give a judge the power to fashion the best result based on the facts of a case. However, it would be inappropriate to require all alternative families to seek legal recognition through the courts as this would promote uncertainty and could raise access to justice issues. There are a number of provisions that could be enacted to provide a basic structure for alternative families. In cases involving the use of reproductive technologies, it would be advantageous to apply a presumption of parenthood to a biological parent's same-sex partner, but this presumption should not operate to the absolute exclusion of the other biological parent.[176] A presumption of access could be used to ensure that the child and biological parent have an ongoing relationship. This would promote children's best interests by protecting their

[174] Harvison Young, *supra* note 4 at 510.
[175] Boyd, *supra* note 20 at 82; Kelly, *supra* note 3 at para. 38.
[176] Bernstein, *supra* note 22 at 6.

continuing relationship with persons to whom they have valuable ties.[177] It would also encourage children's primary caregivers to facilitate such relationships by protecting their family units from threats to their status as legal parents.

In cases where multiple parents seek legal recognition, the courts should be given the power to issue a declaration of parenthood, subject to a consideration of the best interests of the child. A declaration of parenthood, because it acknowledges an existing parental relationship, is a more appropriate method for the recognition of multiple parents than adoption, which is a process that effectively creates a new parental relationship.[178] This would better promote the best interests of children by reflecting and legitimizing their emotional realities.

CONCLUSION

There is a clear disconnect between family laws, popular attitudes about parenting, and the way Canadian families are organized. As a result, alternative families have few reliable means to obtain legal recognition. Often, their only hope is to litigate the issue and, even then, the results are unpredictable. Absent legislative guidance, a judge's perception of the ideal family unit can be determinative. Moreover, the cost of such complex litigation is prohibitive to many families. Legislative reform is necessary to reshape the legal meaning of family to include forms other than the heterosexual nuclear unit. Additionally, in determining the best interest of the child, judicial attitudes must shift from the primacy of biological ties to include a greater emphasis on the psychological and social ties that parents and children intentionally form.

In order to create laws that will fully and effectively respond to our societal reality, there must be a thorough consideration of how Canadians, as a society, wish to define a parent. It is inappropriate for a legislature to enact a law that purports to be more inclusive without having contemplated the potential ramifications of the new structure. Legislatures can no longer maintain the status quo and ignore the ways that society has evolved. It is necessary to thoroughly examine Canadian family laws and their underlying conceptions of parenthood in order to better meet the needs, desires, and circumstances of Canadian families.

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[177] Harvison Young, *supra* note 4 at 548.
[178] Doskow, *supra* note 25 at 21.