



# **ASSISTED REPRODUCTION: LEGAL PARENTAGE AND BIRTH REGISTRATION**

**ISSUE PAPER**

**April 2014**

The Manitoba Law Reform Commission was established by *The Law Reform Commission Act* in 1970 and began functioning in 1971.

**Commissioners:** Cameron Harvey, Q.C., President

Jacqueline Collins

Michelle Gallant

John C. Irvine

Hon. Mr. Gerald O. Jewers

Myrna Philips

Hon Mr. Justice Perry Schulman

**Legal Counsel:** Catherine Skinner

**Administrator:** Pat Power

The Commission offices are located at 432–405 Broadway, Winnipeg, MB R3C 3L6.

**Tel:** (204) 945-2896    **Email:** [mail@manitobalawreform.ca](mailto:mail@manitobalawreform.ca)

**Fax:** (204) 948-2184    **Website:** <http://manitobalawreform.ca>

The Manitoba Law Reform Commission is funded through grants from:



ISBN 978-0-7711-1562-2

## **ISSUE PAPER**

The Manitoba Law Reform Commission has conducted research on questions relating to assisted reproduction, legal parentage and birth registration. It is publishing its research in the form of an issue paper, with the goal of adding to the debate on these questions and informing important policy decisions that are required in this area of law. The Commission does not offer formal recommendations in this paper but analyzes a variety of possible responses to the legal problems raised by the interaction of assisted reproduction technology and legal parentage rules. The Commission has identified its preferred approach on some issues, but not on those issues which, in the Commission's view, require further research, consultation and consideration.

---

## TABLE OF CONTENTS

ACKNOWLEDGMENTS .....	v
<b>CHAPTER 1: INTRODUCTION .....</b>	<b>1</b>
A. Introduction .....	1
B. Background and Scope .....	1
C. Assisted Reproduction Technologies .....	3
<b>CHAPTER 2: LEGAL FRAMEWORK .....</b>	<b>6</b>
A. United Nations Convention on the Rights of the Child .....	6
B. <i>Charter of Rights and Freedoms</i> .....	6
C. Canada Assisted Human Reproduction Act .....	7
D. Manitoba <i>Human Rights Code</i> .....	8
E. Birth Registration – <i>The Vital Statistics Act</i> .....	8
F. Legal Parentage – <i>The Family Maintenance Act</i> .....	9
G. Case Law .....	12
A.A. v. B.B. – Legal parentage – multiple parents .....	12
D.W.H.v D.J.R. – Legal parentage .....	13
H. Canadian Legislative Reforms .....	14
1. Newfoundland and Labrador <i>Children’s Law Act</i> and Yukon <i>Children’s Law Act</i> ....	14
2. Quebec <i>Civil Code</i> .....	14
3. Prince Edward Island <i>Child Status Act</i> .....	15
4. Ontario <i>Vital Statistics Act</i> .....	15
5. Nova Scotia <i>Birth Registration Regulations</i> .....	15
6. Alberta <i>Family Law Act</i> .....	16
7. Uniform Law Conference of Canada <i>Uniform Child Status Act</i> .....	16
8. NWT <i>Children’s Law Act</i> .....	17
9. British Columbia <i>Family Law Act</i> .....	17
I. International Developments .....	18
1. United Kingdom .....	18
2. United States .....	19
3. Australia .....	20
4. New Zealand .....	21
5. The Hague Conference on Private International Law .....	21
<b>CHAPTER 3: LEGAL PARENTAGE AND BIRTH REGISTRATION REFORMS .....</b>	<b>23</b>
A. Principles .....	23
B. Assisted Reproduction- No Surrogacy .....	23
1. Birth mother .....	23
2. Third party donor .....	24
3. Parent(s) other than the birth parent .....	25
C. Surrogacy .....	32
1. Process for transfer of legal parentage .....	32
2. Genetic link with intended parents .....	34
D. Children Born Outside Manitoba and Outside Canada .....	37
Recognition of Extra-Provincial Orders .....	37
Birth Certificates Issued Outside Canada .....	38
E. Judicial Oversight .....	39

F. Consequential Amendments to <i>The Vital Statistics Act</i> .....	39
G. Parenting Terminology .....	40
<b>CHAPTER 4: SUMMARY OF THE COMMISSION'S CONCLUSIONS .....</b>	<b>42</b>
Assisted Reproduction Without Surrogacy.....	42
Surrogacy.....	42
Children Born Outside Manitoba .....	42
Judicial Oversight.....	43
Consequential Amendments to <i>The Vital Statistics Act</i> .....	43
Parenting Terminology.....	43
<b>APPENDIX A: CASE LAW .....</b>	<b>44</b>
<i>M.D. v. L.L.</i> – Birth registration .....	44
<i>Gill v Murray</i> – Birth registration .....	44
<i>Rypkema v British Columbia</i> – Birth registration .....	45
<i>K.G.D. v C.A.P.</i> – Birth registration and legal parentage .....	46
<i>Fraess v Alberta</i> – Legal parentage .....	46
<i>M.D.R. (Rutherford) v Ontario</i> – Birth registration .....	47
<b>NOTES .....</b>	<b>49</b>

## **ACKNOWLEDGMENTS**

The Commission gratefully acknowledges the assistance of Darlene Jonsson, consultant, who prepared a first draft of this issue paper. The Commission also extends its thanks to Professor Karen Busby of the University of Manitoba, Faculty of Law for her comments on an early draft of this issue paper.

---

## **CHAPTER 1: INTRODUCTION**

### **A. Introduction**

The concept of ‘family’ is fluid, and continues to evolve in law. It has always been necessary to accommodate diverse social relationships,<sup>1</sup> but advances in assisted reproductive technologies in recent years now allow the creation of family structures that formerly were not possible. These advances in technology raise new social and legal questions about what constitutes a family, and what it means to be a parent.

This issue paper discusses various ways in which Manitoba law could respond to new social realities relating to birth registration and legal parentage when a child is born as a result of assisted reproduction. The current legislation has significant gaps, presenting challenges to courts wishing to apply the law on a consistent basis, and resulting in confusion, uncertainty and needless stress for families. While legal principles are evolving on a case by case basis throughout the country, reform is needed to rationalize the impact of the *Charter of Rights and Freedoms* [“*Charter*”],<sup>2</sup> and to bring clarity and predictability to this area of family law.

Several Canadian jurisdictions have amended their legislation to account for evolving social attitudes and technological advances in this area, and the Uniform Law Conference of Canada has proposed model provisions in its *Uniform Child Status Act* (2010).<sup>3</sup> The Commission has considered these examples as possible models for the reform of Manitoba’s legislative framework.

Chapter 1 sets out the background and scope of this issue paper, and outlines developments in assisted reproduction technologies. Chapter 2 reviews the legal framework surrounding legal parentage and birth registration in circumstances involving assisted reproduction. Chapter 3 discusses possible reforms to the law of legal parentage and birth registration. Chapter 4 summarizes the Commission’s preferred approaches to some of the legal problems raised in this issue paper.

### **B. Background and Scope**

Legal parentage is governed by provincial legislation. It is a “lifelong immutable declaration of status”<sup>4</sup> that impacts a number of areas of a child’s life, affecting identity, citizenship, inheritance and dependants’ relief rights, and entitlement to benefits under federal and provincial laws. It also imposes obligations with respect to caring for and supporting the child<sup>5</sup> and affects the ability of an adult to participate fully in a child’s life and to provide consent for the purposes of health care, travel, education and adoption.

Historically, legal doctrine dealing with parentage was structured around the concept of illegitimacy; parentage was possessory and was linked to the marital status of the child’s parents.

A man was presumed to be the father of his wife's child, unless proof was presented otherwise. The relationship between a child born outside of a marriage and his or her biological father was not recognized, and the child could not inherit from anyone.

Following a gradual evolution toward increasing legal recognition of illegitimate children,<sup>6</sup> Canadian law was reformed in the 1970s and 80s to abolish the concept of illegitimacy. A child has the same status whether born within or outside of a marriage.

The revised statutory schemes assumed that a child will have one mother, whose identity is determined by the act of giving birth, and one father, whose identification may not be so simple. To deal with this reality, the statutes include rebuttable presumptions based on both biological and social understandings of parenthood. Biological parenthood is presumed on the basis of a social relationship - generally, the husband or partner of the woman giving birth is presumed to be the child's father – but social or biological evidence may be provided to rebut the presumption. In modern times, rebuttal is usually accomplished by DNA evidence. As explained by the Ontario Court of Appeal, the legislation “favours biological parents … [but] does not define parentage solely on the basis of biology”.<sup>7</sup>

A biological connection is irrelevant when legal parenthood is assumed by adoption. Adoption legislation provides for the re-allocation of legal parenthood. The adopted child ceases to be the child of the biological parents and becomes the child of the adopting parents for all legal purposes.<sup>8</sup>

Legal parentage may be a starting point for determining parental responsibilities, but there are other functional approaches to defining parenthood. People who are not legal parents but who have assumed parenting roles and responsibilities may be treated as parents for the purposes of child custody, guardianship, access and support.<sup>9</sup> In this context, the law acknowledges that a child may have more than two ‘parents’. Similarly, while direct parenting responsibilities and issues of custody, guardianship, access and support are related to parentage, they do not necessarily flow directly from legal parentage status.

With the development of assisted reproduction technologies, the assumptions made 30 to 40 years ago about parentage and the formation of the family no longer reliably apply. The presumptions of fatherhood in Manitoba legislation do not address issues of parentage involving assisted reproduction. The use of new technologies means that the assumptions made about the identification of a child's mother are also no longer always clear. The woman who gives birth to a child after assisted reproduction may not have a genetic connection to the child if a second woman donated the ovum used for reproduction. The increasing number of planned families formed through the use of assisted reproduction technologies requires an expanded concept of family to reflect the reality of the myriad forms that exist, and to ensure that children's interests are adequately protected.

While questions around legal parentage are frequently approached from the perspective of the rights of persons carrying out assisted reproduction, parentage decisions must be informed and guided by the principle that underlies all of family law, that the best interests of the child are paramount.<sup>10</sup> Legal parentage status confers authority on parents so that they are able to care for their children, and imposes duties on them to do so. All children, regardless of the circumstances of their conception, benefit from having certainty in their family relationships and from being parented by persons who have clear legal rights and obligations.

The New Zealand Law Commission commented in a 2005 report:

The “status” or powers and rights that go with parenthood are not “benefits”, but are the means by which parents’ responsibilities to children can be exercised, so as to provide the security and protection that children, as vulnerable members of our society, need. In order to exercise the full range of parental responsibilities, the relevant adults need to have the full powers and rights of parenthood.<sup>11</sup>

This issue paper focuses on the law regarding parentage in cases where assisted reproduction is used. The term “assisted reproduction” refers to all methods of conceiving a child other than sexual intercourse. The term “partner” is used generally to refer to either a spouse or a person who is cohabiting with another person in a conjugal relationship of some permanence.<sup>12</sup>

Other emerging issues, including the ownership or storage of sperm, ova or embryos, the regulation of health care facilities providing assisted reproductive technology services, and a child’s access to information about his or her genetic identity,<sup>13</sup> warrant review but are beyond the scope of this paper.<sup>14</sup>

The parent-child relationship is relevant in many areas of law which are not discussed in this paper including the law of succession, inheritance, and income tax. It is also relevant in the application of statutory compensation schemes following accidents, including the scheme contemplated in *The Fatal Accidents Act*, and in family law matters of custody and maintenance. The scope of this paper does not permit the Commission to explore the relationship between legal parentage and these areas of law. However, the Commission urges government to consider any possible amendments to parentage rules within this broader legal context. Changes to Manitoba’s legal parentage rules also invoke important public policy considerations, such as health care cost recovery for non-resident assisted reproduction participants,<sup>15</sup> which are outside the project scope.

## C. Assisted Reproduction Technologies

There are two broad types of assisted reproduction:

- Artificial insemination – an ovum is fertilized within a woman’s reproductive tract by artificial means. The woman who carries the embryo is the genetic mother and, in most cases,

intends to parent. The genetic father may be known or unknown and, if known, may or may not intend to parent the child.

- In vitro fertilization (IVF) – an ovum is fertilized outside of the body of the woman who will carry the embryo to term. Embryos can be frozen for transfer at a later time, in a process referred to as FET (frozen embryo transfer). The woman who carries the embryo may or may not be the genetic mother. The genetic parents may be known or unknown.<sup>16</sup> Either genetic parent may or may not intend to parent the child.

Either form of assisted reproduction may involve a surrogacy arrangement, in which a woman agrees to carry an embryo with the intent that the child will be raised by another person or couple. There are two general types of surrogacy: traditional and gestational. In a traditional surrogacy, the ovum of the surrogate mother is fertilized, establishing a genetic connection between surrogate mother and child. Gestational surrogacy is more common and occurs where an embryo is implanted and carried by the surrogate mother, who has no genetic connection to the child. Surrogacy is not illegal in Canada, but payment for the services of surrogates and for the purchase of sperm, ova or embryos is prohibited under the federal *Assisted Human Reproduction Act*.<sup>17</sup>

According to the Canadian Fertility and Andrology Society, 11,806 IVF treatments were performed in Canada in 2010, resulting in 3,188 live births.<sup>18</sup> The number of births resulting from artificial insemination is unknown, since this procedure may be carried out without medical assistance.

The majority of IVF and FET treatments result in the embryo being carried by a woman who intends to parent. However, as noted, these procedures also allow the genetic aspects of reproduction to be separated from gestation. It is possible for three people to contribute to the birth of a child, if an embryo formed from a donated ovum and donated sperm is carried by a surrogate. The number of people who could be included in some definition of ‘parent’ increases to eight if each of these persons has a partner, and if a fourth couple with no biological connection to the child are the intended parents.

Under a new process called nuclear transfer, the number of potential parents could increase further. Nuclear transfer involves injecting the nucleus of a fertilized ovum into a second donor ovum. This is done to ensure that genetic defects carried in the mitochondrial DNA of the first ovum (found outside of the nucleus) are not passed on to the resulting child. The child would inherit some DNA from both of his or her ‘mothers’, although nearly all of it would be from the woman from whom the injected nuclear material was obtained.<sup>19</sup> The Chief Medical Officer of Britain recently announced plans to proceed with nuclear transfers in that country, if regulations to permit the procedure under the *Human Fertilisation and Embryology Act 1990*<sup>20</sup> are approved by the U.K. Parliament.<sup>21</sup>

Clearly, there is no single portrait of a family created through the use of assisted reproductive technologies. Assisted reproduction is used by heterosexual couples experiencing infertility, including those who are concerned about genetic issues or are unable to carry a fetus to term, and by lesbian couples, gay male couples, persons intending to become single parents and persons intending to form families with more than two parents. They may use anonymous or known donor sperm, ova or embryos, or some combination of donor genetic material and surrogacy. The families that result are varied and diverse, and each has a unique and distinct network of social and extended family relationships.

---

## **CHAPTER 2: LEGAL FRAMEWORK**

### **A. United Nations Convention on the Rights of the Child**

A child's right to an identity from birth is recognized under the United Nations *Convention on the Rights of the Child*.<sup>22</sup> The Convention does not answer the question of who a child's legal parents should be, but it obligates parties to the Convention to ensure that a child has a legal identity from birth, to protect children from discrimination and to give priority to the best interests of children.<sup>23</sup>

Canada ratified the Convention in 1991, and is obliged to take all legislative, administrative and other measures to protect and ensure children's rights and to develop policies and take action in the best interests of the child. As an international human rights treaty, the Convention may also influence the interpretation of domestic law. The Supreme Court of Canada has held that "where possible, statutes should be interpreted in a way which makes their provisions consistent with Canada's international treaty obligations and principles of international law."<sup>24</sup> The Convention also provides useful guidance with respect to decision-making involving the needs and rights of children.

### **B. Charter of Rights and Freedoms**

Section 15 of Canada's *Charter of Rights and Freedoms* guarantees equality before and under the law, and equal protection and benefit of the law.<sup>25</sup> The Supreme Court of Canada has been clear that discrimination on the basis of marital status or sexual orientation contravenes the *Charter*.<sup>26</sup>

In the 1999 decision of *M. v. H.*, the Supreme Court held that it was discriminatory to exclude same-sex couples from the definition of "spouse" in Ontario legislation providing for court-enforced spousal support.<sup>27</sup>

The decision in *M. v. H.* prompted legislative reform throughout the country respecting the legal recognition of same-sex couples. In Manitoba, *The Vital Statistics Act* and several other Manitoba statutes were amended with respect to the rights of common-law couples and to recognize same-sex relationships in 2002.<sup>28</sup>

*Charter* challenges were also successfully brought in a number of provinces and territories with respect to the common-law definition of 'marriage' as a union between a man and a woman.<sup>29</sup> In each case, the court found that because the definition of marriage excluded same-sex couples, the couples were not given equal treatment in matters of public benefits and obligations, and were excluded from a fundamental institution in society.

In 2005, Parliament enacted the *Civil Marriage Act*.<sup>30</sup> The Act confirms the gender neutral definition of marriage already adopted by the courts, removing the barrier to same-sex marriage. It

defines marriage “for civil purposes, as the lawful union of two persons to the exclusion of all others”.<sup>31</sup>

Consistent with the section 15 jurisprudence on sexual orientation, court challenges have been brought in various provinces alleging that their legislation provides for unequal treatment with respect to parentage and birth registration when assisted reproduction is used, particularly in the case of same-sex couples.<sup>32</sup>

Section 15 equality arguments may also be engaged from the perspective of the children born following assisted reproduction, if they are disadvantaged because of the circumstances of their conception or because of the gender, sexual orientation or marital status of their parents.<sup>33</sup>

## **C. Canada Assisted Human Reproduction Act**

Legal parentage falls within provincial jurisdiction, but the federal government has legislated in the broader area of assisted reproduction. The *Assisted Human Reproduction Act (“AHRA”)*<sup>34</sup> enacted in 2004, prohibits payment for surrogacy and for human reproductive material. It sets a minimum age of 21 for a woman to act as a surrogate, and of 18 for a person to donate eggs or sperm. Section 12, which is not yet in force, would prohibit the reimbursement of a donor or surrogate mother for expenses incurred in relation to the donation or surrogacy unless the reimbursement is made in accordance with the regulations.<sup>35</sup>

Paragraph 2(e) of the *AHRA* prohibits discrimination against persons who seek to undergo assisted reproduction procedures, including on the basis of their sexual orientation or marital status.

When the *AHRA* was enacted, it also provided for a national donor database and regulatory scheme to be administered by a new Assisted Human Reproduction Agency of Canada. Following a constitutional challenge, the Supreme Court of Canada upheld the criminal prohibitions on paid surrogacy, underage donation and commercial activity relating to gametes and embryos, but found invalid the provisions regulating donor information, the storage and transfer of reproductive material, medical licensing and practice, and some aspects of research relating to assisted reproduction, on the grounds that these matters fell within provincial jurisdiction.<sup>36</sup>

The *AHRA* sets out seven principles which inform the interpretation and application of the Act. These give priority to the health and well-being of children and women in the application of assisted reproduction technologies.<sup>37</sup> The principles reflect long-standing policy concerns that surrogacy has the potential to result in the exploitation and commodification of women and children. These policy considerations form an important backdrop to the regulation of assisted reproduction technologies and explain in part the ban on commercial surrogacy in Canada and elsewhere.<sup>38</sup>

## **D. Manitoba Human Rights Code**

While the *Charter* applies to legislation and the actions of government, provincial human rights codes prohibit discrimination in both the public and private sector, including certain actions by private individuals, in areas regulated by provincial law.

The Manitoba *Human Rights Code*<sup>39</sup> prohibits unreasonable discrimination on the grounds of protected characteristics, including:

- sex, including sex-determined characteristics, such as pregnancy
- gender identity
- sexual orientation
- marital or family status
- social disadvantage

In addition to these listed characteristics, the *Code* prohibits discrimination based on other group stereotypes, rather than on individual merit. Discrimination is prohibited “with respect to any service, accommodation, facility, good, right, licence, benefit, program or privilege available to or accessible to the public or to a section of the public”<sup>40</sup> and with respect to employment, contracting and the purchase or rental of real property.

Section 58 of the *Code* provides that unless another Act expressly provides otherwise, the rights and obligations in the *Code* are paramount over the substantive rights and obligations in every other Act.<sup>41</sup> Broad remedies are available under the *Code*, including an order for a party to do or refrain from doing anything to secure compliance with the *Code*, or to pay compensation or damages.

## **E. Birth Registration – *The Vital Statistics Act***

Provincial vital statistics legislation sets out the administrative process for registering births. The information on a birth registration does not definitively establish legal parentage, but section 34 of *The Vital Statistics Act* (“VSA ”)<sup>42</sup> provides that a certificate issued under the Act is *prima facie* proof of the facts recorded. When a person is identified as a parent on a birth certificate, that person’s parentage is presumed unless it is refuted with other evidence.

A birth certificate is often the primary source of identifying information about a person, and is used for purposes such as a child’s school and health care registration, travel and obtaining passports and other documents of identification. As commentators have explained, “It is both practically and legally valuable for any person who intends to be a parent to be listed on the child’s birth certificate”.<sup>43</sup> The Supreme Court of Canada has found that, “including one’s particulars on a birth registration is an important means of participating in the life of a child.”<sup>44</sup>

The Manitoba *Vital Statistics Act* does address the birth registration of a child born as a result of assisted reproduction, but only if artificial insemination is used. When artificial insemination is used, the VSA requires the particulars of the birth mother's spouse or common law partner (opposite sex or same-sex) to be shown as those of the father or other parent, with the consent of the spouse or partner.<sup>45</sup>

Artificial insemination is not defined in the Act, but the Vital Statistics online *Guide to Completing the Registration of Birth Form* explains:

This term refers to fertilization inside the mother's body by artificial means, without sex. It does not include other means of assisted reproduction where fertilization occurs outside the mother's body, such as in vitro fertilization (IVF) or frozen embryo transfer (FET).<sup>46</sup>

## **F. Legal Parentage – *The Family Maintenance Act***

In Manitoba, *The Family Maintenance Act* ("FMA")<sup>47</sup> deals with the legal parentage of children. Like the parentage legislation of many other provinces, the *FMA* has not kept up with advances in reproductive technology.

Section 17 of the *FMA* establishes the parentage of children for all purposes of Manitoba law, and abolishes the historical distinctions based on legitimacy:

Person is child of parents

17. For all purposes of the law of Manitoba a person is the child of his parents, and his status as their child is independent of whether he is born inside or outside marriage.

Section 1 of the Act defines "child" and "parent" as follows:

"child" includes a child to whom a person stands in loco parentis; ...

"parent" means a biological parent or adoptive parent of a child and includes a person declared to be the parent of a child under Part II;

While the definition of "child" is apparently meant to accommodate situations in which a person standing as a parental figure (in loco parentis)<sup>48</sup> is required to provide financial support for the child, the definitions apply throughout the entire Act and are somewhat circular.

Certain rights and obligations flow from legal parentage status under the *FMA*. Each parent of a child is obliged to provide reasonably for the child's support, maintenance and education, whether or not the child is in that parent's custody. The obligation of a person who stands in a parent-like relationship to a child to provide support is secondary to that of the child's parents. Subject to any court order, the parents have joint rights to custody of the child, unless they have

never cohabited after the birth of the child. Only a parent of a child may apply under the *FMA* for a court order for custody of or access to the child.<sup>49</sup>

In addition to the *FMA*, there are avenues of recourse in Manitoba for persons who are not legal parents to apply for an order for access to or guardianship of a child. In the case of a divorce, either spouse or any other person may apply for custody or access under the federal *Divorce Act*, but a person who isn't one of the spouses must obtain leave to do so. Grandparents, other family members, persons in parent-like relationships with a child, and in exceptional circumstances, other persons, may apply for an order of access under *The Child and Family Services Act*. A court may also appoint any adult as a guardian of a child under that Act.<sup>50</sup>

The *FMA* sets out presumptions of paternity. Generally, unless the contrary is proven on a balance of probabilities, a man is presumed to be the father of a child if

- he was married to the child's mother or cohabiting with her in a relationship of some permanence at the time of the birth or within 300 days before the birth;
- he married the mother after the child's birth and acknowledged being the father; or
- he has been found by a court to be the father.<sup>51</sup>

A person may apply to court for a declaratory order that a woman is or is not in law the mother of a child, or that a man is or is not in law the father of a child. In the case of a father, but not a mother, the order may be obtained before the child is born.<sup>52</sup>

The *FMA* does not address how parentage should be determined in situations of assisted reproduction, whether involving donor ova, sperm or embryos, or surrogacy. The *FMA* also does not envisage same-sex parenting. As a result, the legal status of children born following assisted reproduction under the Act is uncertain.

The *FMA* has also not been fully rationalized with *The Vital Statistics Act* ("VSA").<sup>53</sup> As noted, as a result of the 2002 amendments, the VSA requires that in cases of artificial insemination, the birth mother's spouse or common law partner be entered as the father or other parent on the birth registration form (with both parties' consent). The *FMA* does not currently contemplate parentage in such situations. In addition, this option is not available for other forms of assisted reproduction, and therefore excludes many intended parents.

The VSA recording of parentage is also not consistent with the *FMA* definition of "parent". In cases of artificial insemination, the father or other parent recorded on the birth registration would not likely be a biological parent, or an adoptive parent, as required by the *FMA*. As a result, a declaration of parentage or an adoption is necessary in order for the person to be a legal parent under the child status provisions of the *FMA*.

A similar result occurs under the legislation of other provinces:<sup>54</sup>

... a number of provinces allow two mothers to appear on the child's birth certificate from birth. The "gender neutral birth certificate" is considered to be a significant breakthrough for lesbian mothers because, unlike second-parent adoption, it can be utilized at the time of the child's birth. However, unlike an adoption, the gender neutral birth certificate does not secure legal parentage. Rather, it is presumptive proof of parentage only, and thus rebuttable. It can, therefore, be challenged by either the biological mother or a known donor. ... Thus, while gender neutral birth certificates do provide some legal protection to non-biological mothers at the point of birth, they are limited in their effect as well as their applicability.<sup>55</sup>

This result was confirmed by one presenter during the Legislative Assembly Standing Committee review of the 2002 amendments. The presenter noted that although the amendments would allow her, as the same-sex partner of the birth mother, to be named on the birth registration for their child, legal parentage did not follow:

We now face another hurdle in our family, and that is that I have to adopt [our daughter]. Even though I can retroactively go back and we could put my name on the birth registration form and the birth certificate, I have to adopt [our daughter], if I want to be legally her parent under the law. That involves home studies. It involves great expense. It involves a court appearance. We are a family. We are equal parents in [our daughter's] life, and we always have been, and it really makes no sense that I should have to adopt my own daughter. I was an equal part of conceiving her in our lives so it makes no sense that I should have to adopt her. So, under the law, we should be considered equal.<sup>56</sup>

As in other provinces, the *FMA* represented progressive reform of the law when it was enacted. The Act abolished the concept of illegitimacy, but issues around parentage and assisted reproduction were not pressing concerns at the time. The Ontario Court of Appeal explained, with respect to similar Ontario legislation:

The legislation was not about the status of natural parents but the status of children. The purpose of the legislation was to declare that all children should have equal status. At the time, equality of status meant recognizing the equality of children born inside and outside of marriage. The legislature had in mind traditional unions between one mother and one father. It did not legislate in relation to other types of relationships because those relationships and the advent of reproductive technology were beyond the vision of the Law Reform Commission and the legislature of the day. ...

Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the CLRA [the *Children's Law Reform Act*]'s legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child's parents as adopting parents or "natural" parents. The CLRA, however, does not recognize these forms of parenting and thus the children of these relationships are deprived of the equality of status that declarations of parentage provide.<sup>57</sup>

## G. Case Law

Recent court and human rights tribunal decisions have considered the legal parentage and birth registration provisions of various provincial statutes in light of the *Charter*, provincial human rights legislation and the courts' inherent *parens patriae*<sup>58</sup> jurisdiction to act in the best interests of children. This section will highlight just two of these recent cases, with a selection of other representative cases summarized in Appendix A.

### A.A. v. B.B. – Legal parentage – multiple parents

The case of *A.A. v. B.B.*<sup>59</sup> involved two lesbian co-mothers who were the primary parents of a child, and the child's biological father. The biological father and the birth mother were named on the birth registration, and all parties wanted the birth mother's spouse, who was co-parenting the child, to be added as a parent. All parties also agreed that it was in the best interests of the child for the biological father to remain involved in the child's life and to be legally recognized as a parent. The parties sought a declaration of the co-mother's parentage, under the Ontario *Children's Law Reform Act* ("CLRA"), or under the court's *parens patriae* power. No *Charter* argument was raised.

The Superior Court of Justice held that the court did not have jurisdiction to make the declaration under the *CLRA* or its *parens patriae* jurisdiction. On appeal, the Ontario Court of Appeal granted the declaration using its *parens patriae* jurisdiction. The court noted that the declaration of parentage was important because if the co-mother adopted the child, the father would lose his parental status, and it was in the child's best interests for all three parents to remain involved in his life. The court said that biology is not the sole determining factor for parentage:

...the Act does not define parentage solely on the basis of biology. For example, s. 1(2) treats adopting parents as natural parents. Often one or both of the adopting parents will not be the biological parents of the child. Similarly, s. 8 enacts presumptions of paternity that do not all turn upon biology; the obvious example is the presumption of paternity flowing simply from the fact that the father was married to the child's mother at the time of birth. Further, as Ferrier J. pointed out in *T.D.L. v. L.R.L.*, [1994] O.J. No. 896 (S.C.J.) at para. 18, the declaration made under s. 4(1) is not that the applicant is a child's natural parent, but that he or she is recognized in law to be the father or mother of the child....

It is contrary to D.D.'s best interests that he is deprived of the legal recognition of the parentage of one of his mothers. There is no other way to fill this deficiency except through the exercise of the *parens patriae* jurisdiction. As indicated, A.A. and C.C. cannot apply for an adoption order without depriving D.D. of the parentage of B.B., which would not be in D.D.'s best interests.<sup>60</sup>

The court held that there was a legislative gap in the *CLRA* because the scheme did not contemplate a child having two mothers. This was not because there was an intention to exclude

non-biological parents but because the realities of modern family forms were not contemplated at the time.<sup>61</sup> Rosenberg, J.A. said:

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

... a finding that the legislative gap is deliberate requires assigning to the legislature a discriminatory intent in a statute designed to treat all children equally. I am not prepared to do so. ... There is nothing in the legislative history of the CLRA to suggest that the legislature made a deliberate policy choice to exclude the children of lesbian mothers from the advantages of equality of status accorded to other children under the Act.<sup>62</sup>

### **D.W.H.v D.J.R. – Legal parentage**

*D.W.H. v. D.J.R.*<sup>63</sup> involved a gay man who applied for a declaration of parentage. He and his partner had entered into an agreement with a lesbian couple so that two children would be conceived, one to be primarily raised by the male couple and one by the female couple. A child was conceived through assisted reproduction, and was primarily parented by the applicant and his partner, the biological father. After the breakdown of the same-sex relationship, the biological father retained primary care of the child and his former partner applied to be declared a legal parent. The biological father and the birth mother opposed the application.

The court allowed the application for a declaration of legal parentage, finding that the parentage provisions of the *Family Law Act* discriminated against the applicant on the basis of gender and sexual orientation.

Under the FLA, a gay male, regardless of whether he provided sperm for the purposes of the artificial conception, cannot be deemed a parent by operation of law. At the end of the day, the only individuals who can be recognized as parents based upon consent/intent (absent a surrogacy declaration or adoption) are those who are in a spousal relationship with the biological mother. ... By failing to provide a similar benefit for gay males (whether as genetic donor or intended/consensual father) the FLA creates a distinction that transcends the mere operation of biology....

The effect of the FLA is that when gay males in a committed relationship decide to have a family assisted by a female (in this instance with the assistance of a friend who conceives for them) they should either be satisfied with guardianship status (which they must apply for to receive) or they must undertake the protracted adoption

process. Denying a gay father (biological or intended) the status of legal parent has a negative effect on his human dignity. ...

The damaging effects engendered by the exclusion of same-sex couples using assisted conception from parental status by operation of law are numerous and severe. They re-enforce outdated concepts which do not accurately reflect the realities of today's family in Canada. As such, I find that the impugned legislation does not survive the final stage of the s. 1 analysis.<sup>64</sup>

The Alberta Court of Appeal affirmed the declaration:

This conclusion presumes that children benefit when the law recognizes the reality of their family situations, even when that reality falls outside the norm. The same presumption underlies the decision of the Ontario Court of Appeal in *A.A.*.<sup>65</sup>

## H. Canadian Legislative Reforms

Unlike Manitoba's *Family Maintenance Act*, statutes in British Columbia, Alberta, Québec, Newfoundland and Labrador, Prince Edward Island, Yukon and the Northwest Territories, and the Uniform Law Conference of Canada *Uniform Child Status Act*, all deal with the legal parentage of children born as a result of assisted reproduction, to varying degrees.<sup>66</sup>

The following is a brief overview of the relevant provisions in other provinces and territories:

### **1. Newfoundland and Labrador *Children's Law Act* and Yukon *Children's Law Act***

Both Acts define “artificial insemination” to include IVF using the birth mother’s own ovum, but apply only to opposite -sex couples. The provisions are somewhat complex. The birth mother’s male partner is deemed to be the legal father if his sperm was used or, if the couple are married, the sperm of another man was used and he consented in advance to the insemination. If the couple are cohabiting but not married and the sperm of another man was used, the partner is deemed to be the father if he consented in advance to the insemination, unless it is proved that he refused to consent to assume the responsibilities of parenthood.<sup>67</sup>

If the male partner did not consent to the insemination, or to assume the responsibilities of parenthood, he is deemed to be the father if he has demonstrated a settled intention to treat the child as his child,<sup>68</sup> unless it is proved that he did not know that the child resulted from artificial insemination.

### **2. Québec *Civil Code***

The Québec *Civil Code* (“*Code*”) allows either same-sex or opposite sex couples, or single parents, who enter into a ‘parental project’ using genetic material from another person to be

regarded as the child's parents at birth. The birth mother and her same-sex or opposite-sex partner are parents of the child from birth.

A parental project exists from the time that a person or spouses decide to use the genetic material of a person who is not a party to the parental project in order to have a child. However, the *Code* is unique in that a parental project does not necessarily involve assisted reproduction. The *Code* contemplates the contribution of genetic material within the context of a parental project by sexual intercourse. In that case, the person who provided the material has one year to apply for a bond of filiation.

There is a presumption that if a child is born of a parental project during a marriage or civil union or within 300 days after its termination, the same-sex or opposite-sex spouse of the birth mother is the child's other parent.

The *Code* also provides that surrogacy contracts are void, and there is a maximum of two legal parents. As a result, a parental project is not an option for gay male partners who both wish to act as legal parents.<sup>69</sup>

### **3. Prince Edward Island *Child Status Act***

The Prince Edward Island Act applies to assisted conception, including IVF using donated sperm or ova. The birth mother is the child's legal mother at birth, whether or not she is the genetic mother. The birth mother's spouse or partner at the time of the conception is presumed to be a parent of the child, unless the person did not consent to the conception and did not demonstrate a settled intention to treat the child as the person's child, or the person did not know that the child was born by assisted conception. There is a maximum of two legal parents.<sup>70</sup>

### **4. Ontario *Vital Statistics Act***

Following amendments in January 2007, the Ontario *Vital Statistics Act*<sup>71</sup> has allowed an "other parent" to certify a birth statement, if the child's mother acknowledges him or her. Only two persons can certify a child's birth.

The provisions apply in any case of assisted conception other than sexual intercourse, but only if the biological father is unknown. Where the biological father is a known sperm donor, a non-biological parent cannot be included on the registration.

### **5. Nova Scotia *Birth Registration Regulations***

Regulations have been made under the Nova Scotia *Vital Statistics Act* to address birth registration in cases of assisted reproduction. The regulations apply only where a child is born as a result of assisted reproduction using an anonymous sperm donor. The birth mother's same-sex or opposite-sex spouse must be registered as the child's other parent. If the mother is unmarried

and a person acknowledged by the mother as the other parent files a declaration that he or she intends to assume the role of parent, the registration must show the person as the child's other parent.

In the case of a surrogacy, a court may make a declaration of parentage if the surrogacy was planned before conception, the surrogate does not intend to parent the child and one of the intended parents has a genetic link to the child.<sup>72</sup>

## **6. Alberta Family Law Act**

The Alberta Act was amended in 2010 to extend the right to parentage declarations to same-sex couples.<sup>73</sup> There is a maximum of two legal parents.

In cases of assisted reproduction with no surrogate, the legal parents are the birth mother and either the male person who provided sperm with the intention of becoming a parent, or if there is no such person, the same-sex or opposite-sex partner who consented to be a parent at the time of conception.

In cases of surrogacy, if the surrogate consents after the birth, a parentage declaration must be granted declaring as legal parents the persons who provided human reproductive material with the intention of being a parent.<sup>74</sup> Where only one person provided material with the intention of being a parent, his or her same-sex or opposite sex partner who consented to be a parent at the time of conception can be declared the other parent. When an order is made, the parent is deemed to be the child's parent from the time of birth.<sup>75</sup>

## **7. Uniform Law Conference of Canada *Uniform Child Status Act***

The Uniform Law Conference of Canada (ULCC) adopted a new *Uniform Child Status Act* ("Uniform Act") in 2010.<sup>76</sup> In cases of assisted reproduction with no surrogate, the birth mother's same-sex or opposite sex partner is presumed to be the other legal parent if the person consented to be a parent of the child and did not withdraw the consent before the conception. A person is presumed to have consented to the conception, unless the contrary is proven, if the person was married to the birth mother or in a common law relationship with her at the time of conception.<sup>77</sup> No genetic link is necessary between the birth mother or the other parent and the child.

In cases of surrogacy, a court may grant a declaration of parentage if the intended parent or parents consented to be the parents of the child before the conception and the surrogate consents to relinquish the child after the birth. One of the intended parents must have provided reproductive material for the conception. If there are two intended parents they must be married or in a common-law relationship.

There may be more than two legal parents if a court makes a declaratory order that a person is an ‘additional parent’ of a child born as a result of assisted reproduction. There must be an agreement before conception among the prospective birth mother, her partner, if any, and the prospective additional parent. The additional parent must be a person who provided the ovum, sperm or embryo used in the assisted reproduction, or his or her partner. The parties must apply for the order within 30 days after the birth unless the court extends the period.

Under these provisions, there is a potential for a child to have up to six parents: the birth mother, her partner, the sperm donor, the ovum donor and the donors’ partners.

## **8. NWT *Children’s Law Act***

The NWT *Children’s Law Act* was amended in 2011<sup>78</sup> to add legal parentage provisions based on the ULCC Uniform Act.

In cases of assisted reproduction with no surrogate, the birth mother’s same-sex or opposite-sex partner is presumed to be the other legal parent if he or she consented to be a parent of the child and did not withdraw the consent before the conception. The Act does not require a genetic link between either the birth mother or the other parent and the child.

While there are no specific provisions regarding parentage in surrogacy situations, the presumption regarding the consent of the birth mother’s partner does not apply where the birth mother intended at the time of conception to relinquish the child to a genetic parent.<sup>79</sup>

The NWT *Vital Statistics Act*<sup>80</sup> provides for a father or ‘other parent’ to be identified on a birth registration, if the person signs the statement. An ‘other parent’ is a person other than the mother of the child who is recognized to be a parent under the *Children’s Law Act*.<sup>81</sup>

## **9. British Columbia *Family Law Act***

British Columbia enacted its new *Family Law Act* in 2011, following several years of public consultations. The Act came into force in March 2013.

In cases of assisted reproduction with no surrogate, the birth mother’s same-sex or opposite -sex partner is presumed to be the other legal parent unless, before the child was conceived, the person did not consent to be the child’s parent or withdrew his or her consent.

The B.C. Act is unique in that in cases of surrogacy, the intended parents may be the legal parents from birth, rather than the birth mother. All parties must have recorded their intentions in writing before the conception, the surrogate must provide written consent to the intended parents after the birth and the intended parents must take the child into their care. If these requirements are met, no court declaration is generally required and the intended parents are registered on the birth certificate. No genetic link is necessary between the intended parents and the child.

A child may have more than two legal parents if the potential birth mother and an intended parent, or two intended parents, agree in writing before the assisted conception that they will all be the child's parents. Alternatively, the agreement may be between the potential birth mother, her partner and a donor. In these circumstances, the parties to the agreement are the child's parents upon the child's birth. No court declaration is needed.<sup>82</sup>

BC also amended its *Vital Statistics Act* to add gender neutral parent terms, and to provide that nothing must appear on any certificate issued by the office that would disclose that a child was born as a result of assisted reproduction.<sup>83</sup>

## I. International Developments

### 1. United Kingdom

The United Kingdom (U.K.) began examining assisted reproduction issues in 1982, with the establishment of the Warnock Committee "to consider recent and potential developments in medicine and science related to human fertilisation and embryology ... including consideration of the social, ethical, and legal implications ...".<sup>84</sup> Following the Warnock Committee's report in 1985, the U.K. enacted the first legislation in the world dealing with surrogacy, the *Surrogacy Agreements Act 1985*,<sup>85</sup> followed by the *Human Fertilisation and Embryology Act 1990*.<sup>86</sup>

2008 reforms to the *Human Fertilisation and Embryology Act 1990* have helped to clarify the rules concerning parentage where assisted reproduction technology is used for conception, in both surrogacy and non-surrogacy situations.<sup>87</sup>

#### Assisted Reproduction – No Surrogacy

For married heterosexual couples, the rules provide that the birth mother and her husband are presumed to be legal parents unless it can be shown that the husband did not consent to the conception. If the couple is unmarried, the birth mother's partner is the legal father if the conception took place in a licensed clinic within the United Kingdom and both partners sign consent forms electing the male partner to be treated as a parent.

Female partners who are in a civil union at the time of conception are both recognized as legal parents from birth if the conception is through donor insemination or fertility treatment, including at-home procedures, and the non-birth mother consents to the conception. Female partners who are not in a civil union at the time of conception will also be recognized as parents from birth if a licensed fertility clinic is used for conception and both partners sign consent forms electing the non-birth mother to be treated as a parent.

For male same-sex partners in non-surrogacy situations, the biological father is considered the legal parent of the child, along with the birth mother. If the male same-sex partners are in a civil union, the non-biological father may sign a parental responsibility agreement, together with the biological father and birth mother, to confer responsibility on the non-biological father. This

allows the non-biological father to make parental decisions, but does not create full legal parenthood for inheritance purposes.

### **Assisted Reproduction – Surrogacy**

As in Canada, surrogacy arrangements are not illegal, but commercial surrogacy agencies and surrogacy advertisements are prohibited. The *Surrogacy Agreements Act* was amended in 1990 to provide that surrogacy agreements are unenforceable,<sup>88</sup> and in 1994 regulations were made to allow married couples to apply for parentage orders with respect to children born as a result of surrogacy arrangements.<sup>89</sup>

The 2008 amendments to the *Human Fertilisation and Embryology Act 1990* also enable people in same-sex relationships and unmarried couples to apply for a parental order transferring parenthood from a surrogate mother to the intended parents.<sup>90</sup> Regulations made under the Act in 2010 confirm that the welfare of the child is the paramount consideration in making parental orders.<sup>91</sup>

The surrogate mother is named on the birth certificate. The intended parents must obtain a court order to be recognized as legal parents, with the consent of the surrogate mother and her partner. Intended parents must be married, civil partners or two persons living as partners in an enduring family relationship and not within prohibited degrees of relationship in relation to each other.<sup>92</sup> The legislation requires that the gametes of at least one of the intended parents be used to create the embryo.

As described by Professor Busby, social workers in Britain prepare parental order reports for consideration by the judge charged with making a parental order. The social workers' duties are to investigate the surrogacy arrangement and the best interests of the child.<sup>93</sup>

There are few reported cases under the *Human Fertilisation and Embryology Act 1990* and the *Surrogacy Agreements Act 1985*. The majority of reported cases concern international surrogacy situations in which the court is asked to issue a parentage order in circumstances where there have been payments to the surrogate mother, arguably contravening Britain's ban on commercial surrogacy. In a recent case granting a parentage order, the court weighed public policy factors regarding commercial surrogacy against the best interests of the child, finding:

Welfare is no longer merely the court's first consideration but becomes its paramount consideration. The effect of that must be to weight the balance between public policy considerations and welfare decisively in favour of welfare. It must follow that it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making.<sup>94</sup>

## **2. United States**

There is significant variation among the U.S. states with respect to legal parentage and assisted reproduction, in legislation and in case law.<sup>95</sup>

To address this, and to modernize the law around legal parentage, the National Conference of Commissioners on Uniform State Laws (NCCUSL) revised and updated its *Uniform Parentage Act* (UPA) in 2002, and recommended it to states for adoption.<sup>96</sup>

The UPA provides that a sperm or egg donor is a legal parent of any child conceived. A married woman who used assisted reproduction and her husband must sign a record giving consent to become legal parents. The provisions also set limits on when a husband may dispute paternity when his wife gives birth to a child through assisted reproduction. The Act does not address same-sex couples; it recognizes only heterosexual relationships.

The UPA does deal with surrogacy arrangements, and provides that a court may issue a pre-birth validation order of a gestational agreement providing that the intended parents are the legal parents of the child and the surrogate mother relinquishes her rights, if a number of conditions are met. If validated, an agreement may be enforceable. After the child's birth, the intended parents must file a notice with the court in order to obtain a declaration of parentage. No genetic link is required between the intended parents and the child, but the intended parents must be married and the intended mother must be unable to bear a child without unreasonable risk.

### **3. Australia**

There have been several reviews and law reform initiatives relating to assisted reproduction, surrogacy and parentage in Australia in recent years.<sup>97</sup> Laws vary among the states and territories, but five Australian jurisdictions presume that a birth mother's same-sex partner is a legal parent of a child born following assisted reproduction, and that a donor is not a parent by reason only of the donation.<sup>98</sup>

All Australia jurisdictions now permit altruistic surrogacy and provide for the transfer of parentage to the intended parents by court order following the birth of the child.<sup>99</sup> Certain requirements must be met; the New South Wales Act, for example, requires that a report by an independent counsellor be filed, expressing the opinion that the proposed order is in the best interests of the child. The intended parents must be a single person or two persons who are a couple.<sup>100</sup>

According to one Australian commentator, the Queensland *Surrogacy Act 2010* "tipped the balance in terms of the reform trajectory Australia-wide".

Unlike the jurisdictions which preceded it in implementing reform, Queensland has no requirement of genetic connection between intended parent(s) and child, no restriction on the genetic connection between birth mother and child, no prescription as to the method of conception or the sexual orientation or marital status of the intended parents, and no restriction on the intended parent being a single person rather than part of a couple. ...

...

When NSW and Tasmania introduced their laws in late 2010 and early 2011 respectively, both adopted the less prescriptive Queensland approach, duplicating all of the above elements.<sup>101</sup>

Despite these recent legislative reforms, the process for obtaining parental status remains complex in surrogacy situations. Most states have rules about who qualifies as an intended parent or surrogate mother, and some require the involvement of lawyers or mandatory counselling. In Western Australia and Victoria, a statutory agency must give approval for the process before conception.<sup>102</sup>

#### **4. New Zealand**

The *Status of Children Act 1969* governs legal parentage. In circumstances of assisted reproduction, the birth mother is the child's mother whether or not there is a genetic link, and the birth mother's same-sex or opposite sex partner at the time of conception is presumed to be the other legal parent. A donor of genetic material is not a legal parent unless he or she becomes the birth mother's partner after the conception.<sup>103</sup>

Although a donor is not a legal parent, under the *Care of Children Act 2004*, parents and donors may enter into agreements as to contact between the donor and child and the role of the donor in the child's upbringing. The parties may also apply to court to have the agreement included in a court order which is enforceable in the same way as a parenting order. The court may only do so with the consent of all parties and if satisfied that an order is in the best interests of the child.<sup>104</sup>

Commercial surrogacy is prohibited by the *Human Assisted Reproductive Technology Act 2004*. Altruistic surrogacy is permitted, but must be approved by the National Ethics Committee on Assisted Reproductive Technology. The Committee has set guidelines for approval, including requirements that at least one of the intended parents should be the potential child's genetic parent, the intended mother must have a medical reason for not undertaking pregnancy, the birth mother must be either a family member or close friend of the intended parents and an agreement should be made as to ongoing contact, and day-to-day care.<sup>105</sup>

There is no legislative process for the transfer of legal parentage following the birth of a child within a surrogacy arrangement. The intended parents must adopt the child, or apply for a guardianship order.<sup>106</sup>

#### **5. The Hague Conference on Private International Law**

In 2012, the Hague Conference on Private International Law published its *Preliminary Report on the Issues Arising from International Surrogacy Arrangements*,<sup>107</sup> in response to the growing number of international surrogacy arrangements. The report recognizes that the perceived risks of surrogacy are exacerbated in the context of international surrogacy arrangements. The report describes the potential for child abuse and trafficking, possible statelessness of children born

outside the jurisdiction in which the intended parents reside, and the risks to the safety and well-being of surrogate mothers living in conditions of poverty.<sup>108</sup>

The report concludes that domestic law cannot fully address these problems and that a global solution may be required. The Hague Conference on Private International Law continues to explore the possibilities of multi-lateral regulation of international surrogacy arrangements.

## CHAPTER 3: LEGAL PARENTAGE AND BIRTH REGISTRATION REFORMS

### A. Principles

The cases and commentary reviewed in previous chapters emphasize the need to ensure equality of treatment and to provide certainty in parentage determinations. The cases also highlight the importance of the participants' intentions, giving increasing weight to the role of intention in questions of legal parentage. This is a reasonable reflection of the reality of the lives of children born as a result of assisted reproduction, given that deliberate planning and forethought was required in order for them to be conceived.<sup>109</sup> As one commentator has observed, “[t]he sole aim of ART is to produce a child, so parenthood is “intentional” rather than “happenstance”.<sup>110</sup> Legal processes should take into consideration that the children would not have been conceived or born but for the efforts of the intended parents.

The Commission suggests that the following principles are relevant to the reform of parentage rules in the context of assisted reproduction:<sup>111</sup>

- The law respecting legal parentage and birth registration must comply with the *Charter* and ensure equality of treatment for persons using assisted reproduction and their children.
- Children should have equal status in law and the same legal protections regardless of the circumstances of their conception or the status of their parents.
- Children and their parents benefit from clarity and certainty of status at the earliest reasonable time. Accordingly, out-of-court processes should be preferred for establishing parentage whenever possible.
- Markers of legal parentage generally include biology, gestation and the intent to parent the child formed before conception. With respect to children born as a result of assisted reproduction, the intent to parent the child before conception is a principal marker.
- The child's best interests are a paramount consideration in all decisions concerning parentage.

### B. Assisted Reproduction- No Surrogacy

#### 1. Birth mother

In assisted reproduction situations that do not involve surrogacy, it is presumed that the person who gives birth to a child also intends to parent the child. If a donor ovum or embryo and IVF are used, there may be no genetic link between the birth mother and the child.

In 1985, the Ontario Law Reform Commission recommended that “[f]or all purposes, a woman bearing a child through artificial conception in order to rear it should be conclusively deemed to be the child's legal mother...”.<sup>112</sup> The Uniform Act's section 3(2) expressly provides that the birth mother is a parent. Most Canadian statutes that deal with assisted reproduction now provide

that in cases of assisted reproduction not involving surrogacy, the birth mother is the child's legal mother at birth. A genetic link between the birth mother and the child is not necessary.<sup>113</sup>

Where the birth parent intends to parent but does not have a genetic link to the child, this provision does not rule out the possibility that the person who provided the ovum or embryo may also be a legal parent, consistent with recent case law regarding multiple parents. Legal parentage may of course also subsequently be changed by adoption.

## COMMISSION'S CONCLUSION

The Commission concludes that, in assisted reproduction situations that do not involve surrogacy, Manitoba's legislation should provide that the person who gives birth to a child is a parent of the child, whether or not a genetic link to the child exists.

### 2. Third party donor

The Manitoba *Family Maintenance Act* and *The Vital Statistics Act* do not clarify the legal rights of sperm, ova or embryo donors. Where artificial insemination is used, *The Vital Statistics Act* allows births to be registered naming the birth mother's spouse or common-law partner as a parent, with both parties' written consent. However, birth registration does not conclusively determine the parental relationship, and this does not address other forms of assisted reproduction or the legal parentage of donors, whether known or unknown.

Frequently, a person who donates reproductive material does so with the sole intent of helping others to become parents, and none of the parties to the conception intend the donor to be a parent to the child:

... 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. In fact, the intention of the parties is usually the complete opposite.<sup>114</sup>

In these cases, any risk that the donor will be considered to be a parent may be a significant disincentive to donate.<sup>115</sup>

Other Canadian and international jurisdictions to have addressed the issue provide that a person who donates ova or sperm for assisted reproduction without the intention of becoming a parent is not a parent of the child born as a result. The more recent statutes include persons who donate embryos.<sup>116</sup> This has also been consistently recommended by law reform bodies, including the Uniform Law Conference of Canada as reflected in section 6(6) of the Uniform Act.<sup>117</sup>

Again, there may still a possibility for the donor to be a legal parent if that is consistent with the parties' intentions. This provision also would not prevent a court from finding that a donor who is not a legal parent has developed a parent-like relationship with a child for the purposes of

custody, access or support.<sup>118</sup> It would, however, provide certainty to donors and prospective parents that an uninvolved donor is not a legal parent merely because a genetic relationship exists.

## **COMMISSION’S CONCLUSION**

The Commission concludes that Manitoba’s legislation should provide that a person who donates human reproductive material or an embryo for the purposes of assisted reproduction other than for the person’s own reproductive use

- is not, by reason only of the donation, a parent of a child born as a result, and
- may not be declared to be a parent of the child by reason only of the donation.

### **3. Parent(s) other than the birth parent**

#### **(a) Same-sex or opposite sex partner**

*The Family Maintenance Act* sets out presumptions to be used to determine paternity.<sup>119</sup> There is no requirement for a biological connection in relation to the term “father”, but the term “parent” is defined to mean a biological parent, adoptive parent or a person declared to be the parent of a child.

The *FMA* does not provide a mechanism for identifying the same-sex partner of the birth mother as a parent. As well, in the case of assisted reproduction by an opposite-sex couple using third party donor sperm, the partner of the birth mother would fit within the Act’s presumptions for paternity, but not within the definition of “parent”. As noted, *The Vital Statistics Act* allows the birth registration of a child conceived through artificial insemination to be completed showing the birth mother’s partner as the father or other parent, but this provides presumptive proof of parentage only, and is not conclusive legal status.

With respect to the same-sex partner of a birth parent, Canadian courts have consistently held that a statute that requires a person in a same-sex relationship to engage in a legal process to gain the same parental status or presumptions granted to a person in a heterosexual relationship contravenes section 15 of the *Charter*. This situation is also not in the best interests of the children born within these family relationships.<sup>120</sup> As the Victorian Law Reform Commission has observed, recognizing the non-biological parent in law means that the parent:

is subject to all the legal obligations of caring for the child; having consented to the treatment as a result of which the child was conceived, he or she cannot avoid caring or providing for the child because of the absence of any biological relationship.<sup>121</sup>

Legal recognition also means that the relationship between both partners to the child is clear if the relationship breaks down and the partners dispute their intentions:

These issues arise in numerous mother versus mother cases that usually concern disputes about co-mother contact with the child or children, who reside after relationship breakdown with the birth mother .... In an alarming number of cases the birth mother has taken the position of absolutely denying the parental role of the co-mother.<sup>122</sup>

In cases that do not involve surrogacy all Canadian jurisdictions that address same-sex relationships in legal parentage legislation now provide that the birth mother's partner at the time of conception is presumed to be a parent of the child if she consented to the conception.<sup>123</sup> The presumption flows from the intent of the couple to conceive and parent a child, rather than biology, so that a child born to a same-sex couple has the same legal status as a child born to an opposite-sex couple.

In Alberta, the presumption applies if no male person provided sperm with the intention of becoming a parent and if the birth mother's partner consented to be a parent at the time of conception. In Prince Edward Island, the presumption applies unless the partner did not consent to the conception and did not demonstrate a settled intention to treat the child as the partner's child or the partner did not know that the child was born by assisted conception. In Québec, there is a presumption that if a child is born of a parental project during a marriage or civil union or within 300 days after its termination, the same-sex or opposite-sex spouse of the birth mother is the child's parent.

Under the Uniform Act and in the Northwest Territories, the partner is presumed to be a parent if he or she consented to be a parent of the child and did not withdraw the consent before the conception. A person who was a partner of the birth mother at the time of conception is presumed to have consented unless the contrary is proven on a balance of probabilities.<sup>124</sup>

The British Columbia Act is somewhat simpler; the partner of the birth mother is presumed to be a legal parent unless there is proof that before the conception the person did not consent to be the child's parent or withdrew the consent.<sup>125</sup> The Commission endorses this more straightforward approach.

Under this model, legal parentage flows in large part from the intent of the parties to conceive a child. If a person enters into a relationship with the birth mother after the conception, the person's legal status with respect to the child would be the same as if assisted reproduction had not been used. Adoption would be the only route to legal parenthood.

## **COMMISSION'S CONCLUSION**

The Commission concludes that, in assisted reproduction situations that do not involve surrogacy, the spouse or partner of the birth mother at the time of the conception should be presumed to be a parent of the child, unless there is proof that the spouse or partner did not consent to be a parent to the child, or that he or she withdrew consent, before the conception.

### **(b) Multiple parents**

The Commission has suggested that where a birth mother intends to be a legal parent to the child, there should be a legislative presumption that her spouse or partner is a parent of the child, as well as a provision that a donor of reproductive material is not a parent by reason only of the donation. However, this may not be adequate for all family situations. As the case law illustrates, the birth mother, her partner and the sperm donor may intend before the conception that the donor will be a known and involved legal parent. In circumstances of ovum or embryo donation, the parties may intend that a third party female donor will be a legal parent. The number of parties involved may be larger if a sperm, ovum or embryo donor has a spouse or partner.

Although the number of cases brought before the courts has been limited, orders have been made to reflect the realities of these parenting choices. In the Ontario case *A.A. v. B.B.*, discussed in Chapter 2, Section G of this report, the parties to the conception wanted the biological mother, her same-sex partner and the donor biological father all to be recognized as legal parents of the child. The Court of Appeal agreed that it was in the child's best interests for all three involved adults to be recognized as legal parents.<sup>126</sup> In *D.W.H.*, the Alberta Court of Appeal affirmed a parentage declaration in circumstances involving a male couple and the birth mother without finding it necessary to determine whether the result was that the child had three legal parents.<sup>127</sup>

The remedies in these cases were individual ones, granted under court's *parens patriae* jurisdiction. Comprehensive legislative remedies were not ordered.<sup>128</sup> The cases also did not address the right of a person to be registered as a third parent of a child at birth, without applying to court.

The case of *C. (M.A.) v. K. (M.)*<sup>129</sup> arose following a relationship breakdown in a three parent family. A lesbian couple conceived a child through assisted reproduction, and all parties agreed that the biological father would be recognized as the child's legal father and would have generous access. The relationship was amicable for several years, but eventually deteriorated. The couple applied jointly to adopt the child, and for an order dispensing with the biological father's consent, arguing that the order was needed in order to solidify the legal status of the non-biological mother and to resolve the conflict with the biological father. The biological father had signed a written agreement shortly after the child's birth that if the couple applied to adopt the child he would, if necessary, consent. However, he opposed the application for an order dispensing with his consent because the adoption would terminate his status as a legal parent. He claimed that an adoption order would discriminate against him as a gay father

...because it says you're a second-class parent. You are little more than a sperm donor we control. It will have a chilling effect on the reproductive choices available to the gay and lesbian community.<sup>130</sup>

The court declined to make the order, finding that it was not bound by the terms of the parties' agreement.<sup>131</sup> The non-biological mother had other options available to her, including, since the decision in *A.A. v. B.B.*, the option to apply for a declaration that the child has three legal parents.

The biological father had been a loving, involved and responsible parent, and terminating his parental status would not be in the child's best interests. The court said:

...This court sees all kinds of family structures and, absent specific statutory provisions otherwise, the nuclear family of two parents and a child enjoys no special preference when the court is assessing the best interests of a child. Indeed, a child can have more, or less, than two parents for the purposes of family law...<sup>132</sup>

Some commentators have argued for broader recognition of multiple family forms:

If it causes psychological distress to deny a lesbian co-mother status as her child's parent, ... how is there less distress because there is a known donor or an involved father? Of course, the offence to dignity is the same. ...Non-recognition of parentage is dehumanizing and psychologically distressing....

Another constitutional case, at great expense, or government action, is needed to recognize and affirm the realities of all families, rather than enforce traditional family forms as privileged. The equality guarantee of the Charter requires that we move past fear and rejection of what is unfamiliar, look at the effects of legal exclusion from the perspective of the rights claimant, and see the common humanity that unites us all. Children in GLBT families and their parents should not be marginalized, nor children's best interests threatened, because their families are "different" from the culturally dominant, yet increasing statistically rare, norm of the nuclear family.<sup>133</sup>

The New Zealand Law Commission recommended against a limit of two parents in legislation:

... We have considered whether valid policy reasons exist to exclude the possibility of more than two parents at law. There may be a heightened potential for conflict; however, that in itself is not a reason to limit the numbers of parents. There is no restriction on how many guardians may be appointed in relation to one child, although the potential for conflict will be a significant factor in the court's decision whether or not to appoint an additional guardian. ....

Should the relationships break down, a potential for difficulty is how the court will deal with issues of custody and access between three parents. However, the courts encounter the same issues when stepfamilies separate and there are two genetic parents and another "social" parent who may play a significant role in the child's life and with whom ongoing contact may be in the child's best interests.<sup>134</sup>

In 2007, the Victorian Law Reform Commission recommended that the two parent limit continue, at least for the time being, observing:

This will not prevent people from forming families where several people act as parents. It remains possible, therefore, that in time, a process similar to that of opting ... may emerge as a necessity for a greater number of families where the donor is regarded as a parent of the child. Legal recognition of non-birth mothers may be the

first step towards developing a sense of confidence in and acceptance of diverse family types necessary for further reform.<sup>135</sup>

It has been suggested that while recent judicial recognition of the multiple parent model recognizes the reality of diverse family forms, there is a risk that the intentions of same-sex couples to parent exclusively won't be respected:

[T]he multiple parent model ... gives recognition to the many lesbian and gay parents who seek to create families outside of the two-parent biological model, it is inclusive of the many other models of parenting that exist within society (such as step-families and the kinship parenting networks found within many indigenous communities), and ultimately it may transcend the traditional, patriarchal and heterosexist model of family. However, in light of the gender battles that continue to plague Canadian family law, there is a real possibility that the multiple parent model might be used by the courts to "find fathers" for children born into lesbian families.<sup>136</sup>

On the other hand, if the recognition of more than two legal parents in appropriate situations accurately reflects the considered choice of the parties and the reality of the intended family at the time of conception, it may provide more stability for the child, and perhaps reduce the potential for uncertainty and conflict in the event of relationship breakdown. The corollary is that the intention of the parties will be clear if they choose not to enter into a multiple parent agreement when that option is expressly available in legislation. This will also help to ensure that the parties' intentions are carefully considered in advance and expressed in writing. The B.C. Branch of the Canadian Bar Association, in its submission on the new *Family Law Act* said:

Regarding surrogacy and genetic donors, the CBABC FRA Working Group does not want to discourage these practices by having the Proposed Act imposing involuntary legal obligations on anyone. But if third or fourth parties make themselves parents, the CBABC FRA Working Group recommends that these parties must do so by contractual agreement. These agreements should make plain the financial responsibilities for the parenting involved in a surrogate or donor relationship.<sup>137</sup>

The Alberta and Prince Edward Island child status statutes set a maximum of two legal parents for a child.<sup>138</sup> The B.C. *Family Law Act* and the Uniform Act, on the other hand, provide for the possibility of more than two legal parents.

Under the Uniform Act, a child born as a result of assisted reproduction may have more than two legal parents if a court makes a declaratory order that a person is an additional parent. The birth mother, her partner, if any, and the prospective additional parent (s) must all consent before the conception that the person will be an additional parent. The additional parent must have a genetic link to the child (as a sperm, ovum or embryo donor), or be a donor's partner.

Under these provisions, there could be a maximum of six parents (the birth mother, ovum donor, sperm donor and their partners). The application to court must be made within 30 days after the birth of the child unless the court extends the period.

In B.C., a court order is not necessary for a child to have more than two legal parents, and the intended parents do not have to be genetically linked to the child. A person who intends to be a parent of a child, or two persons in a marriage or marriage-like relationship who intend to be parents of a child, must enter into an agreement with the prospective birth mother before the child is conceived that they will all be the child's legal parents. Alternatively, the birth mother, her partner and a donor could enter into an agreement. An agreement is revoked if one of the parties withdraws or dies before a child is conceived.<sup>139</sup>

The first option would allow a gay male couple, along with the birth mother, to be the parents of a child at the child's birth. The option would also allow for other combinations. The agreement could be between the birth mother and a lesbian or heterosexual couple, or the birth mother and a single man or woman, whether or not any of them were able to provide the sperm, ovum or embryo. This enables a couple or single person to be recognized as legal parents even though both the sperm and the ovum, or the embryo, were donated. The only restriction is that if there are two intended parents they must be married or in a marriage-like relationship. Under this option, a partner of the birth mother is not included among the possible parents.

The second option allows a birth mother, her same-sex or opposite sex partner, and a donor to enter into a parenting arrangement. A partner of the donor is not included. The provisions appear to contemplate an arrangement between a birth mother and her partner and a single donor, rather than multiple donors, although the Act doesn't specifically set a maximum number of parents. Since a conception may involve both a sperm and ovum donor, it may be that a child could have four legal parents. On the other hand, the section describes "a donor who agrees to be a parent together with the potential birth mother and a person married to or in a marriage-like relationship with the potential birth mother".<sup>140</sup> It doesn't mention the donor agreeing to be a parent with another donor as well.

One effect of the B.C. Act is that the same-sex partner of the birth mother and the same-sex partner of a donor are in generally the same parenting circumstances when multiple parents are contemplated. The same-sex partner of the sperm or ovum donor may be an intended parent in an agreement with the donor (as the other intended parent) and the birth mother. The same-sex partner of the birth mother may enter into an agreement with the birth mother and the donor. A partner of either the birth mother or the donor may be included in a parenting arrangement, but not both.<sup>141</sup>

The approaches in the B.C. and Uniform Acts also differ with respect to the requirement for a court order. In B.C., if all requirements are met, the parties to an agreement are the legal parents of the child from the time of the child's birth without a court application, and they may be identified as the parents on the child's birth registration. In *M.D.R. v Ontario (Deputy Registrar General) (Rutherford)*<sup>142</sup> the Ontario Superior Court of Justice commented that the right to register as a parent at the child's birth is a significant benefit:

I agree with the Applicants, the benefit they seek under the VSA is access to the benefit of being able to register both intended parents as of right, or access to the social and symbolic institution of having their names on the birth record at first instance. For the child, the benefit is in having their parents put on the birth registration at first instance. As argued by the Applicants access to a court proceeding is not the same thing as access to parental recognition at first instance...

...it would seem that in identifying the benefit at the outset it is necessary to consider the symbolic feature of the benefit from the perspective of the Applicants. In this respect, this case is analogous to the gay marriage cases: the Applicants want access to the same scheme as heterosexual parents, not a parallel scheme. They view themselves as totally excluded. Furthermore, they want to ensure that they do not need to waive their privacy to gain parentage and to forgo the risk that they will not receive a declaration of parentage or adoption.<sup>143</sup>

## COMMISSION'S CONCLUSION

There are circumstances in which it may be appropriate for a child to have more than two legal parents. Several Canadian courts have recognized this need and have exercised the *parens patriae* jurisdiction to grant parentage orders in multiple parent situations. Setting out a statutory process for multiple parent arrangements would provide greater certainty to both the adults and children involved.

Law reform initiatives in Canada offer a variety of approaches to this question. In British Columbia, up to three adults may be presumed to be parents provided certain conditions are met. Under the Uniform Act, there could be as many as six parents. If the Uniform Act's approach is extended to include intended parents with no genetic or gestational connection to the child, the maximum number of parents becomes eight. More recent technologies, such as nuclear transfer, could further increase the number of genetic parents.

On the other hand, some Canadian jurisdictions have expressly provided for a maximum of two legal parents. British Columbia is the only Canadian jurisdiction to have enacted a provision for more than two legal parents, and the Commission is not aware of any comparable provisions in jurisdictions outside Canada.

Given the novelty of a statutory provision for the presumption of more than two legal parents, the Commission recommends caution when legislating in this area. The British Columbia provision has been in force for just over one year. There is little evidence available about what effect such provisions may have on the interests of the children born as a result of multi-parent arrangements.

At present, the Commission is not in a position to formulate a preferred approach to this question. Manitoba's existing legislation does not appear to preclude a court order declaring an additional parent in circumstances the court considers appropriate, using its *parens patriae*

jurisdiction. Before making any recommendations about statutory amendments in this area, the Commission considers that additional research, consultation and deliberation is required on questions about who should be eligible to be an additional parent, what conditions should be met, and whether additional parents should be presumed in the law without judicial intervention.

## C. Surrogacy

### 1. Process for transfer of legal parentage

The Manitoba *Family Maintenance Act* does not address surrogacy arrangements. The Act allows any person having an interest to apply to court for a declaration that a woman is or is not in law the mother of a child, or that a man is or is not in law the father of a child. The application may be made before the birth of the child with respect to a father but not with respect to a mother. The terms ‘mother’ and ‘father’ are not defined, but ‘parent’ is defined as the biological or adoptive parent of a child.<sup>144</sup>

In *C.(J) v. Manitoba*,<sup>145</sup> the genetic parents of a child being carried by a surrogate mother (the genetic father’s sister) applied before the child’s birth for a declaration compelling hospital staff attending at the birth to complete documentation showing the applicants to be the parents of the child and that they were to be shown as the ‘natural and legal parents’ of the child on the birth certificate. Because the *FMA* allows for a declaration of parentage to be made before the birth of a child in respect of a father but not in respect of a mother, they argued that they “should not be penalized because Manitoba has a legislative vacuum which does not deal with the unique circumstances of this case in particular and with advances in medical technology over the past ten years in general”.<sup>146</sup>

The court held that a declaration of parentage could not be made before the birth in respect of the mother of the child. It was clear from the VSA definition of “birth” that the mother for birth registration purposes was contemplated to be the person who gives birth to the child, regardless of the original source of the genetic material. There was no gap, as the Legislature had put its mind to the timing of parentage orders and “must have contemplated differential treatment when pre-birth declarations of paternity only were allowed”.<sup>147</sup> No *Charter* challenge was made and so there was no argument as to whether the treatment would survive scrutiny under the section 15.<sup>148</sup>

Legislation in Alberta and British Columbia, regulations in Nova Scotia and the Uniform Act each set out a process by which a birth mother may relinquish legal parentage to the intended parents under a surrogacy arrangement. In jurisdictions where there is no legislation, courts must rely on their inherent jurisdiction to act in the best interests of the child when making parentage declarations in surrogacy situations.

In Alberta and Nova Scotia and under the Uniform Act, the birth mother is the legal mother at birth, whether or not there is a surrogacy arrangement. A genetic link between the birth mother and the child is not necessary. After the child is born, a court order may be made, if the surrogate mother consents, declaring the intended parents to be the child's parents and the birth mother not to be a parent. In all three schemes, the intended parents may be a same-sex or opposite sex couple, but one of the intended parents must have a genetic link to the child.<sup>149</sup>

The Uniform Act provides that the order is deemed to be effective from the time of the child's birth, but until the order is made, the surrogate and an applicant jointly have the rights and responsibilities of a parent in respect of the child. While this clarification may assist the intended parents, the result of any process that requires a court order in uncontested situations is that a surrogate mother who does not intend to be a legal parent will have a legal role in decision making with respect to the child until the court order is made. The situation may prove difficult if decisions about urgent medical care are needed, for example, or if there is a need to travel before a court order can be obtained.<sup>150</sup>

The British Columbia Act is unique in Canada, in that the birth mother is not the child's legal mother at birth if the conditions set out in the Act are met. The intended parents will be the legal parents from birth, and will be registered on the birth statement, if all parties recorded their intentions in writing before the conception, the surrogate provides written consent to the intended parents after the birth and the intended parents take the child into their care. No genetic link is necessary between the intended parents and the child.<sup>151</sup>

Where all parties consent after the birth, the process is administrative rather than judicial; a court declaration is not required.

In all jurisdictions, a court declaration remains available where there is a question as to legal parentage. The Alberta, B.C. and Uniform Acts also provide for a court to confirm, vary or set aside a previous order if evidence becomes available that was not available at the time of the original declaration. Rights or duties that have already been exercised and property interests that have already been distributed are not affected.<sup>152</sup>

No Canadian jurisdictions allow a surrogate mother to relinquish parentage before the birth of the child. The Alberta and Uniform Acts specifically provide that a surrogacy contract is unenforceable, and it may not be used as evidence of the surrogate mother's consent after the birth.<sup>153</sup> The Québec *Civil Code* provides that a surrogacy contract is null.<sup>154</sup> Allowing surrogacy contracts to be enforceable is consistently argued to be inconsistent with public policy, women's personal autonomy rights and the principle that no agreement can displace the court's inherent *parens patriae* jurisdiction to act in the best interests of the child.<sup>155</sup>

In some U.S. states, a court can determine parentage in surrogacy situations before the child is born, on application by the intended parents and the surrogate. In some states, there must be a genetic link with an intended parent. The U.S. *Uniform Parentage Act* provides that a court may

issue a pre-birth validation order of a gestational agreement, if a number of conditions are met. After the child's birth, the intended parents must file a notice with the court in order to obtain a declaration of parentage. No genetic link is required between the intended parents and the child, but the intended parents must be married and the intended mother must be unable to bear a child without unreasonable risk.<sup>156</sup>

The New Zealand Law Commission recommended a pre-birth interim court order that would become final 21 days after birth, if there is a genetic link to one intended parent and other requirements are met.<sup>157</sup> The Victorian Law Reform Commission recommended a waiting period of 28 days before an application to court may be made, although no genetic link would be required.<sup>158</sup> The U.K. and some Australian states have adopted a post-birth court declaration process, with varying degrees of complexity.<sup>159</sup>

In Canada, if a surrogate mother refuses to relinquish the child at birth, questions of legal parentage, custody and access would be determined by a court under family law principles.<sup>160</sup> As provided in the Alberta and Uniform Act, the surrogacy agreement at this stage may constitute evidence of the parties' original intentions, but the court's *parens patriae* jurisdiction would prevail over any agreement.<sup>161</sup>

## **2. Genetic link with intended parents**

The requirement for a genetic link between the child and the intended parents in most Canadian jurisdictions means that where a conception is achieved using a donated embryo, or donated sperm and a donated ovum, there is no legislative means to transfer parenthood from the surrogate mother to the intended parents. The intended parents would presumably have to adopt the child and the birth mother would be the legal parent until the adoption order is granted.

In 2008, the Joint ULCC-CCSO Working Group on Assisted Reproduction reported that it was considering an option whereby a genetic link would not be required to transfer parentage following a surrogacy:

The second option looks only at the intention to parent. It goes further than option 1 because it does not require the intended parents to apply to adopt the child where neither of them is genetically related to the child. It provides the same process in all surrogacy cases, regardless of whether or not there is a genetic link. This approach is based on distinguishing between adoption and surrogacy on the basis of when the intention to parent this particular child arises. In surrogacy situations both the intention of the intended parents to parent and the intention of the surrogate to relinquish her parentage arise before conception.<sup>162</sup>

However, in its final report in 2010, the Working Group favoured requiring a genetic link:

One of the "intended parents" must have provided the human reproductive material or embryo used, including where mixed sperm was used. Where there is no possible

genetic link between at least one of the intended parents and the child, adoption is the appropriate path to parenthood...

...An option considered and rejected would have expanded this section to cover surrogacy without a genetic link between either of the intended parents and the child. The concern is that this approach could circumvent the public policy around adoption and create an inconsistent approach to protecting the best interests of the child. While it could be argued that this approach can be distinguished from adoption based on the presence of the intent to parent prior to conception, this seems a narrow distinction.<sup>163</sup>

The Working Group's concerns reflect a principal argument in favour of requiring a genetic link for at least one intended parent in a surrogacy situation. Adoptive parents are required to go through an extensive screening process to assess their preparedness for parenthood.<sup>164</sup> A provision which presumes parentage for individuals without a genetic connection to a child would have the effect of circumventing the screening process.

In many ways, however, it seems incongruous to connect legal parentage solely to a genetic link, particularly when the surrogate mother will most often also have no genetic link to the child. All genetic parents may be unknown.<sup>165</sup> Arguably, it also contravenes the principle that children should have equal status and protections regardless of the circumstances of their conception and certainty of status at the earliest reasonable time.

On this point, the New Zealand Law Commission observed:

Genetic connection is a value underlying legal parenthood laws, although the law has never created an exclusivity between parenthood and genetics. Rather it has formulated reallocation rules based on the degree of genetic connection between the child and the intending parents. Where neither intending parent will be the genetic parent of the child the state screens the parents to ensure their suitability. It is protective of the child's vulnerability in the absence of a genetic connection. Where there is a genetic connection between both parents and the child, the law allocates parenthood automatically. Where one of the intending parents is the genetic parent of the child, the law transfers parenthood to the non-genetic partner under a specific legislative scheme that also does not require screening for parental suitability.<sup>166</sup>

The New Zealand Commission accepted that intended parents who do not contribute their own genetic material should not be forced to go through an adoption process. It found, however, that intended parents in these circumstances should be subject to the same process and requirements as apply for adoption.<sup>167</sup> This would include screening for suitability.

The Victorian Law Reform Commission recommended that a genetic link not be required between the intended parents and the child in order for legal parentage to be transferred, explaining:

A genetic connection between the child and the intended parent(s) is ... preferred, but people should not be excluded from commissioning surrogacy if they are unable to contribute their own gametes.<sup>168</sup>

These comments should be considered in the context of the Victorian Law Reform Commission's recommendations for mandatory counselling prior to conception by surrogacy, including an assessment of the intended parents.<sup>169</sup> The Commission concluded that if surrogacy was conducted outside of a clinic setting, and therefore without mandatory counselling and assessment, adoption would be the only course available to the intended parents.<sup>170</sup>

A Queensland Parliamentary Committee recommended in a 2008 report (relating to whether surrogacy arrangements should be legalized in that state) that, although it is desirable for at least one intending parent to contribute gametes where possible, it would be inequitable to limit access to surrogacy "to individuals who have the capacity to provide their own genetic material".<sup>171</sup> The Queensland committee concluded, however, that intending parents should be required to contribute their gametes unless it is impossible or not medically recommended for them to do so.<sup>172</sup> Intending parents would have to demonstrate the need for surrogacy to a panel of experts. The committee also recommended mandatory psychosocial assessment of the prospective surrogate and intended parents.<sup>173</sup>

Most Canadian jurisdictions and several international jurisdictions do require a genetic link with the intended parents in order to transfer legal parentage in a surrogacy arrangement.<sup>174</sup>

## COMMISSION'S CONCLUSION

There is an obvious need for rules governing parentage in surrogacy situations. The interests of the child and all adult participants are best served by establishing parentage with certainty and at the earliest possible time. Accordingly, whenever possible, the Commission favours provisions for establishing parentage that do not depend on court processes in the context of surrogacy arrangements.

The requirement for a genetic connection between intended parents and the child is a more complex question. The arguments against requiring a genetic connection include respect for the participants' desire to consciously and deliberately reproduce, and the difficulty of generalizing about the value of genetic connections in family relationships.<sup>175</sup> There is also a concern about equitable treatment. Ideally, parentage rules should not place intended parents who are unable to contribute genetic material at a disadvantage in relation to other prospective parents.

However, the Commission is aware that the large majority of jurisdictions that regulate parentage and surrogacy do require a genetic connection between one of the intended parents and the child. Those law reform commissions that have recommended against a genetic requirement do so in the context of a cautious regulatory regime that calls for mandatory screening of intended parents

before conception. These regulatory safeguards are intended to protect the interests of the child and all those involved in surrogacy arrangements.

In light of the diverse interests and complex issues involved, the Commission is unable to identify a preferred approach to this question without additional research, consultation and consideration. Reform in this area of the law should take into account all available evidence about the outcomes for children born as a result of surrogacy arrangements.

## D. Children Born Outside Manitoba and Outside Canada

Both the Uniform Act and British Columbia's *Family Law Act* provide specific rules to determine or recognize parentage when a child is born outside the province or outside Canada. The recognition of extra-territorial parentage orders is complicated by the fact that jurisdictions treat parentage and surrogacy in various and often conflicting ways.

Each Canadian province has its own rules concerning legal parentage in cases of assisted reproduction and surrogacy. Foreign jurisdictions also treat parentage in assisted reproduction situations in a variety of ways. Under some systems, the surrogate mother and her partner, if any, are registered as parents on the birth certificate. In others, a parentage order issued in the child's state of birth recognizes the parental status of the intended parents. It is also common for a foreign birth certificate to be issued in the name of the intended parents. In all of these circumstances, intended parents may wish to have their parentage recognized in domestic provincial law.

### Recognition of Extra-Provincial Orders

The Uniform Act provides that extra-provincial declaratory orders made in Canada shall be recognized and have the same effect as if made in the enacting provincial jurisdiction, unless there is new evidence available or the court is satisfied that the extra-provincial declaratory order was obtained by fraud or duress.<sup>176</sup> The British Columbia *Family Law Act* has a similar provision.<sup>177</sup>

The Uniform Act provides that an extra-provincial declaratory order made outside Canada shall be recognized and have the same effect as if made in the provincial recognizing jurisdiction if the foreign court had jurisdiction over the child or at least one of the parents. The domestic court may decline to recognize the order of the foreign court if new evidence is available, the court is satisfied that the extra-provincial order was obtained by fraud or duress, or the extra-provincial declaratory order is contrary to public policy.<sup>178</sup> The British Columbia *Family Law Act* has a similar provision.<sup>179</sup>

Sections 26 to 29 of Manitoba's *Family Maintenance Act* provide for recognition of extra-provincial orders respecting paternity. Orders issued outside Canada will be recognized if the extra-provincial court had jurisdiction over the child or one of the parents and had jurisdiction to

make the declaratory order. A court may decline to recognize an order issued outside Canada if new evidence is available or if the court is satisfied that the order was obtained under fraud or duress.

Section 29 of Manitoba's *Family Maintenance Act* provides that an extra-provincial order may be filed directly with the Director of Vital Statistics who is then authorized to act on it. If the order is from a jurisdiction outside Canada, it must be accompanied by an opinion of a lawyer authorized to practise in Manitoba that the order is entitled to recognition in Manitoba, and a sworn statement by a lawyer or public official in the extra-provincial jurisdiction as to the effect of the order. The document must be translated as required by the Director of Vital Statistics.

This administrative arrangement may be appropriate for extra-provincial orders issued in Canada. However, considering the policy implications and risks associated with international surrogacy arrangements, the Commission takes the view that extra-provincial parentage orders issued outside Canada ought to be recognized through a judicial rather than an administrative process.

It suggests a provision similar to those in the Uniform Act and the British Columbia *Family Law Act* allowing recognition of extra-provincial orders issued outside Canada unless there is new evidence that was not available at the time the order was issued, the court has reason to believe that the order was obtained through fraud or duress, or the order is contrary to public policy.

## **COMMISSION'S CONCLUSION**

The Commission concludes that Manitoba's legislation should include provisions for recognizing extra-provincial parentage orders consistent with sections 13-17 of the *Uniform Child Status Act*. A court order should be required to recognize extra-provincial declaratory orders issued outside Canada.

### **Birth Certificates Issued Outside Canada**

Intended parents residing in Manitoba may wish to regularize their legal status if they are identified as parents on a birth certificate issued outside Canada but would not be presumed to be the child's parents under Manitoba law. The Uniform Act provides that persons in this situation may apply to the court for a declaratory order that they are the parents of the child and that the court may make an order declaring them to be parents if the child would otherwise have no parents.<sup>180</sup> The Commission is in favour of including a similar provision in Manitoba's legislation.

## **COMMISSION'S CONCLUSION**

Manitoba's legislation should include a provision for a declaratory order respecting parentage in cases where intended parents are listed as the parents on a birth certificate issued outside Canada, consistent with section 18 of the *Uniform Child Status Act*.

## **E. Judicial Oversight**

In this paper, the Commission has suggested approaches to establishing parentage that do not depend on court processes. This is consistent with the best interests of both the child and the intended parents. The legislation, however, merely creates presumptions of parentage which can be rebutted. Inevitably, there will be cases in which there is a dispute or uncertainty as to whether a person is or is not a parent. In such cases, the Commission suggests that Manitoba's legislation should make clear that any interested person may apply to the Manitoba Court of Queen's Bench for a declaratory order of parentage. Sections 31 and 32 of the British Columbia *Family Law Act* provide specific rules for such applications and serve as a useful model for reform in Manitoba.

### **COMMISSION'S CONCLUSION**

The Commission suggests that Manitoba's legislation should include a provision for application to the Court of Queen's Bench in cases of dispute or uncertainty about parentage, following the model of sections 31 and 32 of the British Columbia *Family Law Act*.

## **F. Consequential Amendments to *The Vital Statistics Act***

This paper has identified a lack of correspondence between Manitoba's *Family Maintenance Act* ("FMA") and *The Vital Statistics Act* ("VSA"). While the VSA allows a same-sex partner of the birth mother to be registered on a birth certificate, that person is not contemplated as a parent in the FMA. Similarly, in cases of artificial insemination, the father or other parent recorded under the VSA would not satisfy the FMA's definition of parent.

The VSA also allows for registration of an "other parent" only in cases of artificial insemination, excluding many intended parents who conceive using other forms of assisted reproductive technology.

These inconsistencies should be addressed through legislative amendment of both the FMA and the VSA. The administrative procedures for the registration of births should be consistent with the parentage provisions, and should be updated to account for any changes to the rules governing legal parentage.

### **COMMISSION'S CONCLUSION**

Manitoba's legislation should be amended to ensure consistency between the birth registration provisions in *The Vital Statistics Act* and the legal parentage provisions in *The Family Maintenance Act*. Manitoba's *Vital Statistics Act* should also be amended to account for all forms of assisted reproduction technology, and not just artificial insemination.

## G. Parenting Terminology

Advances in assisted reproduction technologies and our changing views of the family require us to reconsider what it means to be a legal parent. If Manitoba law is to reflect new family realities, the terminology used in legislation will have to be reconsidered. Parentage and birth registration statutes should ensure that gender neutral terminology options are used with respect to the persons involved in a child's conception and birth, where possible. This concern relates to issues surrounding same-sex parenting and the fact that a child may have more than one "mother" and no "father", or more than one "father" and no "mother". There are also emerging issues surrounding gender terminology, sex reassignment and human rights.

The Manitoba *Vital Statistics Act*, like other Canadian vital statistics legislation, provides that a person who has undergone transsexual surgery may apply to the Director to change his or her designation of sex.<sup>181</sup> The person must submit two medical certificates certifying that surgery has occurred and that as a result, the sex designation of the person should be changed. On being satisfied that the designation should be changed, the Director will make a notation on the person's birth registration changing the sex designation so that it is consistent with the results of the surgery. Every birth certificate issued after the change must be issued as if the original registration had been made with the sex as changed.<sup>182</sup>

Transsexual surgery does not necessarily result in a person's inability to conceive or carry a child as a member of the person's original gender. If a person undergoes a female to male transition but does not have a hysterectomy, it may be possible for the person, now identified on birth registration documents as a male, to carry a fetus. The person could also be the donor of an ovum or embryo. Similarly, the sperm of a person who has undergone a male to female transition and is identified as a female may be used to conceive a child.<sup>183</sup>

Further, court and tribunal decisions under provincial human rights legislation have held that discrimination against transsexual persons on the basis of their gender identity or gender transition, whether before or after surgery, is discrimination on the basis of sex under human rights codes.<sup>184</sup>

The Ontario Human Rights Tribunal recently ordered the Ontario government to cease requiring evidence that transgendered persons have undergone surgery before amending the change of sex designation on their birth registrations. The Tribunal found that the requirement for surgery discriminated on the basis of sex.<sup>185</sup> The Ontario government has complied with the order, and no longer requires evidence of surgery in order for a person's birth registration to be amended. A person is now required to complete a statutory declaration stating that they have assumed, or have always had, the gender identity that accords with the change in sex designation, they are living full time in that gender identity and they intend to maintain that gender identity.<sup>186</sup>

This approach has been supported by the Council of Europe Commissioner for Human Rights:

The key point here is that there is no inherent need to enforce one set of specific surgical measures for the classification of an individual to be eligible for changing sex. Similar reasoning lies behind the Spanish Ley de Identidad de Género and the British Gender Recognition Act. Both laws have recognised that the protection of the majority's assumed unease with the procreation of transgender people – which is, due to hormonal treatment and the wishes of most concerned individuals, extremely rare – does not justify a state's disregard of their obligation to safeguard every individual's physical integrity. States which impose intrusive physical procedures on transgender persons effectively undermine their right to found a family.<sup>187</sup>

This Commissioner recommended that countries “[a]bolish sterilisation and other compulsory medical treatment as a necessary legal requirement to recognise a person's gender identity in laws regulating the process for name and sex change”.<sup>188</sup>

Eventually, children will be born in Manitoba following the use of assisted reproduction by persons whose reproductive capacity does not match the gender identified on their birth registration documents. Terminology referring to the ‘other parent’ or an ‘additional parent’ is already employed in the legislation of some jurisdictions, but it is possible that a child may have neither a ‘mother’ who is female nor a ‘father’ who is male.

## **COMMISSION'S CONCLUSION**

In the Commission's view, it is in the best interests of children born in these circumstances if the terminology used was sensitive to these matters, so far as possible, so that discriminatory assumptions and inappropriate terms are avoided. Manitoba's parentage and birth registration legislation should be amended to use gender neutral language wherever possible.

---

## **CHAPTER 4: SUMMARY OF THE COMMISSION'S CONCLUSIONS**

### **Assisted Reproduction- No Surrogacy**

- In assisted reproduction situations that do not involve surrogacy, Manitoba legislation should provide that the person who gives birth to a child is a parent of the child, whether or not a genetic link to the child exists. (p. 24)
- Manitoba legislation should provide that a person who donates human reproductive material or an embryo for the purposes of assisted reproduction other than for the person's own reproductive use
  - is not, by reason only of the donation, a parent of a child born as a result, and
  - may not be declared to be a parent of the child by reason only of the donation (p. 25)
- In assisted reproduction situations that do not involve surrogacy, Manitoba legislation should provide that the spouse or partner of the birth mother at the time of the conception is presumed to be a parent of the child, unless there is proof that the spouse or partner did not consent to be a parent to the child, or that he or she withdrew consent, before the conception. (p.26)
- The Commission recognizes the merit of a provision allowing for additional parents in non-surrogacy situations, but is not in a position to formulate a preferred approach to this issue without additional research, consultation and consideration. (p.31)

### **Surrogacy**

- The Commission recognizes the need for regulation of parentage in surrogacy situations. It favours out-of-court processes for establishing parentage wherever possible. Considering the diverse interests and complex policy issues involved, the Commission is not prepared to formulate a preferred approach to the transfer of parentage in the context of surrogacy without further research, consultation and deliberation. (p.36)

### **Children Born Outside Manitoba**

- Manitoba's legislation should include provisions for recognizing extra-provincial parentage orders consistent with sections 13-17 of the *Uniform Child Status Act*. A court order should be required to recognize extra-provincial declaratory orders issued outside Canada. (p.38)
- Manitoba's legislation should include a provision for a declaratory order respecting parentage in cases where intended parents are listed as the parents on a birth certificate issued outside Canada, consistent with section 18 of the *Uniform Child Status Act*. (p.38)

## **Judicial Oversight**

- Manitoba's legislation should include a provision for application to the Court of Queen's Bench of Manitoba in cases of dispute or uncertainty about parentage, following the model of sections 31 and 32 of the British Columbia *Family Law Act*. (p.39)

## **Consequential Amendments to *The Vital Statistics Act***

- Manitoba's legislation should be amended to ensure consistency between the birth registration provisions of *The Vital Statistics Act* and the legal parentage provisions of *The Family Maintenance Act*. *The Vital Statistics Act* should be amended to account for all forms of assisted reproduction technology, and not just artificial insemination. (p.39)

## **Parenting Terminology**

- Manitoba's legislation concerning parentage and birth registration should use gender neutral terminology wherever possible. (p.41)

---

## APPENDIX A: CASE LAW

### ***M.D. v. L.L. – Birth registration***

In *M.D. v. L.L.*,<sup>189</sup> the applicants were the genetic parents of a child conceived through in vitro fertilization and carried by a gestational surrogate. They sought an order declaring that they were the parents of the child, and an order that the surrogate mother and her spouse were not parents of the child. With respect to the surrogate mother, the court considered whether it could declare a person not to be a parent when she is the ‘mother’ of the child under the statutory definition of ‘birth’. The court concluded that it could do so:

A declaration of parentage pursuant to section 4 of the CLRA is a judgment in rem, recognized for all purposes by the world: *Sayer v. Rollin* (1980), 16 R.F.L. (2d) 289, [1980] O.J. No. 613 (Ont. C.A.), at para. 5. What additional benefit is there in a declaration of non-parentage when combined with a section 4 declaration? .... Where there are two persons with potential claims to be the child's mother, a declaration that one of them is the child's mother might not preclude the other from also being that child's mother. Thus, a declaration of non-maternity would clarify the status of the interested parties in a manner that is worthy of judicial determination...

In my opinion there is a gap in the current VSA legislation that does not operate in the best interests of the child, insofar as the inferential definition of “mother” under that statute impedes the court's jurisdiction to declare a person not to be the mother of a child.

The definition of “birth” first appears in the Vital Statistics Act, 1948, Ch. 97, section 1(a): “birth” means the complete expulsion or extraction from its mother of a foetus which did at any time after being completely expelled or extracted from the mother breathe or show any other sign of life, whether or not the umbilical cord was cut or the placenta attached.

As can be seen, this definition is in essence the same definition of birth that we have today, exactly 60 years later. In 1948, the notion that ova could be fertilized in a laboratory, and then implanted into a surrogate mother to gestate, would have been the stuff of science fiction. The current VSA has not changed with respect to its definition of “birth”, and the consequent inference that the “mother” is the person who gave birth to the child. There is no recognition in the VSA that there can be two mothers: the birth mother and the genetic mother.<sup>190</sup>

### ***Gill v Murray – Birth registration***

In *Gill v. Murray*,<sup>191</sup> two lesbian couples who had conceived children through assisted reproduction challenged the refusal of the British Columbia Director of Vital Statistics to register the same-sex partner of the biological mother as a parent. Opposite sex couples registering as parents were not questioned as to their biological connection to the child. The couples argued

that the refusal discriminated against them on the basis of their sex, sexual orientation and family status, contrary to the British Columbia *Human Rights Code*.<sup>192</sup>

The Tribunal agreed that the failure to register the births discriminated against both the couples and their children:

The effect of the Birth Registration process is to deny same-sex couples the right to be registered as parents of a child, or to reflect the family unit, which is a right that opposite sex parents have.

When the partner of the mother is not a biological parent of the child, Vital Statistics will only register that parent if an adoption order under the provisions of the Adoption Act, R.S.B.C. 1996, c. 5 has been obtained. Although this is theoretically the case whether the partner is the same or the opposite sex as the mother, in practice only same-sex partners of mothers are questioned as to their biological relationship with the child. Opposite sex partners of women giving birth are not similarly questioned.

Furthermore, women who give birth to a child born using a donor egg are registered as mothers without question. Similarly, men who self-identify as fathers are able to register themselves as such on the Birth Registration forms. Neither parent is required to adopt, or resort to the Court, to establish the parent-child relationship....

With the advent of various forms of reproductive technology, it is possible for a child to have legal social parents, biological parents, and a birth mother who is neither a legal social or biological mother. It is evident that the Birth Registration regime established by Vital Statistics has not kept up with reproductive technologies....

I conclude that Vital Statistics has denied the Complainants access to the benefit of verification and documentation of parent/child relationships available to others without the necessity of the adoption procedure, and has thus contravened s. 8 of the Code. I find that Vital Statistics has discriminated against [the Complainants] on the basis of sex, sexual orientation and family status. ....

Further, I find that Vital Statistics has discriminated against the infant children on the basis of sex, sexual orientation and their family status by denying them the right to have their parents named on the birth registration, and birth certificate, even though both parents acknowledge and fulfil the parental role. In that respect, the infant Complainants are treated differently than children of opposite sex parents.<sup>193</sup>

The Tribunal ordered the Director to amend the birth registration form so that it allows the registration of a non-biological parent who is the co-parent of a mother or father.

### ***Rypkema v British Columbia – Birth registration***

*Rypkema v. British Columbia*<sup>194</sup> dealt with the right of genetic parents in the case of surrogacy to be identified on the child's birth registration. The applicant couple had entered into a gestational

surrogacy arrangement with a married woman. After the birth, the surrogate mother and her spouse surrendered custody and care of the child to the applicants, with the intent that the applicants would be the parents. The Director of Vital Statistics declined to register the couple as the child's parents, because the intended mother had not given birth to the child as defined in the *Vital Statistics Act*. At the time, BC did not have legal parentage legislation, and the only other option was adoption.

The court ordered that the intended parents be registered on the child's birth registration, stating that the cost and trouble of adoption was not necessary. The applicants did not raise *Charter* or human rights issues, but the court held that it had jurisdiction to make declarations of paternity and maternity in the absence of parentage legislation. All parties had intended that the genetic parents would be the parents, and including their details on the birth registration is an important means of affirming the parent-child relationship and allowing them to participate in their child's life. This would avoid the child being disadvantaged by any difficulties faced by the parents in carrying out their parental role.

### **K.G.D. v C.A.P. – Birth registration and legal parentage**

In *K.G.D. v. C.A.P.*,<sup>195</sup> the applicant was the biological father of a child carried by a gestational surrogate mother. The child was conceived by in vitro fertilization using a donor ovum. The genetic mother was unknown, and the biological father had cared for the child since her birth.

The court found that there was a legislative gap in Ontario's vital statistics legislation, because it did not contemplate the registration of the birth of a child without a mother.<sup>196</sup> Using its *parens patriae* jurisdiction, the court found that it was in the child's best interests to grant a legal parentage declaration and ordered that the applicant be shown as the father and the only parent on the birth registration.

### **Fraess v Alberta – Legal parentage**

In *Fraess v. Alberta (Minister of Justice and Attorney General)*,<sup>197</sup> the same-sex partner of a biological mother applied to have a provision of the Alberta *Family Law Act* declared unconstitutional. The biological father was an anonymous donor. The *FLA* at that time provided that the male spouse of a woman who conceived through assisted conception was presumed to be a legal parent on the birth of the child if he consented to being a parent before the conception. There was no requirement for a genetic link between the male spouse and the child. However, as a same-sex partner of the biological mother, the applicant was not presumed to be a legal parent and her only option for legal parentage was a step-parent adoption.

The court held that the Act contravened section 15 of the *Charter*, by forcing a same-sex spouse to engage in a protracted legal process to gain the same parental status that was granted to heterosexual spouses by operation of law. It considered severing the section, but noted that

severance would remove the recently enacted presumption in favour of male spouses in cases of assisted conception:

It seems extraordinary that once the Legislature as a policy matter accepts a person can be a parent through intention that should be taken away from those persons because it is discrimination under the Charter.

The Legislature has already answered the question of whether a legal parent child relationship can arise from an intent on the part of the adult to create the relationship. That occurs under the present legislation only for male persons. Once the Legislature has exercised that policy option to extend the right to males the law is clear there is no justification for not extending the right to females.<sup>198</sup>

The court held that the appropriate measure was to read in language that would include the applicant as the spouse of the biological mother.

### ***M.D.R. (Rutherford) v Ontario – Birth registration***

In *M.D.R. v. Ontario (Deputy Registrar General) (Rutherford)*,<sup>199</sup> the applicants were lesbian couples who were parents of children conceived through anonymous donor insemination. As in *Gill*, a male partner of a woman who gave birth after assisted conception could be identified as a parent on the birth registration. There was no requirement for a biological connection to the child. Unlike *Gill*, however, the applicants had the option of applying for a declaration of legal parentage under Ontario legislation.

The applicants in Rutherford sought “access to the benefit of being able to register both intended parents as of *right*, with the resulting presumption of parentage, or access to the social and symbolic institution of having their names on the birth record at first instance”.<sup>200</sup> They objected to the requirement that they obtain a declaration of legal parentage in order to be named on the birth registration. The court observed that “[f]or the child, the benefit is in having their parents put on the birth registration at first instance”.<sup>201</sup>

The Ontario Superior Court of Justice declared that the birth registry scheme under the VSA was invalid because it contravened subsection 15 of the *Charter*. The applicants were denied equal benefit of the law because they were denied presumptive proof of parentage, and the hardship suffered went to the core of their essential dignity.

The court observed that the Supreme Court in *Trociuk* acknowledged the importance of birth registration and the recording of biological ties, but also stated that biological ties “do not exhaustively define the parent-child relationship”.<sup>202</sup> The VSA is not restricted to biological parentage:

The purpose of the VSA is to record the child's birth and to create a record of parentage. A record of parentage is important to affirm the parent-child relationship. Often the biological parents are the same as the social parents. However, there is

nothing in the text or context of the VSA to suggest that parentage is restricted to biological/genetic parentage....

The VSA has always balanced the registration of biological parentage with social parentage due to the need to promote other important purposes, the most clear purpose in the past being to ensure the legitimacy of children.

The government recognized that the importance of identifying biological parentage was tempered by the need historically to promote legitimacy. Part of that social goal was to protect children in a society that differentiated between legitimate and illegitimate children. In the pre-1986 legislation, social parentage trumped registration of biological parentage where a child was born to married parents.<sup>203</sup>

The court compared lesbian women who plan a pregnancy with a spouse using assisted reproduction with heterosexual non-biological fathers who plan a pregnancy with a spouse using assisted reproduction. The children of the claimants could be compared with the children of the heterosexual non-biological fathers.

I conclude that there is a distinction between the claimants and the comparator group on the basis of sex and the analogous ground of sexual orientation. This distinction is as a result of both the VSA itself and of state action. This distinction is discriminatory due to pre-existing disadvantage and stereotype, the lack of correspondence between the benefit and the needs of lesbian co-mothers who use reproductive technology and their children, and the engagement of core dignity interests.

... I agree with the respondent that birth is not a social construct. At present, it takes one ovum and one sperm for a child to be created. However, that does not mean that parentage is not a social construct. In fact, our expanded understanding of parent for child support purposes suggests that we do see parentage as such a construct, and perhaps understand it as a concept that may change depending on context. The respondent's error is in comparing birth to marriage, rather than parentage to marriage.<sup>204</sup>

The court struck down the legislation but suspended the declaration for 12 months to allow the legislature to correct the defects.<sup>205</sup>

The court also granted declarations of parentage for both applicants under the Ontario *Children's Law Reform Act*,<sup>206</sup> noting that “[t]he CLRA is clearly not restricted to granting declarations of parentage to only biological parents”.<sup>207</sup> The court relied on its inherent *parens patriae* jurisdiction to fill the legislative gap in the CLRA in failing to provide for a declaration of parentage of two same-sex parents. Alternatively, the court held that if the government intended to exclude lesbian co-mothers from legal parentage (so that there was an intentional scheme rather than a ‘gap’), then the CLRA discriminated against lesbian co-mothers in a manner that could not be justified under the *Charter*.

---

## NOTES

---

<sup>1</sup> See for example, Statistics Canada, *Fifty years of families in Canada: 1961 to 2011: Families, households and marital status, 2011 Census of Population*: “While today's census families are characterized by diversity, this was also the case for families in the first half of the 20th Century, but often for different reasons. Widowhood and remarriage following the death of a spouse were more common in the early decades of the 1900s, when there was higher maternal mortality and higher mortality rates overall for infants, children and adults. There were also many deaths which occurred during the two world wars and the Korean War. ... As a result, lone-parent families were relatively prevalent in the early decades of the 20th Century”, online: Statistics Canada <[http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011003\\_1-eng.pdf](http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011003_1-eng.pdf)>.

<sup>2</sup> The *Constitution Act 1982, Schedule B to the Canada Act 1982* (UK), 1982, c 11 [Charter].

<sup>3</sup> *Uniform Child Status Act* (2010), online: Uniform Law Conference of Canada <<http://www.ulcc.ca/en/2010-halifax-ns/573-civil-section-documents-2010/810-uniform-child-status-act>> [Uniform Act].

<sup>4</sup> A.A. v B.B., 2007 ONCA 2, 83 OR (3d) 561 at para 14.

<sup>5</sup> Legal parentage status may also have implications in other respects; for example, legislation may require a person to declare a conflict of interest in relation to his or her parent or child.

<sup>6</sup> See the discussions in Institute for Law Research and Reform of Alberta, *Status of Children* (Report No 20, 1976) at 3-5; Law Reform Commission of Nova Scotia, *Final Report: The Legal Status of the Child Born Outside of Marriage in Nova Scotia* (1995) at 11-14; Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters* (1985) [Ontario Report]; Wanda Wiegers, “Fatherhood and Misattributed Genetic Paternity in Family Law” (2011), 36 Queen's LJ 623-671.

<sup>7</sup> A.A. v B.B., *supra* note 4 at para 32.

<sup>8</sup> *The Adoption Act*, SM 1997, c 47, s 31.

<sup>9</sup> In *Chartier v Chartier*, [1999] 1 SCR 242, 168 DLR (4th) 540; 134 Man R(2d)19, the Supreme Court of Canada unanimously held that a stepfather cannot unilaterally terminate his status as a person who stands in the place of a parent under the *Divorce Act*. As a result, a child may have two or more ‘fathers’ for the purposes of support obligations. See also *M.(LM) v B.(WG)*, 2003 MBCA, 17223 DLR (4th) 509, [2003] 4 WWR 199, 33 RFL (5th) 169, 170 Man R (2d) 182; *Swindler v Swindler* 2005 SKCA 131 (stepfather support obligation continues after mother marries biological father); Alison Harvison Young, “This Child Does Have 2 (Or More) Fathers ....: Step-parents and Support Obligations” (2000) 45 McGill LJ 107.

<sup>10</sup> *M.(LM) v B.(WG)*, *ibid*: “Family law affecting children has moved from preserving parental rights over children to decisions identifying the best interests of children and promoting children’s welfare”, per Steel, JA at para 31.

<sup>11</sup> New Zealand Law Commission, *New Issues in Legal Parenthood* (Report No 88, 2005), online: New Zealand Law Commission <[http://www.lawcom.govt.nz/sites/default/files/publications/2005/04/Publication\\_91\\_315\\_R88.pdf](http://www.lawcom.govt.nz/sites/default/files/publications/2005/04/Publication_91_315_R88.pdf)> [New Zealand Report] at para 2.19.

<sup>12</sup> Including a member of a couple who have registered their common law relationship under *The Vital Statistics Act*, RSM 1987, c V60 [VSA].

<sup>13</sup> See Michelle Giroux & Mariana De Lorenzi, “Putting the Child First: A Necessary Step in the Recognition of the Right to Identity” (2011) 27 Can J Fam L 53; *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480, leave to appeal to SCC refused, [2013] SCCA No 36.

<sup>14</sup> In 2008, the Commission made recommendations for legislative amendments to provide for succession rights for posthumously conceived children to the estates of their deceased parents, and to allow the children to apply for dependants’ relief, subject to a number of conditions: Manitoba Law Reform Commission, *Posthumously Conceived Children: Intestate Succession and Dependants Relief*; The Intestate Succession Act: Sections 1(3), 6(1), 4(5), 4(6) and 5(Report No. 118, 2008).

<sup>15</sup> See e.g., Tom Blackwell, “Canadian surrogates get hefty bills as hospitals start charging when babies heading to foreign parents”, *The National Post*, February 21, 2013, online: The National Post

---

<<http://news.nationalpost.com/2013/02/21/ontario-surrogate-gets-1400-bill-after-giving-birth-as-hospitals-start-charging-third-party-carriers-for-post-natal-care/>>.

<sup>16</sup> Donated embryos may be formed from separate donations of sperm and ova, or may be donated by couples who have concluded their IVF treatment. The donations may be anonymous and in either case, the child will not be genetically related to either intended parent. See Sonja Goedeke & Deborah Payne, “Not just for today but for tomorrow, not just for us but for the families: A qualitative study of New Zealand fertility counsellors’ views and practices regarding embryo donation” (2010) 25:11 *Human Reproduction* 2821.

<sup>17</sup> *Assisted Human Reproduction Act*, SC 2004, c 2 [“AHRA”] s 6.

<sup>18</sup> Canadian Fertility and Andrology Society, *Fertility FAQ*, online: Canadian Fertility and Andrology Society <<http://www.cfas.ca>>. Statistics Canada reports the total number of births in Canada for 2010-11 as 376,951: Statistics Canada, *Births, estimates, by province and territory*, online: Statistics Canada <<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo04a-eng.htm>>.

<sup>19</sup> See Human Fertilisation and Embryology Authority, *Mitochondria replacement consultation: Advice to Government*, March 2013, online: Human Fertilisation and Embryology Authority <[http://www.hfea.gov.uk/docs/Mitochondria\\_replacement\\_consultation\\_-\\_advice\\_for\\_Government.pdf](http://www.hfea.gov.uk/docs/Mitochondria_replacement_consultation_-_advice_for_Government.pdf)> at 9: “These changes to a person’s mitochondria will be passed down the maternal line through the mitochondrial DNA to the next generation”.

<sup>20</sup> *Human Fertilisation and Embryology Act 1990* (UK), 1990, c 37.

<sup>21</sup> Department of Health (UK) and Human Fertilisation and Embryology Authority, Press Release, “Innovative genetic treatment to prevent mitochondrial disease” (June 28, 2013) online: Government of the United Kingdom <<https://www.gov.uk/government/news/>>.

<sup>22</sup> *Convention on the Rights of the Child*, UN Doc A/44/736 (1989), 1577 UNTS 3. The Convention is an international human rights agreement adopted by the UN General Assembly in 1989 and ratified by all members of the UN except the US and Somalia. The responsibility to implement this obligation is shared by the provinces and territories, since many areas of responsibility for matters affecting children are under provincial and territorial jurisdiction. Parties to the Convention also agreed to provide regular reports on how they are implementing the Convention to the UN Committee on the Rights of the Child.

<sup>23</sup> *Ibid.*, articles 2.1, 3.1, 7.1, 8.1.

<sup>24</sup> *Németh v Canada (Minister of Justice)*, 2010 SCC 56, 3 SCR 281 at para 34. However, “[t]he presumption that legislation implements Canada’s international obligations is rebuttable. If the provisions are unambiguous, they must be given effect” at para 35.

<sup>25</sup> *Charter*, *supra* note 2, s 15.

<sup>26</sup> *Miron v Trudel*, [1995] 2 SCR 418; *Egan v Canada*, [1995] 2 SCR 513 in which, although the Court upheld the opposite sex definition of “spouse” in the *Old Age Security Act* as being justified under section 1, it was unanimous in holding that sexual orientation is an analogous ground of discrimination.

<sup>27</sup> *M. v H.*, [1999] 2 SCR 3 at para 114. In 2007, the Court held that provisions of the Canada Pension Plan that disallowed certain benefits to the same-sex partners of contributors contravened section 15: *Canada (Attorney General) v Hislop*, 2007 SCC 10, [2007] 1 SCR 429.

<sup>28</sup> VSA, *supra* note 12, and 55 other Manitoba statutes were amended to increase the rights and responsibilities of same-sex couples, including providing for joint adoption rights, by *The Charter Compliance Act*, SM 2002, c 24, s 54. Other significant amendments to Manitoba statutes related to compliance with the *Charter* were made by *An Act to Comply with the SCC decision in M. v. H.*, SM 2001, c 37, which added a gender neutral definition of “common law partner” in provincial statutes relating to support rights and obligations and pension and death benefits, and *The Common-Law Partners’ Property and Related Amendments Act*, SM 2002, c 48, which provided for the registration of same-sex and opposite sex common law relationships. Federally, the *Modernization of Benefits and Obligations Act*, SC 2000, c 12 amended 68 statutes to effect equal application of federal laws to unmarried heterosexual and same-sex couples, and to extend some benefits and obligations previously limited to married couples.

<sup>29</sup> *Hyde v Hyde and Woodmansee* (1866), LR 1 P&D 130 at 133.

---

<sup>30</sup> *Civil Marriage Act*, SC 2005, c 33. In a reference to the Supreme Court of Canada, the Court held that the bill was within Parliament's exclusive legislative authority over legal capacity for civil marriage and was consistent with the *Charter: Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698.

<sup>31</sup> *Civil Marriage Act*, *ibid*, s 2. Consequential amendments also added gender neutral terminology and extended the legal benefits and obligations of marriage to same-sex couples under other federal statutes, including in respect of divorce, business corporations, veteran's benefits and income tax legislation.

<sup>32</sup> Several of these cases are reviewed in Chapter 2, Section G or in Appendix A of this issue paper.

<sup>33</sup> See *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358: "Where access to benefits such as citizenship is restricted on the basis of something so intimately connected to and so completely beyond the control of an applicant as the gender of his or her Canadian parent, that applicant may, in my opinion, invoke the protection of s. 15" at para 85.

<sup>34</sup> *AHRA*, *supra* note 17.

<sup>35</sup> No regulations have been made with regard to expenses. As the prohibitions on paying consideration for surrogacy and on purchasing sperm, ova or embryos are in force, the legal situation with respect to the reimbursement of expenses is less than clear. Reimbursement is not specifically prohibited, so long as it is not 'consideration' or a 'purchase'. The fact that the Act provides for reimbursement of expenses, albeit by a provision that is not in force, suggests that Parliament intended the reimbursement of expenses to be distinct from consideration. This is supported by the statement on the Health Canada website that "you cannot be paid to donate. You may only be refunded money for your actual expenses related to the donation." See Health Canada, *Become a donor*, online:Health Canada <<http://healthycanadians.gc.ca/health-sante/pregnancy-grossesse/become-devenir-eng.php>>.

<sup>36</sup> *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3SCR 457 at para 290 Cromwell, J, found that section 12, dealing with reimbursement for donation and surrogacy related expenses, is valid because it simply defines the scope of the commercial surrogacy prohibition.

<sup>37</sup> *AHRA*, *supra* note 17, ss 2(a), 2(c). For a discussion of these principles see Alana Cattapan, "Rhetoric and Reality: 'Protecting' Women in Canadian Public Policy on Assisted Human Reproduction" (2013) 25 Canadian Journal of Women and the Law 202.

<sup>38</sup> According to a recent review, empirical data from the United States and Britain suggest that surrogate mothers are generally satisfied with the surrogacy arrangements in which they participate. The same is not necessarily true in jurisdictions where women may not enjoy the same status and where regulation may not effectively control exploitative practices. See Karen Busby and Delaney Vun, "Revisiting *The Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers" (2010) 26 Canadian Journal of Family Law 13.

<sup>39</sup> *The Human Rights Code*, SM 1987-88, c 45.

<sup>40</sup> *Ibid*, s 13(1).

<sup>41</sup> It is settled law that human rights legislation has quasi-constitutional status: *Insurance Corporation of British Columbia v Heerspink*, [1982] 2 SCR 145.

<sup>42</sup> *VSA*, *supra* note 12,s 34.

<sup>43</sup> Nicholas Bala and Christine Ashbourne, "The Widening concept of 'Parent' in Canada: Step-Parents, Same-Sex Partners, and Parents by ART", (2011-2012) 20 Am. U.J. Gender Soc. Pol'y & L 525.

<sup>44</sup> *Trociuk v British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 SCR 835 at para 16.

<sup>45</sup> *VSA*, *supra* note 12, s 3(6).

<sup>46</sup> Government of Manitoba, *Guide to Completing the Registration of Birth Form*, online: Government of Manitoba <[http://vitalstats.gov.mb.ca/pdf/registration\\_guide.pdf](http://vitalstats.gov.mb.ca/pdf/registration_guide.pdf)>.

<sup>47</sup> *The Family Maintenance Act*, RSM 1987, c F20 [FMA].

<sup>48</sup> *FMA*, *ibid*, s 36(4); see *M.(LM) v B.(WG)*, *supra* note 9.

<sup>49</sup> *FMA*, *supra* note 47, s 39.

<sup>50</sup> *The Child and Family Services Act*, SM 1985-86, c 8, ss 77-78.

---

<sup>51</sup> *FMA*, *supra* note 47, s 23.

<sup>52</sup> *FMA*, *supra* note 47, ss 19-20.

<sup>53</sup> *VSA*, *supra* note 12.

<sup>54</sup> See e.g. *General Regulations to the Vital Statistics Act*, RRO 1990, Reg 1094 [Ontario Regulations], s 2(2); *Birth Registration Regulations*, NS Reg 390/2007 [Nova Scotia Regulations], s 3.

<sup>55</sup> Fiona Kelly, “(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families” (2009) 40 Ottawa L Rev 185 at para 10 [footnotes omitted].

<sup>56</sup> Manitoba, Legislative Assembly, Standing Committee on Law Amendments, *Hansard*, 37th Leg, 3rd Sess, vol 9 (24 July 2002). Professor Karen Busby similarly commented at the hearing: “[B]oth a married man and a common-law partner whose partner conceives a child through artificial insemination are not the legal parent of that child for all legal purposes. ... I have no doubt that the vast majority of heterosexual families out there who have conceived children through artificial insemination would be shocked to learn that the relationship between the husband and the social or non-biological father and the children so conceived would not be recognized for all legal purposes. For the sake of these families, this gap in the law must be closed. Moreover, the adoption process is expensive and invasive. While it is required in many circumstances, it should not be required when two people have made a decision to conceive a child together and both have been involved in the planning and the process of this event and have raised the child together from its birth.”

<sup>57</sup> *A.A. v B.B.*, *supra* note 4 at paras 34-35.

<sup>58</sup> *Parens patriae* refers to the inherent jurisdiction of a superior court to intervene to protect the best interests of a child or another vulnerable individual. It can be used to fill a legislative gap or on judicial review, but cannot be exercised in contravention of a statutory provision. See *E (Mrs) v Eve*, [1986] 2 SCR 388, 61 Nfld & PEIR 273, 31 DLR (4th) 1, 8 CHRR 3773; *Beson v Director of Child Welfare (Nfld)*, [1982] 2 SCR 716; *The Children's Advocate of Manitoba v Child and Family Services of Western Manitoba*, 2005 MBCA 11, 249 DLR (4<sup>th</sup>) 396, [2005] 10 WWR 70, 16 RFL (6<sup>th</sup>) 366, 192 Man R (2d) 23.

<sup>59</sup> *A.A. v B.B.*, *supra* note 4, overturning [2003] OJ No 1215, 225 DLR (4th) 371 (SCJ).

<sup>60</sup> *A.A. v B.B.*, *supra* note 4, paras 32, 37.

<sup>61</sup> The court declined to consider the *Charter* argument first raised on appeal.

<sup>62</sup> *A.A. v B.B.*, *supra* note 4 at paras 35, 38.

<sup>63</sup> *D.W.H. v D.J.R.*, 2011 ABQB 608, supplemental reasons 2011 ABQB 791 [*DWH QB*], aff'd 2013 ABCA 240, 280 DLR (4<sup>th</sup>) 90 [*DWH CA*].

<sup>64</sup> *DWH QB*, *ibid* at paras 84, 90, 115.

<sup>65</sup> *DWH CA*, *supra* note 63 at para 60.

<sup>66</sup> British Columbia *Family Law Act*, SBC 2011, c 25 [BC FLA]; Alberta *Family Law Act*, SA 2003, c F-4.5 [Alberta FLA]; *Civil Code of Québec*, LRQ, c C-1991 [*Civil Code*]; Newfoundland and Labrador *Children's Law Act*, RSNL 1990, c C-13 [NL CLA]; Prince Edward Island *Child Status Act*, RSPEI 1988, c C-6 [PEI CSA] Yukon *Children's Law Act*, RSY 2002 c 31 (renamed by SY 2008, c 1, s 199); Northwest Territories *Children's Law Act*, SNWT 1997, c 14 [NWT CLA]; Uniform Law Conference of Canada, *Uniform Act*, *supra* note 3.

<sup>67</sup> But note that a party cannot refuse to assume obligations of parenthood if the person is a functional parent. See *Doe v Alberta*, 2007 ABCA 50, 404 AR 153, 278 DLR (4th) 1, [2007] 4 WWR 12, leave to appeal refused [2007] SCCA 211. The Alberta Court of Appeal held that although the mother's partner did not consent to be a parent and the presumptions regarding legal parentage status did not apply, that did not exclude the possibility that he could become a functional parent in the future. Where a person has demonstrated a settled intention to treat a child as a child of his or her family, there is an obligation of support for the child. The parents cannot agree otherwise; the nature of the relationship cannot be agreed in advance and an agreement between the parties cannot displace the jurisdiction of the court to determine parental rights and obligations.

<sup>68</sup> The legislation does not define “settled intention”. But see the Alberta FLA, *supra* note 66, s 48(3) which lists the factors to consider when determining whether a person has demonstrated a settled intention to treat a child as the person's own child. These factors include the duration and nature of the child's relationship with the person.

- 
- <sup>69</sup> *Civil Code of Québec*, *supra* note 66, articles 538 - 542.
- <sup>70</sup> PEI CSA, *supra* note 66, ss 9- 10.
- <sup>71</sup> *Vital Statistics Act*, RSO 1990, c V.4.
- <sup>72</sup> Nova Scotia Regulations, *supra* note 54, s 5.
- <sup>73</sup> *Family Law Act*, SA 2010 c16.
- <sup>74</sup> Section 2 of the *Family Law Act General Regulation*, Alta Reg 148/2005 sets out the requirements for the consent.
- <sup>75</sup> Alberta FLA, *supra* note 66, s 8.2.
- <sup>76</sup> Uniform Act, *supra* note 3.
- <sup>77</sup> A partner is not presumed to be or recognized in law to be a parent of the child if the birth mother intended at the time of conception to relinquish the child to a person whose reproductive material was used in the assisted conception or his or her partner: s 4(3) of the Uniform Act, *supra* note 3.
- <sup>78</sup> NWT CLA, *supra* note 66.
- <sup>79</sup> *Ibid*, s 8.1(3).
- <sup>80</sup> *Vital Statistics Act*, SNWT 2011, c 34.
- <sup>81</sup> *Ibid*, s 24.
- <sup>82</sup> BC FLA, *supra* note 66, s 30.
- <sup>83</sup> *Vital Statistics Act*, RSBC 1996, c 479, s 14.1.
- <sup>84</sup> *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (1984) online: Human Fertilisation and Embryology Authority <[www.hfea.gov.uk/docs/Warnock\\_Report\\_of\\_the\\_Committee\\_of\\_Inquiry\\_into\\_Human\\_Fertilisation\\_and\\_Embryology\\_1984.pdf](http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf)>.
- <sup>85</sup> *Surrogacy Agreements Act 1985* (UK), c 49.
- <sup>86</sup> *Human Fertilisation and Embryology Act 1990*, *supra* note 20.
- <sup>87</sup> *Human Fertilisation and Embryology Act 2008* (UK), c 22.
- <sup>88</sup> *Surrogacy Agreements Act*, *supra* note 85, s 1A.
- <sup>89</sup> *Parental Orders (Human Fertilisation and Embryology) Regulations* (UK), 1994/2767.
- <sup>90</sup> *Supra* note 87.
- <sup>91</sup> *Human Fertilisation and Embryology (Parental Orders) Regulations 2010* (UK), 2010, No 985.
- <sup>92</sup> *Supra* note 87, s 54(2).
- <sup>93</sup> The Children and Family Court Advisory Support Service (CAFCASS) issues guidance for parental order reporters. See CAFCASS, Guidance for Parental Order Reporters, online: CAFCASS <[www.cafcass.gov.uk/media/6721/Parental%20Order%20Guidance%20050412.pdf](http://www.cafcass.gov.uk/media/6721/Parental%20Order%20Guidance%20050412.pdf)>. For a description of this system, see Karen Busby, "Of Surrogate Mother Born: Parentage Determinations in Canada and Elsewhere" (2013, 25 Canadian Journal of Women and the Law, 284 at 304-308).
- <sup>94</sup> *Re L*, [2010] EWHC3 146 (Fam) at paras 9-10.
- <sup>95</sup> See Linda D Elrod, "A Child's Perspective of Defining a Parent: The Case for Intended Parenthood" (2011) 25:2 BYU Journal of Public Law 245; Nancy D Polikoff, "A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century" (2009) 5 Stan JCR & CL 201.
- <sup>96</sup> *Uniform Parentage Act* (last amended or revised in 2002), online: National Conference of Commissioners on Uniform State Laws <[http://www.uniformlaws.org/shared/docs/parentage/upa\\_final\\_2002.pdf](http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf)>. Uniform acts are proposed statutes promulgated by the National Conference of Commissioners on Uniform State Laws, an unofficial body composed of representatives of every state. The Act was revised in 2000 and amended in 2002 to include a definition of a parent in relation to a child conceived by artificial insemination. It has been adopted by Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming: Legislative Fact Sheet, online: National Conference of Commissioners on Uniform State Laws

---

<[http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage Act](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act)>. See Jennifer Sroka, "A Mother Yesterday, but Not Today: Deficiencies of the Uniform Parentage Act for Non-Biological Parents in Same-Sex Relationships" (2013) 47 Val UL Rev 137.

<sup>97</sup> Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report* (October 2008) [Queensland Report]; Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (2007) [Victoria Report]. Legislative Council Standing Committee on Legislation, Parliament of Western Australia, *Report on the Surrogacy Bill 2007* (2008) 5; Social Development Committee, Parliament of South Australia, *Inquiry into Gestational Surrogacy* (2007); Legislative Council Select Committee on Surrogacy, Parliament of Tasmania, *Report on Surrogacy* (2008); Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) [New South Wales Report]; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008* (2008); Standing Committee of Attorneys-General Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009).

<sup>98</sup> See e.g. *Artificial Conception Act 1985* (WA) s 6A; *Status of Children Act 1978* (NT) 5DA; *Parentage Act 2004* (ACT) s 8(4).

<sup>99</sup> *Surrogacy Act 2010* (Qld); *Surrogacy Act 2012* (Tas); *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (NSW); *Assisted Reproductive Treatment Act 2008* (Vic); *Surrogacy Act 2008* (WA); *Surrogacy Act 2008* (SA). The Northern Territory does not have surrogacy legislation. Once parentage is transferred, it is recognized under the *Family Law Act 1975* (Cth) s 60HB. See Jenni Millbank, "The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 brick walls'?" (2010) 35:1 Melbourne University Law Review 165 [Millbank].

<sup>100</sup> *Surrogacy Act 2010* (NSW), *ibid*, ss 25-31.

<sup>101</sup> Millbank, *supra* note 99 at 184-185.

<sup>102</sup> See Busby, *supra* note 93 at 308-313; Millbank, *supra* note 99.

<sup>103</sup> *Status of Children Act 1969* (NZ) 1969/18.

<sup>104</sup> *Care of Children Act 2004* (NZ) 2004/90.

<sup>105</sup> *Human Assisted Reproductive Technology Act 2004* (NZ) 2004/92. See also New Zealand National Ethics Committee on Assisted Reproductive Technology, *Guidelines*, online: Advisory Committee on Assisted Reproductive Technology <<http://acart.health.govt.nz/publications-and-resources/guidelines-and-advice-issued-echart>>.

<sup>106</sup> The New Zealand Law Commission issued a comprehensive report on legal parenthood issues in 2005: New Zealand Report, *supra* note 11. The New Zealand Government published a response in 2006, but no reforms have yet been implemented. See New Zealand Ministry of Justice, online: Government of New Zealand <[www.justice.govt.nz/publications/global-publications/g/government-response-to-law-commission-report-on-new-issues-in-legal-parenthood-march-2006/law-commissions-recommendations-and-government-response](http://www.justice.govt.nz/publications/global-publications/g/government-response-to-law-commission-report-on-new-issues-in-legal-parenthood-march-2006/law-commissions-recommendations-and-government-response)>.

<sup>107</sup> Hague Conference on Private International Law, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* (Prel. Doc. No. 10 of March 2012), online: Hague Conference on Private International Law <[www.hcch.net/upload/wop/gap2012pd10en.pdf](http://www.hcch.net/upload/wop/gap2012pd10en.pdf)>.

<sup>108</sup> *Ibid*, para 1. See also Hague Conference on Private International Law, *Private International Law Issues Surrounding The Status of Children, Including Issues Arising from International Surrogacy Arrangements*, (Prel. Doc. No. 11 of March 2011) online: Hague Conference on Private International Law <[www.hcch.net/upload/wop/gap2012pd10en.pdf](http://www.hcch.net/upload/wop/gap2012pd10en.pdf)> at paras 31-38.

<sup>109</sup> See Brenda Cossman "Parenting Beyond the Nuclear Family: *Doe v Alberta*" (2007) 45 Alta L Rev 501; Richard F Storrow, "Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage" (2002) 53 Hastings LJ 597; Susan Boyd, "Gendering Legal Parenthood: Bio-genetic Ties, Intentionality and Responsibility" 25:1 Windsor YB Access Just 63.

<sup>110</sup> Elrod, *supra* note 95.

<sup>111</sup> These are similar to the principles adopted by the joint ULCC-CCSO Working Group in drafting the Uniform Act, *supra* note 3. See Uniform Law Conference of Canada, Civil Law Section, Assisted Human Reproduction, Report of the Joint ULCC- CCSO Working Group (2009), online: Uniform Law Conference of Canada ,<

---

<http://www.ulcc.ca/en/2009-ottawa-on/192-civil-section-documents/396-assisted-human-reproduction-working-group-report-2009>> at para 35. See also New Zealand Report, *supra* note 11; Queensland Report, *supra* note 97; Victoria Report, *supra* note 97.

<sup>112</sup> Ontario Report, *supra* note 6 at 277.

<sup>113</sup> See BC FLA, *supra* note 66, s 26(1); Alberta FLA, *supra* note 66, s 7(2)(a). A genetic link is not required under the *Status of Children Act 1969* (NZ), *supra* 103, s 17; the *Human Fertilisation and Embryology Act 2008*, *supra* note 87, s 33, and the *Status of Children Act 1974* (Vic), Parts II and III. Although there is no definition of “mother” in Manitoba’s *FMA* or *VSA*, the definition of “birth” in the *VSA* refers to “the complete expulsion or extraction from its mother”: *supra* note 12, s 1, which suggests that motherhood is linked to the act of giving birth. See *J.C. v Manitoba*, 2000 MBQB 173, 151 Man R (2d) 268.

<sup>114</sup> Fiona Kelly, “Equal Parents, Equal Children: Reforming Canada’s Parentage Laws to Recognize the Completeness of Women-led Families” (2013) 64 UNBLJ 253, citing Angela Campbell, “Conceiving Parents Through Law” (2007) 21:2 International Journal of Law, Policy and the Family 242 at 259. See also Ontario Report, *supra* note 6 at 277.

<sup>115</sup> Joanna Radbord, “Same-sex Parents and the Law” (2013) 33 WRLSI 1. The author explains, in relation to lesbian couples wishing to conceive, that using a known donor results in a lack of security if the couple wishes to parent independently and the donor does not wish to undertake parental responsibilities (including support). Using unknown donor sperm allows the couple to parent with autonomy and security and avoids the risk of transmissible diseases through pre-conception screening. However, it is costly, less effective at achieving pregnancy and requires a more technological approach.

<sup>116</sup> The Alberta, NWT, BC and Uniform Acts include embryo donors. The NL and Yukon Acts refer to sperm donors, and the PEI Act to sperm and ova donors. The Québec *Civil Code* refers to genetic material. The U.S. *Uniform Parentage Act*, *supra* note 96 refers to sperm and egg donors. The New Zealand *Status of Children Act 1969*, *supra* note 103, includes embryo donors, and provides that a donor is not a parent unless he or she is the partner of the woman who carries the child or later becomes the woman’s partner: ss 18-25. In the U.K., an egg donor, or a sperm donor who donates through a licensed clinic, is not the legal parent of the child: *Human Fertilisation and Embryology Act 2008*, *supra* note 87 ss 36, 47.

<sup>117</sup> See also British Columbia Ministry of Attorney General, Justice Services Branch, Civil Policy and Legislation Office, *White Paper on Family Relations Act Reform- Proposals for New Family Law Act* ( July 2010), online :Government of British Columbia <<http://www.ag.gov.bc.ca/legislation/shareddocs/fra/Family-Law-White-Paper.pdf>>at 32.

<sup>118</sup> See *W.W.v X.X .and Y.Y.*, 2013 ONSC 879, in which a sperm donor who had entered into a donor agreement relinquishing parental rights applied for a declaration of parentage and access to the child. The facts are not clear as to the donor’s relationship with the child, and the matter has not yet been concluded.

<sup>119</sup> *FMA*, *supra* note 47,s 23.

<sup>120</sup> The lack of parental status for the non-biological mother has implications in a number of areas, including applications for child custody and support, inheritance rights, citizenship, rights and benefits under provincial and federal legislation and their legal relationship with the parent’s extended family. If the birth mother died, it could affect the other parent’s ability to obtain medical care for the child.

<sup>121</sup> Victoria Report, *supra* note 97 at 115.

<sup>122</sup> Jenni Millbank, “The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family” (2008) 22:2 Int J Law Policy Family 149.

<sup>123</sup> The Ontario *Vital Statistics Act*, *supra* note 71, allows a person acknowledged by the birth mother to certify the birth statement, but only if the biological father is unknown. The Nova Scotia Regulations, *supra* note 54 similarly apply only if the biological father is unknown.

<sup>124</sup> See NWT CLA, *supra* note 66, ss 2(1.1); 8.1; Uniform Act, *supra* note 3, s 5(1).

<sup>125</sup> BC FLA, *supra* note 66, s 27(3).

<sup>126</sup> *A.A. v B.B.*, *supra* note 4.

<sup>127</sup> *DWH CA*, *supra* note 63.

---

<sup>128</sup> In A.A., the court found that a legislative gap existed, rather than a *Charter* violation. In *DWH QB*, *supra* note 63, the chambers judge found that there was a *Charter* violation but the point was moot since the provision had been repealed.

<sup>129</sup> (2009) 94 OR (3d) 756 (Ont CJ).

<sup>130</sup> *Ibid* at para 6.

<sup>131</sup> *Supra* note 129 at para 53.

<sup>132</sup> *Supra* note 129 at paras 36-37.

<sup>133</sup> Radbord, *supra* note 115 at 11-14.

<sup>134</sup> New Zealand Report, *supra* note 11 at paras 6.67 – 6.72 [footnotes omitted]. The Commission recommended a process by which a donor could be a child’s legal parent along with the intended parents. An agreement between the parties respecting the role of the donor in the child’s upbringing would have to be filed with the court for approval before conception, as well as evidence of independent legal advice and counselling.

<sup>135</sup> Victoria Report, *supra* note 97 at 139.

<sup>136</sup> Fiona Kelly, “Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and Their Children Into Canadian Family Law” (2004) 21 Can J Fam L 133. See also: Shelley Gavigan, ‘Equal Families, Equal Parents, Equal Spouses, Equal Marriage: The Case of the Missing Patriarch’ (2006) 33 Supreme Court Law Review 317; and Millbank, *supra* note 119 at 24: “even judgments that do accept the mother-led family as the core family unit have generally failed to see anything wrong in ‘adding’ to it. The mothers, we hear time and time again, will just have to accommodate their child’s ‘need’ for a father. Lesbian mothers may be functional family but they are not a complete family.” [footnotes omitted] Millbank, *supra* note 122, argues for “a form of automatic, universal and stable legal recognition for co-mothers based on pre-conception intention. The rationale for recognition is that the attempt to conceive was a shared enterprise between the women.” at 25.

<sup>137</sup> Canadian Bar Association, British Columbia Branch, Family Relations Act Working Group, *Submission to Ministry of Attorney General: White Paper on Family Relations Act Reform, Proposals for a New Family Law Act* (October 2010) at 36, online: Canadian Bar Association <<http://www.cbabc.org/CMSPages/GetFile.aspx?guid=9e8ea20f-46a9-4958-bc3a-c30a6321efac>>.

<sup>138</sup> PEI CSA, *supra* note 66, s 9(8); Alberta FLA, *supra* note 66, s 9(7)(b).

<sup>139</sup> BC FLA, *supra* note 66, s 30.

<sup>140</sup> BC FLA *supra* note 66, s 30(1)(b)(ii).

<sup>141</sup> It appears, then, that the presumption that a partner of the birth mother is a parent of the child unless he or she did not consent to the conception does not apply when multiple parents are intended, although this is not completely clear. Under s 27, the presumption that the birth mother’s partner is a parent is subject only to ss 29 (surrogacy) and 28 (assisted reproduction after death). S 27 is not expressly subject to s 30 (parenting by other arrangement). However, only one of the options under s 30 enables the partner of the birth mother to be a parent.

<sup>142</sup> *M.D.R. v Ontario (Deputy Registrar General) (Rutherford* (2006) 81 OR (3d) 81, 270 DLR (4th) 90, 141 CRR (2d) 292, 30 RFL (6th) 25.

<sup>143</sup> *Ibid* at paras 150, 156.

<sup>144</sup> FMA, *supra* note 47, s 1.

<sup>145</sup> 2000 MBQB 173, 151 Man R (2d) 268.

<sup>146</sup> *Ibid*, at para 3. See also Alexandra Bosanac, “Winnipeg couple became parents through surrogacy — but not in the eyes of Canadian law” *National Post* (May 10, 2013) online: National Post <<http://news.nationalpost.com/2013/05/10/through-surrogacy-winnipeg-couple-became-parents-but-not-in-the-eyes-of-canadian-law/>>; A couple entered into a surrogacy arrangement with the genetic mother’s sister. When the child was born, the surrogate mother and her husband were registered as the child’s parents, and the intended parents were required to apply to court for a parentage declaration.

<sup>147</sup> *Supra* note 145, at para 7.

---

<sup>148</sup> The court would have issued a paternity declaration but refrained from doing so, because the applicants did not want the genetic father named on a birth registration identifying his sister as the birth mother.

<sup>149</sup> Alberta FLA, *supra* note 66, s 8.2; Nova Scotia Regulations, *supra* note 54, s 5; Uniform Act, *supra* note 3, s 8.

<sup>150</sup> Uniform Act, *supra* note 3, s 8(8). It is not clear how this provision would affect issues such as parental leave and EI benefits, for example, or insured health care benefits. See Natalie Stechyson, “Patchwork of Canadian laws creates confusion in determining parental rights for gay and lesbian parent” *Calgary Herald* (October 8, 2013) online: <<http://www.calgaryherald.com/health/Part+Patchwork+Canadian+laws+creates+confusion+determining+parental+rights+lesbian+parents/8947706/story.html>> describing a situation in which surgery for a child born as a result of a surrogacy arrangement was delayed because the child was not included in the intended parents’ medical coverage.

<sup>151</sup> BC FLA, *supra* note 66, s 29(3).

<sup>152</sup> BC FLA, *supra* note 66, s 32; Alberta FLA, *supra* note 66, s 9; Uniform Act, *supra* note 3, s 11.

<sup>153</sup> The agreement may be used as evidence that an intended parent consented to be a parent before the conception.

<sup>154</sup> Civil Code, *supra* note 66, art 541. Under s 6 of the Assisted Human Reproduction Act, *supra* note 17, there can be no consideration paid to a woman to be a surrogate mother.

<sup>155</sup> See Royal Commission of New Reproductive Technologies, *Proceed with Care: Final Report* (Canada: Minister of Government Services, 1993) at 666; Canadian Bar Association, National Health and Family Law Sections *Submission on Draft Legislation on Assisted Human Reproduction* (November 2001), online: Canadian Bar Association <<http://www.cba.org/cba/pdf/reprobrief.pdf>>.

<sup>156</sup> Uniform Parentage Act, *supra* note 96, ss 803, 807.

<sup>157</sup> New Zealand Report, *supra* note 11.

<sup>158</sup> Victoria Report, *supra* note 97.

<sup>159</sup> Surrogacy Act 2008 (WA); Surrogacy Act 2010 (Qld); Parentage Act 2004 (ACT); Human Fertilisation and Embryology Act 1990 (UK), the Human Assisted Reproductive Technology Act 2004 (NZ). In the UK, for example the surrogate mother’s consent must be given no less than six weeks and no more than six months after the birth. The Victorian Law Reform Commission, *supra* note 97, recommended a waiting period of 28 days before an application to court may be made.

<sup>160</sup> In *H.L.W. and T.H.W. v. J.C.T. and J.T.*, 2005 BCSC 1679, the birth mother in a traditional surrogacy arrangement sought custody of the child after relinquishing him to the intended parents, but the case does not appear to have gone to trial.

<sup>161</sup> *Doe v. Alberta*, 2007 ABCA 50, per Berger, J.A. at para 26: “The parties are entitled to enter into agreements: s 53. The court may uphold those agreements, or incorporate them into an order: s 51, s 86, and “heavy weight” may be given to the contract of the parties; *Paquette v. Dingwall*, [1996] A.J. No. 327 (CA). However, no agreement between the parents can oust the jurisdiction of the court to pronounce upon parental rights and obligations and to depart from written agreements about child support: *Hansford v. Hansford* (1972), 9 R.F.L. 233 (Ont SC), *Kendall v. Kendall* (1981), 15 Sask. R. 394 (Sask. U.F.C.), *Sands v. Sands* (1975), 24 R.F.L. 276 (Ont CA), S.(D.B.) v. G.(S.R.), 2006 SCC 37, S.(D.B.) v. G.(S.R.), 2005 ABCA 2 at para. 18”. See also Glenn Rivard and Judy Hunter, *The Law of Assisted Human Reproduction*, (Markham: LexisNexis Butterworths, 2005); *Woodhouse v. Woodhouse*, 29 OR (3d) 417, 136 DLR (4th) 577, 20 RFL (4th) 337, 91 OAC 91; Ontario Report, *supra* note 6 at 220.

<sup>162</sup> Uniform Law Conference of Canada, Joint ULCC-CCSO Working Group, *Assisted Human Reproduction - Working Group Report 2008* (August 10-14, 2008) online: Uniform Law Conference of Canada <[www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/637-child-status/1498-assisted-human-reproduction-working-group-report-2008](http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/637-child-status/1498-assisted-human-reproduction-working-group-report-2008)> at para 46.

<sup>163</sup> Commentary on the Uniform Act, *supra* note 3 at 16-18.

<sup>164</sup> Adoption Act, CCSM c A2, s 56.

<sup>165</sup> See, for example *Buzzanca v. Buzzanca* (1998) 72 Cal.Rptr.2d 280, 61 Cal.App.4th 1410. The intended parents made an arrangement with a surrogate mother to carry an embryo genetically unrelated to any of them, conceived from anonymous sperm and ovum donations. After the conception, the intended parents separated and the husband

---

argued that there was no ‘child of the marriage’. The appeal court concluded that both of the intended parents were legal parents of the child because they initiated the surrogacy agreement, intended the birth and intended to parent.

<sup>166</sup> New Zealand Report, *supra* note 11 at para 3.18.

<sup>167</sup> New Zealand Report, *supra* note 11 at para 7.67.

<sup>168</sup> Victoria Report, *supra* note 97 at 15.

<sup>169</sup> Victoria Report, *supra* note 97 at 175.

<sup>170</sup> Victoria Report, *supra* note 97 at 190.

<sup>171</sup> Queensland Report, *supra* note 97 The Queensland Committee noted, at 50, that research in the UK showed that “the importance an intending mother placed on having a genetic connection to her child varied with her ability to provide one. If a woman was able to use her gametes she reported it was important, however, if not able, the importance placed on a genetic connection diminished”, citing Olga van den Akker, “Psychosocial aspects of surrogate motherhood” *Human Reproduction Update* vol. 13, no. 1, 53-62 at 57-58.

<sup>172</sup> Queensland Report, *supra* note 97 at 54.

<sup>173</sup> Queensland Report, *supra* note 97 at 62.

<sup>174</sup> See e.g., Alberta FLA, *supra* note 66; the *Human Fertilisation and Embryology Act 1990* (UK), *supra* note 86; the *Human Assisted Reproductive Technology Act 2004* (NZ), *supra* note 105, all of which require a genetic connection between one of the intended parents and the child.

<sup>175</sup> Victoria Report, *supra* note 97 at 36.

<sup>176</sup> Uniform Act, *supra* note 3, ss 13-14.

<sup>177</sup> BC FLA, *supra* note 66, s 35.

<sup>178</sup> Uniform Act, *supra* note 3, ss 16-17.

<sup>179</sup> BC FLA, *supra* note 66, s 36.

<sup>180</sup> Uniform Act, *supra* note 3, s 18.

<sup>181</sup> Bill 56, *The Vital Statistics Amendment Act*, 3<sup>rd</sup> Sess, 40<sup>th</sup> Leg, Manitoba, 2013 (received first reading April 24, 2014) eliminates the requirement for transsexual surgery before applying for a change in sex designation.

<sup>182</sup> VSA, *supra* note 12, s25.

<sup>183</sup> See Natalie Stechyson, “Transgender pregnancy: The last frontier in assisted reproductive technology”, *Calgary Herald*, October 1, 2013 FIX Vital statistics statutes are not specific as to what surgeries are necessary to justify a change in sex designation. In *XY v. Ontario (Ministry of Government and Consumer Services)*, [2012] OHRTD No 715, 2012 HRTO 726 (Ont HRT), at para 71, the evidence of the Ontario Director of Vital Statistics was that this determination is left to the discretion of the physicians.

<sup>184</sup> See e.g. *Canada (Attorney General) v Canada (Human Rights Commission)*, 2003 FCT 89, 46 CHRR 196, 228 FTR 231; *Nixon v Vancouver Rape Relief Society*, 2005 BCCA 601; leave to appeal to SCC refused, [2006] SCCA No 365 (respondent not liable for discrimination on other grounds).

<sup>185</sup> *XY v Ontario (Ministry of Government and Consumer Services)*, [2012] OHRTD No 715, 2012 HRTO 726 (Ont HRT).

<sup>186</sup> See Government of Ontario, *Changing your Sex Designation on Your Birth Registration and Birth Certificate*; online: <[www.ontario.ca/government/changing-your-sex-designation-on-your-birth-registration-and-birth-certificate](http://www.ontario.ca/government/changing-your-sex-designation-on-your-birth-registration-and-birth-certificate)>. A letter of support from a physician, psychologist or psychologist associate is also required.

<sup>187</sup> Council of Europe Commissioner for Human Rights, *Human Rights and Gender Identity*, CommDH/IssuePaper (2009) 2 at 9 [footnotes omitted].

<sup>188</sup> *Ibid*, at 18.

<sup>189</sup> *M.D. v LL.*, [2008] OJ No 907, 52 RFL (6th) 122, 90 OR (3d) 127. See also *R.(J) v H.(L)*, [2002] OJ No 3998 (SCJ); *W.J.Q.M. v A.M.A.*, 2011 SKQB 317, 339 DLR (4th) 759, 382 Sask R 119; *J.A.W. v. J.E.W.*, 2010 NBQB 414, 373 NBR (2d) 211.

<sup>190</sup> *M.D. v LL.*, *ibid* at paras 55, 61-63.

---

<sup>191</sup> *Gill v Murray*, [2001] BCHRT 34.

<sup>192</sup> *Human Rights Code*, RSBC 1996, c 210.

<sup>193</sup> *Supra* note 186 at paras 78-84. The Tribunal's reasoning was adopted in *A.A. v New Brunswick (Department of Family and Community Services)*, [2004] NBHRBID No 4.

<sup>194</sup> *Rypkema v British Columbia* 2003 BCSC 1784, 233 DLR (4<sup>th</sup>) 760, [2004] 3 WWR 712.

<sup>195</sup> *K.G.D. v C.A.P.*, [2004] OJ No 3508. A similar result was reached in *W.J.Q.M. v A.M.A.*, *supra* note 189.

<sup>196</sup> The respondent surrogate mother and the government agreed that the Act had a legislative gap.

<sup>197</sup> *Fraess v Alberta (Minister of Justice and Attorney General)*, 2005 ABQB 889, 278 DLR (4th) 187.

<sup>198</sup> *Ibid* at paras 13-14.

<sup>199</sup> *Rutherford*, *supra* note 142.

<sup>200</sup> *Rutherford*, *supra* note 142 at para 150.

<sup>201</sup> *Rutherford*, *supra* note 142 at para 150.

<sup>202</sup> *Rutherford*, *supra* note 142 at para 16.

<sup>203</sup> *Rutherford*, *supra* note 142 at paras 32, 47-48.

<sup>204</sup> *Rutherford*, *supra* note 142 at paras 112-114 [footnotes omitted]. The court observed that in this case there were no "competing interests" because the donors were unknown.

<sup>205</sup> Effective January 2, 2007, the *Ontario Vital Statistics Act General Regulation, RRO 1990, Reg 1094* provides that two lesbian mothers may register as parents in case of assisted reproduction, but only if the father is unknown.

<sup>206</sup> *Children's Law Reform Act*, RSO 1990, c C.12. The government consented to the declarations.

<sup>207</sup> *Rutherford*, *supra* note 142 at para 73.