

TRANSFORMING LAW'S FAMILY: THE LEGAL RECOGNITION OF PLANNED
LESBIAN FAMILIES

by

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ABSTRACT

Lesbian families with children are greater in number and more visible today than ever before. In fact, social scientists have suggested that we may be in the midst of a lesbian “babyboom”. Canada’s Census figures support this assertion. Between 2001 and 2006 there was a forty-seven per cent increase in households made up of two lesbian mothers and their children. This dissertation addresses the legal issues raised by lesbian motherhood, focusing primarily on legal parentage. It considers the terms upon which parental recognition has been achieved thus far, and evaluates the efficacy of a reform agenda focused exclusively on gaining access to the existing legal framework.

To explore the legal and social dynamics of planned lesbian families, interviews were conducted with forty-nine lesbian mothers living in British Columbia and Alberta who conceived using assisted reproduction. Mothers were asked about the structure of their families, how they defined terms such as “parent” and “family”, the extent to which they had engaged with law, and their recommendations for law reform. The interviews revealed that lesbian mothers define family and parenthood broadly, emphasizing intention and caregiving over a purely biological model of kinship. All of the mothers defined a “parent” as someone who intends to parent and, once a child is born, performs that intention through caregiving. Parental status was thus not limited to those who shared a biological relationship with a child, or even to two individuals.

The research suggests that lesbian mothers have little interest in being subsumed into the existing legal framework which tends to prioritize dyadic and biological parenting. In fact,

only a tiny portion of the mothers felt that identical treatment would adequately respond to their needs. The vast majority supported law reform that would extend to them the benefits of the current system, while simultaneously expanding the existing framework to include a wider variety of parental and family configurations within it. The reform model chosen to achieve this aim combined parental presumptions in favour of the lesbian couple or a single lesbian mother, with opt-in mechanisms that allowed the family to extend beyond the two parent unit.

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Finally, I would like to thank the forty-nine women who entrusted me with their stories. It was an honour to be welcomed into their lives. While the interviews covered set topics, few of the women simply told me the pertinent information. Instead, they disclosed stories of coming out, falling in love, wishing for a child, searching for a donor, and the instantaneous love that their children produced within them. Many also spoke of the heartbreak of infertility, miscarriage, premature birth, post-partum depression, and parental separation. More often than not, the women spoke honestly about their fears, about the lack of role models available to them and their children, and the societal, legal and familial pressure to identify the “real” mother. Some expressed anger and outrage and many cried. It was an enormous honour and privilege to be invited into their homes and to be offered a glimpse of what it might mean to be a lesbian mother living in Canada in 2007. It is my hope that in this dissertation I am able to go beyond the academic and also capture some of the poignancy of their stories.

For Finlay

1 INTRODUCTION: THE VISIBLE LESBIAN FAMILY

1.1 Introduction

In May 2005, four months into my interview-based study about lesbian mothers and the law, I met Yael. What set Yael apart from the other mothers I had spoken to was the age of her children. At 28 and 21, Yael's daughter and son were almost two decades older than most of the children of the other mothers I had interviewed. In fact, Yael's daughter was only one year younger than me. I realized as I listened to her story that Yael was one of the pioneers of planned lesbian motherhood, defined in this dissertation as families in which a single lesbian mother or a lesbian couple have a child using some form of assisted conception. She and her partner became parents before the words "lesbian babyboom" had ever been uttered and before same-sex couples had even the most basic legal protections.¹ She had parented in a legal vacuum and she returned frequently in her interview to the idea that many lesbian mothers today "had it easy".

Yael and her partner Judy began their journey towards parenthood in 1974. Drawing on the services of the Vancouver Women's Health Collective, they found a doctor who was willing to perform alternative insemination using anonymous donor sperm. However, they were warned that they could never present themselves as a couple at the doctor's surgery or give any indication to the receptionist that they were there for insemination services. This initial experience was re-lived over and over for the next twenty years. Yael recounted to me numerous stories of exclusion, isolation, denial and discrimination. She described watching

¹ Not only were Yael and her partner pioneers with regard to lesbian motherhood, they were also one of the first couples in Canada to conceive using what was then referred to as "artificial insemination" with anonymous donor sperm.

her daughter screaming in pain in a hospital waiting room as the nurse informed her that they had to wait for the child's "mother" to give her consent to medical treatment. She told me about the refusal of her daughter's school to refer to her as anything but a "babysitter". She recounted the years of fear she endured after she and Judy separated and she found herself with no legal access rights to her non-biological daughter. When Judy refused to financially support their son, she found that there was no way to enforce the obligation. While Yael tried desperately to invoke the law she also feared it, not "wanting to get too close... 'cause you don't know if it will bite you." Even today she remains angry, primarily at the legal system that in the face of her social and financial commitment to her children "gave [her] no recognition at all."

When I suggested to Yael that she was in fact a "pioneer" she agreed with me. Forced to "invent everything from the ground up", Yael felt quite strongly that she "broke *new* ground". She referred to herself and her family as a "fragile little island", often invisible while at other times the very public object of attack. However, she thought that by being open about her identity and the nature of her family she had contributed to the process of change. In fact, she had a hard time reconciling the current treatment of lesbian mothers with her own experience. When I told her that two mothers in British Columbia can now appear on a child's birth certificate from birth she rolled her eyes and laughed, almost unable to believe how much had changed. Life seemed easier for many lesbian mothers today and she flippantly suggested that the "revolution" might be over.

I left the interview with Yael feeling very much in awe of this woman who had parented during such difficult times. In a lot of ways she was right. Many lesbian mothers parenting in 2005 *did* have it easy. Most of them had legal options available to them that Yael could barely have imagined. They also enjoyed a level of societal acknowledgment that Yael had never experienced. But the more I thought about it the more complicated it became. Without in any way diminishing the harrowing experiences Yael had endured, I wondered whether the path of "progress" was as straightforward as she and I had presumed. I wondered whether the inclusion of lesbian mothers within law might sometimes come at a price; that strategies mattered and that we should be careful about what we asked for. I thought about what it might mean to achieve legal recognition by arguing that lesbian mothers are indistinguishable from the heterosexual norm. I wondered which lesbian mothers this might ultimately exclude. At the same time, I could see how much easier Yael's life would have been had she had some form of legal protection. Much of the negative treatment she endured was because the law treated her as a legal stranger to her child. In thinking about these issues, I began to wonder whether the question was not *whether* lesbian mothers should be legally recognized, but *on what terms* recognition should be granted.

1.2 The birth of the planned lesbian family

While Yael's story is evidence that lesbian motherhood is by no means a new phenomenon,²

² While most lesbians raising children in earlier decades conceived heterosexually, their struggles to form families remain an important part of the history of lesbian parenting. Given their limited economic and social opportunities, as well as the enormous social stigma attached to living openly as a lesbian woman, lesbians have historically had little choice but to have children within a heterosexual union. Many therefore pursued marriage and child rearing as heterosexual women might have but with the knowledge that they were lesbians. A second group of lesbians who became mothers were those who lived in "front" families. Historian Lillian Faderman has documented this practice which involved lesbians and gay men marrying and maintaining "heterosexual" households while conducting sexual affairs within their respective gay circles. In many cases the marriage was "nothing more than a front to permit a woman to function as a lesbian and not be persecuted." Some of these

planned lesbian families are greater in number and more visible today than ever before. In fact, a number of social scientists have declared that we are witnessing a lesbian "babyboom".³ While the number of lesbian mothers in Canada is difficult to determine, the 2006 Canadian Census found that of the 20,610 female same-sex couples who were willing to have their relationships recorded, 3,359 (or 16.3 per cent) were raising children.⁴ These numbers represent a forty-seven per cent increase in the number of children being raised by lesbian couples than was recorded in the 2001 Census.⁵ It is important to note, as the Vanier Institute of the Family has, that "these numbers would tend to *underestimate* the number of lesbians raising children because not all lesbians would necessarily have chosen to respond candidly to the census question."⁶ In addition, the Census figures do not include those lesbian

women also had children, usually by pretending they were part of a heterosexual couple in need of fertility services. Such a situation is recounted in the Beebo Brinker pulp novel series of the 1950s, in which a lesbian woman and a gay male friend marry and then pose as a heterosexual couple in order to access fertility services. As Faderman argues, while there are no statistics on the incidence of "front" marriages between lesbians and gay men or how many of them included children, it is plausible to believe they were not uncommon at a time when homosexual life was as stigmatized as it was in the twentieth century. Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (New York: Columbia University Press, 1991) 97-8; Ann Bannon, *The Beebo Brinker Chronicles: Women in the Shadows* (New York: Quality Paperback Book Club, 1995) 547-48.

³ Kath Weston was the first scholar to refer to the lesbian and gay "babyboom". Kath Weston, *Families We Choose: Lesbians, Gays, Kinship* (New York: Columbia University Press, 1991).

⁴ Statistics Canada, *Family Portrait: Continuity and Change in Canadian Families and Households in 2006, 2006 Census*, Families and Households, 2006 Census, September 2007 (Catalogue number: 97-553-XWE2006001) [Statistics Canada, "Family Portrait"]. These statistics would also include lesbian women who have adopted as well as lesbian couples who are co-parenting a child from a previous heterosexual relationship. The Canadian statistics appear to reflect an international, albeit Western, trend. For example, research from Australia, the United States, and New Zealand has confirmed that between fifteen and twenty per cent of lesbian women in those countries are raising children. See Jenni Millbank, *Meet the Parents: A Review of the Research on Lesbian and Gay Families*, Prepared for the Gay and Lesbian Rights Lobby (NSW) Inc., January 2002 at 20-21 [Millbank, "Meet the Parents"]. Australian statistics suggests that lesbian motherhood is increasing at a fairly rapid rate. The number of Australian same-sex families including children jumped by 26 per cent between 2001 to 2006. In Victoria, Australia's second most populous state, the numbers grew by one third. Peter Munro, "Rainbow Children", *The Age* (17 September 2007). Online: <<http://www.theage.com.au/news/in-depth/rainbow-children/2007/09/15/1189277042132.html?page=fullpage#contentSwap2>>.

⁵ Statistics Canada, *Profile of Canadian Families and Households: Diversification Continues*, Analysis Series, 2002 (Catalogue number: 96F0030XIE2001003) [Statistics Canada, "Profile of Canadian Families"].

⁶ As the Vanier Institute suggests, it is not uncommon for sexual minorities to fail to report their family status in government surveys. Dr Robert Glossop, Executive Director of Programs, The Vanier Institute of the Family, Submission of the Vanier Institute of the Family to the House of Commons Committee on Justice & Human Rights in response to "Marriage and Legal Recognition of Same-Sex Unions: A Discussion Paper", February 2003 [my emphasis].

mothers who are single or separated from their child's other parent, or who are non-custodial parents.⁷ Fertility clinics have also reported a growing numbers of lesbian clients.⁸ In 2001, the Genesis Fertility Centre in Vancouver noted that fifteen to twenty per cent of their clients are now lesbian couples.⁹ Given that lesbian women could not even access such services a decade ago, this is a remarkable figure.

The increase in lesbian families with children, particularly in Canada's urban centres, has given rise to what might be described as a lesbian and gay parenting "community". Support groups for prospective parents, playgroups for parents with toddlers, and social groups for those with older children have proliferated since the 1990s.¹⁰ For example, Vancouver is home to a parenting group that includes over two hundred families who participate in various social events throughout the year. An annual camp for the children of lesbian and gay parents that operates in the Ottawa area has recently struggled to provide places for the burgeoning number of families who apply to attend.¹¹ Even a medium-sized city like Edmonton can sustain a lesbian and gay family playgroup that meets once a month. While these various groups are primarily social, and should not be seen as representative or inclusive of all lesbian and gay parents, their mere presence arguably creates a sense of confidence amongst

⁷ The authors of the National Lesbian Families Survey, a longitudinal study of 84 lesbian headed families in the United States, estimated on the basis of their sampling that approximately 15 to 20 per cent of children born to lesbians are born to single lesbian women. Nanette Gartrell, Jean Hamilton, Amy Banks, Dee Mosbacher, Nancy Reed, Caroline Sparks & Holly Bishop, "The National Lesbian Family Study: 1 – Interviews with Prospective Mothers" (1996) 66 (2) *American Journal of Orthopsychiatry* 272.

⁸ The first sperm bank in the world to actively market themselves to lesbian women, The Sperm Bank of California in Oakland, notes on their website that two thirds of the children born through their services are born to lesbians. Online: Sperm Bank of California <<http://www.thespermbankofca.org>>.

⁹ This figure was provided by a Genesis Fertility Centre employee who testified before the B.C. Human Rights Tribunal in the two mother birth certificate case of *Gill v. Murray*, 2001 BCHRT 34 at 8 [*Gill*]. There is no data on the number of single lesbian women using Genesis' services.

¹⁰ In fact, an East Vancouver midwifery practice has so many lesbian clients that they recently introduced a "queer conceptions" lecture series for queer women and their birthing partners.

¹¹ Online: <<http://www.camptenoaks.org/home.htm>>.

at least some lesbian mothers about being "out" in the wider community. With a support network of queer families potentially surrounding them, many lesbian mothers today are likely to demand that they not only be included, but that their families be recognized, treated equally, and perhaps even celebrated. In fact, the mothers I interviewed, whether they came from gay friendly East Vancouver or semi-rural Alberta, tended to take a pro-active position with regard to interactions with outsiders, often declaring the nature of their families immediately and making it clear that they would go elsewhere if not treated with respect.¹²

While lesbian families with children are certainly more visible today than ever before, they are by no means a homogenous group. In fact, lesbian family configurations vary enormously. Historically, most lesbian mothers conceived within the context of a heterosexual relationship.¹³ After separating from their children's father, many of these women re-partnered with another woman and raised the children together.¹⁴ Some of these children grew up with the sense that they had two mothers, while others viewed their

¹² It is important to note, however, that because I recruited many of my narrators through support group listserves, my sample is likely to be particularly well "networked". Not all lesbian mothers will be members of these groups, and those who are not may feel that they have fewer allies from which to draw confidence.

¹³ For a discussion of the experiences of these women, which were markedly different from the experiences of many lesbian mothers today, it is helpful to read Ellen Lewin's groundbreaking work. Lewin's interviews with 135 lesbian mothers were conducted between 1977 and 1981 (though not published until 1993). The fact that she could find, during that time period, 135 lesbian mothers who were willing to be interviewed supports the assertion that there is nothing new about lesbian motherhood. However, Lewin's accounts of the mothers' experiences reveal the enormity of the legal and social changes that have occurred since that time. Ellen Lewin, *Lesbian Mothers: Accounts of Gender in American Culture* (Ithaca: Cornell University Press, 1993).

¹⁴ Many of these women faced considerable opposition from their former male partners and some found themselves involved in custody disputes. Others decided that they could never win in court and reluctantly withdrew from their children's lives. While most of the mothers who went to court were successful in gaining custody, judges often placed limitations on them, including prohibitions on their new female partners living in the home. For a discussion of some of these early cases see: Katherine Arnup, "'Mothers Just Like Others': Lesbians, Divorce and Child Custody in Canada" (1989) 3 C.J.W.L. 18 [Arnup, "Mothers Just Like Others"]; Katherine Arnup, "'We are Family': Lesbian Mothers in Canada" (1991) 20 Resources for Feminist Research 101 [Arnup, "We are Family"]; Jenni Millbank, "Lesbians, Child Custody, and the Long Lingering Gaze of the Law" in Susan Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press) 280 [Millbank, "Lesbians"]; Susan Boyd, "Lesbian (and Gay) Custody Claims: What Difference Does Difference Make?" (1998) 15 Can. J. Fam. L. 131 [Boyd, "Custody Claims"].

mother's new partner as something other than a parent.¹⁵ With the increasing societal acceptance of lesbian relationships, as well as the younger age at which lesbians now "come out",¹⁶ the number of children born to lesbian women within the context of heterosexual relationships has steadily declined.¹⁷ Not surprisingly, the number of children being born into lesbian relationships has simultaneously risen. These children are usually born through some form of "alternative insemination" using known or anonymous donor sperm.¹⁸ The phrase "alternative insemination" refers to the insertion of semen, using a needle-free syringe, into the vagina of the woman hoping to conceive. I have deliberately avoided the more common term – "artificial insemination" – on the basis that it implies that there is something "unnatural" about the process.¹⁹

¹⁵ For a discussion of the relationships children develop with their mother's new lesbian partner see: Fiona Nelson, *Lesbian Motherhood: An Exploration of Canadian Lesbian Families* (Toronto: University of Toronto Press) at 65-82.

¹⁶ The National Youth Advocacy Coalition, an umbrella organization for gay and lesbian youth in the United States, found that between 1995 and 2000 the average coming out age dropped from 19 to 15. Sarah Wildman, "Coming Out Early", *The Advocate* (10 October 2000). A more recent study by clinical social worker Caitlin Ryan of San Francisco State University, has found that the average age a teenager in the United States now comes out is 13. See Marilyn Elias, "Gay teens coming out earlier to peers and family", *USA Today* (7 February 2007). Online: <http://www.usatoday.com/news/nation/2007-02-07-gay-teens-cover_x.htm>. While these statistics are from the United States, there is no reason to believe that the trend would be any different in Canada.

¹⁷ While it difficult to accurately ascertain how many lesbian women actually conceive in the context of heterosexual relationships and then subsequently come out, Millbank has argued, based on her review of the international literature on lesbian and gay parenting, that it is "fair to estimate that between 50-70% of the children being raised in lesbian households are now children born into lesbian families rather than from previous heterosexual relationships. This proportion will likely increase in the next ten years." Millbank, "Meet the Parents", *supra* note 4 at 24.

¹⁸ It is difficult to know how many children who are born into lesbian relationships are conceived through sexual intercourse with the donor. While intercourse is obviously the cheapest and easiest method of conception (using a fertility clinic will cost, at minimum, several thousand dollars), given the ease of self-insemination outside of a clinic environment, the numbers are probably not high. Amongst my own narrators, only one child was conceived through intercourse with a donor. Interestingly, the second child in that family was conceived through self-insemination.

¹⁹ In situations where insemination is performed outside of a medical environment, usually in the home of the woman intending to conceive, it will be referred to as "self-insemination".

Lesbian families that include donor-conceived children come in many different forms.²⁰ In situations where the biological mother has conceived using some form of alternative insemination with the sperm of an anonymous donor, the family typically resembles the nuclear structure (though single lesbian women also conceive children via this method).²¹ In these families, the child's biological father is unknown and the mother(s) raise the child without any donor involvement.²² Children in these families are usually told that they do not have a father. While we do not know exactly how many lesbian women in Canada conceive using anonymous donor sperm, my research suggests that there may be a trend towards its use.²³ In families where conception has been achieved using the sperm of a known donor family arrangements may be more complicated. Many lesbian women who conceive using the sperm of a known donor have arranged for the donor to play some role in the child's life.

²⁰ My description of the different forms lesbian families might take derives from my own research sample as well as extensive research conducted in other jurisdictions. While lesbian families are diverse, extraordinarily similar patterns of diversity have emerged across jurisdictions, making it possible to generalize about the various family forms and arrangements that exist. Some of the studies that have assisted me in providing an overview of the nature of lesbian family arrangements include: Gillian Dunne, "Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship" (2000) 14(1) *Gender & Society* 11 ["Dunne, "Opting into Motherhood"]; Charlotte Patterson, "Family Lives of Children Born to Lesbian Mothers" in Charlotte Patterson & Tony D'Augelli, eds., *Lesbian, Gay and Bisexual Identities in Families* (New York: Oxford University Press, 1998) [Patterson, "Family Lives"]; Maureen Sullivan, *The Family of Woman: Lesbian Mothers, Their Children, and the Undoing of Gender* (Berkeley: University of California Press, 2004); Lewin, *supra* note 13; Millbank, "Meet the Parents", *supra* note 4; Nelson, *supra* note 15.

²¹ Throughout this dissertation I use the terms "nuclear structure" or "nuclear family" to refer to a family that consists of two parents and a child or children. While the parents in a "nuclear family" have traditionally been of the opposite sex, I include two mother families in the "nuclear family" category in order to distinguish them from queer families that are made up of more than two parents or only one parent.

²² In such a family, the child is raised to understand that he or she does not have a father. By way of explanation, mothers introduce the concept of a "donor" (in contrast to a "father") to the child at an early age.

²³ Research conducted in the 1990s suggests that using the sperm of anonymous donors was by far the most popular choice for lesbian women living in the United States, while women living in Canada, the United Kingdom and Australia were more likely to use known donors. This may be because sperm banks in the United States opened their doors to lesbian women far earlier than in the other countries. Millbank, "Meet the Parents", *supra* note 4 at 30-32. It is possible that now that Canadian sperm banks are open to lesbians, anonymous donors may become a more popular option. While my study sample size is too small to draw any definitive conclusions, my research suggests that this might be the case. Of the thirty-six families represented within my study, twenty-four had conceived using anonymous donor sperm.

These men are often gay,²⁴ and their involvement in their children's lives varies from being "available" if the child asks questions, to enjoying occasional or regular visits, to equal co-parenting. In families where the donor co-parents with (one or) two lesbian mothers, the child is usually understood to have (two or) three parents.²⁵ However, in the far more common situation of a donor who spends time with the child occasionally or even regularly, he is rarely understood to be a "parent" and sometimes not even a "father". In fact, it is not uncommon for the donor's symbolic role as a "father" to be deliberately diminished, and for him to be referred to by his first name or as the child's "donor".²⁶

While lesbian families with children certainly challenge the boundaries of traditional familial relations, they are emblematic of the changing nature of the Canadian family more generally. In other words, lesbian-headed families cannot, and perhaps should not, be understood in isolation from many of the more widespread changes that Canadian families have undergone over the past fifty years. As Judith Stacey has argued, lesbian families with children may be the "*pioneer outpost* of the post-modern family" – perhaps the most complex example of the improvisation, ambiguity and diversity that characterize twenty-first century families – but they are by no means the only family form confronting traditional norms.²⁷ In fact, just over a

²⁴ For example, in Gillian Dunne's Lesbian Household Project in the UK, almost all of the donors were gay men and all of the men who functioned as co-parents were gay. All but one of the known donors in my own study was a gay man. Dunne, "Opting into Motherhood", *supra* note 20.

²⁵ In some families, the donor's (usually male) partner may also be understood as a parent, meaning that the child has four parents.

²⁶ The various ways in which donors are understood will be addressed in more detail in Chapter 4.

²⁷ Judith Stacey, *In the Name of the Family: Rethinking Family Values in the Post-Modern Age* (Boston: Beacon Press, 1996) at 142 [Stacey, "In the Name of the Family"].

third of Canadian children are being raised in homes that do not resemble the married, nuclear, heterosexual norm.²⁸

The most obvious factor contributing to the changing nature of Canadian families in recent decades has been the rise in divorce.²⁹ The increase in divorce rates – approximately thirty-eight per cent of all Canadian marriages end in divorce – has meant that many children are raised by a sole parent or in a reconstituted family that includes a non-biological step-parent. An increasing number of children are also now born to unmarried parents. With marriage rates steadily declining,³⁰ and the stigma attached to having a child "out of wedlock" decreasing,³¹ raising a child outside of marriage has become remarkably common.³² A second group of individuals embracing the option of having children outside of marriage are

²⁸ Two-thirds (65.7 per cent) of Canada's 5.6 million children aged fourteen and under live with married parents. The remaining one third live with unmarried cohabiting parents (18.4 per cent) or with a single parent (15.9 per cent). Statistics Canada, "Family Portrait", *supra* note 4.

²⁹ The divorce rate in Canada soared following the introduction of no-fault divorce in 1986. The highest numbers were recorded in 1987 when 96,200 Canadian couples divorced. Since then the divorce rate has settled to around 70,000 annually (71,783 divorces in 2001). There has also been an increase in the number of divorcing spouses who are divorcing for a second time. In 1973, only 5.4 per cent of divorces involved husbands who had previously been divorced. In 2003, this proportion has tripled to 16.2 per cent of all divorces. Similarly, the proportion of divorces involving wives who had previously been divorced rose from 5.4 per cent to 15.7 per cent during this same three-decade period. Statistics Canada, *Divorces*, 2003 (Catalogue number: 84F0213XPB).

³⁰ The marriage rate in Canada is currently at a record low. In 2003, the marriage rate was 4.7 marriages for every 1,000 population. This was less than half the rate seen in the 1940s when the rate peaked at 10.9. The average age for people marrying has also risen. In 1973, the average age at which men (25.2 years) and women (22.8 years) married for the first time was about five years lower than in 2003. Statistics Canada, *Marriages*, 2003 (Catalogue number: 84F0212XWE).

³¹ The reduction (though by no means elimination) of the stigma of having a child outside of a marriage is perhaps best evidenced by the removal in the 1980s of the legal distinction between "legitimate" and "illegitimate" children. For example, Ontario amended its provincial law in 1980 to remove the legal distinction between legitimate and illegitimate children. Section 1 of Ontario's *Children's Law Reform Act* now states that: "For all purposes of the law in Ontario, a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside marriage." *Children's Law Reform Act*, R.S.O. 1990, c.12, s. 1 [*Children's Law Reform Act*].

³² In 2006, 15.9 per cent of Canadian children aged 0 to 14, lived with common-law parents. This number is more than four times the rate recorded in 1981. Statistics Canada, "Family Portrait", *supra* note 4.

single mothers "by choice".³³ These women often conceive through the use of anonymous donor sperm, and tend to be financially stable professionals in their thirties and forties.³⁴ While many of these women would prefer to parent with a partner, their lack of a partner is no longer seen as a barrier to parenthood. Finally, a growing number of Canadian couples now turn to fertility services to conceive their children.³⁵ Many of these children, whether conceived via donor insemination, in vitro fertilization, or a surrogacy arrangement, do not share a biological relationship with one or both of the adults who raise them.

When viewed within this wider social context, lesbian families with children seem far less aberrant than ever before, and may even be understood as a notable example of a much larger trend. At the same time, however, lesbian families confront some of society's most entrenched norms and thus continue to be an object of societal judgment and scorn.

1.3 Backlash: the resilience of heterosexism and homophobia

Lesbian motherhood may have become increasingly common and more widely accepted than ever before, but it remains a divisive social issue. In fact, the extraordinary resilience of heterosexism and homophobia, bolstered by growing neo-conservatism and a remarkably

³³ It is difficult to know how many women are deliberately becoming single mothers in Canada. However, recent statistics show that an increasing number of older women are becoming single mothers. While there were 19.1 births per 1000 single women aged 35 to 39 in 1981, that figure had risen to 35.5 in 2001. The exact circumstances of these pregnancies cannot be known. However, it has been speculated that the increased numbers in this older age group may represent a growth in single motherhood by choice or chance. While some of these women may have been in common law relationships, the international organization "Single Mothers by Choice" (founded in 1985), has pointed to its rapidly growing membership to suggest that many of these new mothers are single women. With over 100 active members, Vancouver has a thriving "Single Mothers by Choice" group. Chapters of the group exist in all major Canadian cities. Statistics Canada, "Profile of Canadian Families", *supra* note 5.

³⁴ Rosanna Hertz, *Single by Chance, Mothers by Choice* (New York: Oxford University Press, 2006).

³⁵ It is estimated that one in six Canadian couples (approximately 16 per cent) experience problems conceiving. While not all of these couples turn to fertility services, it is likely that a significant portion do. Online: <<http://www.genesis-fertility.com/facts/index.htm>>.

influential fathers' rights movement, means that lesbian mothers remain a vulnerable population. They may enjoy a degree of legal protection and social acceptance unthinkable even a decade ago, but they continue to parent in an environment often characterized by opposition. In the following section I will discuss some of the social and political trends in Canada with which lesbian mothers continue to contend.

1.3.1 Neo-conservatism and the rise of Canada's religious right

Around the same time that lesbians and gay men began to achieve some of their most important (formal) equality victories, a new form of conservatism began to emerge within Canadian society.³⁶ Mirroring what is arguably a trend throughout the developed West, "neo-conservatism" has in recent years become a dominant ethos amongst some of Canada's most influential political leaders, including Prime Minister Stephen Harper. While lacking a singular definition, neo-conservatism is generally understood to include two key elements. First, neo-conservatives embrace a specific economic agenda that favours the free market, privatization, and small government. Second, neo-conservatives promote a distinct social agenda that endorses traditional and fixed values, particularly with regard to family, marriage, and gender relations. In situations where the economic and social agendas of neo-conservatism conflict, neo-conservatives tend to side with the latter.³⁷

³⁶ Brooke Jeffrey, whose research focuses on the rise of neo-conservative thought in Canada, argues that the neo-conservative agenda first began to emerge in Canada in the early 1990s, primarily in the prairie province of Alberta. She attributes much of the growth in neo-conservative thought in Canada to three political leaders, former Alberta Premier Ralph Klein, former Ontario Premier Mike Harris in Ontario, and former leader of the Reform Party, Preston Manning. Brooke Jeffrey, *Hard Right Turn: The New Face of Neo-Conservatism in Canada* (Toronto: Harper Collins, 1999) at 44.

³⁷ Brenda Cossman, "Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project" in Brenda Cossman & Judy Fudge, eds., *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 182 [Cossman, "Family Feuds"].

Though neo-conservatives seek to influence everything from national economic policy to foreign affairs, a central feature of neo-conservatism is the re-assertion of traditional "family values".³⁸ Grounded in both a patriarchal gendered order and a Judeo-Christian conceptualization of the family, the populist "family values" rhetoric of neo-conservatism rejects the possibility of lesbian and gay family and actively opposes any form of lesbian and gay family recognition. While neo-conservatives by no means dominate the Canadian political landscape, neo-conservative rhetoric is frequently espoused by Conservative Party as well as some Liberal Party politicians, creating a consistent and often virulent opposition (at least at the national level) to the social and legal progress made by lesbians and gay men in recent decades.³⁹

Religion, particularly Christianity, has played a significant role in Canada's new conservatism.⁴⁰ While not all neo-conservatives are religious, the increased willingness of some Canadian politicians to make public links between their religious convictions and their political views marks a new era in Canadian politics. Prime Minister Stephen Harper himself has publicly stated that building a conservative political party in Canada capable of maintaining a lasting hold on power will be achieved by focusing not on economic

³⁸ *Ibid.* at 172-73.

³⁹ While traditionally the domain of the Conservative Party of Canada and its predecessors (particularly the Reform Party, but also the Progressive Conservative Party of Canada and, more recently, the Canadian Alliance), family values rhetoric is frequently articulated by members of Canada's more progressive Liberal Party. In essence, many of the members of the two largest national political parties in Canada share a relatively similar (conservative) view of the family. Susan Boyd & Claire Young, "Feminism, Fathers' Rights, and Family Catastrophes: Parliamentary Discourses on Post-Separation Parenting, 1966-2003" in Dorothy Chunn, Susan Boyd & Hester Lessard, eds., *Reaction and Resistance: Feminism, Law, and Social Change* (Vancouver: UBC Press, 2007) 198.

⁴⁰ It is important to note that not all religious groups in Canada have opposed lesbian and gay equality. Most notably, the United Church of Canada, the Metropolitan Community Church of Canada, and the Unitarian Church of Canada all intervened in the same-sex marriages cases in support of the lesbian and gay marriage litigants.

conservatives but on what he called "theo-cons" – religiously inspired social conservatives who care passionately about maintaining the traditional family.⁴¹ It is thus not surprising that societal changes that are understood to "threaten" traditional family values, such as the legalization of same-sex marriage, have been used by conservatives to galvanize the religious elements of their constituency. In fact, the prospect of same-sex marriage gave conservative religious groups of all faiths a shared purpose: the rejection of lesbian and gay claims to equality, particularly with regard to family.

While organizations representing the Jewish, Muslim, Sikh and Hindu faiths have all been actively involved in opposing lesbian and gay equality,⁴² conservative Christians have played the most prominent role. What dominates Christian involvement in debates over sexuality, whether with regard to same-sex marriage or parenting, is the commitment to the preservation of "traditional family values". Thus, as the same-sex marriage debate raged across Canada conservative Christians were quite open about their attempts to "capture" the Conservative Party by publicly encouraging churchgoers and "new Canadians"⁴³ to join the party and vote for Christian candidates.⁴⁴ In 2005, the Christian right successfully captured at least eight Conservative nominations in B.C., Ontario and Atlantic Canada.⁴⁵ These candidates all had ties to various U.S.-based evangelical Christian organizations and several

⁴¹ This statement was made by Stephen Harper in 2003 in a speech at the annual meeting of the Canadian conservative organization Civitas, in which he outlined conservative political strategy. Cited in Marci McDonald, "Stephen Harper and the Theo-Cons", *The Walrus*, 3:8 (October 2006) 44 at 50.

⁴² Each of these religious faiths was represented within the Interfaith Coalition on Marriage and Family that was given intervenor status in a number of the provincial same-sex marriage cases.

⁴³ The term "new Canadians" was used frequently during the same-sex marriage debate to refer to Canadian citizens who had recently immigrated to Canada, usually from the developing world. During the debate, new Canadians were used as a political weapon by conservative politicians, who assumed that their religious and cultural heritage was inherently conservative and thus opposed to homosexuality.

⁴⁴ Gloria Galloway, "Christian activists capturing Tory races: Some in party worry new riding nominees will reinforce notion of 'hidden agenda'", *Globe and Mail* (27 May 2005) A1.

⁴⁵ Frances Russell, "Christians Capturing Tory Party", *Globe and Mail* (3 June 2005).

were funded by the American chapter of Focus on the Family. In fact, the influence of an American-style Christian conservatism on Canadian conservative politics has become increasingly pronounced. In the lead up to the March 2005 Conservative Party Convention a number of prominent Canadian Christians actually urged Stephen Harper to follow the Bush Republicans and publicly proclaim his Christian views.⁴⁶ While unwilling to state his own views publicly, in a pre-election conversation on the Canadian *Drew Marshall Show*, Harper noted that, "I always make it clear that Christians are welcome in politics and particularly welcome in our party."⁴⁷ Not surprisingly, some Conservative Party members, particularly those who have had their nominations defeated by "Christian, pro-family people" supported by local churches, have expressed concern over the "hijacking" of the Party by Christians.⁴⁸

The growing influence of neo-conservatism on Canadian society, and specifically within the Canadian Conservative Party, means that lesbians and gay men face increasing opposition at the same time that they enjoy growing acceptance.⁴⁹ The effect of this contradiction is two fold. First, it makes the legal benefits that are currently available to lesbians and gay men seem somewhat tenuous, particularly given the prospect of a Conservative majority in the future.⁵⁰ While ultimately unsuccessful, Prime Minister Harper has already attempted to

⁴⁶ See, eg, the comments made to Stephen Harper by Craig Chandler, a prominent Canadian evangelical Christian and social conservative: "The re-election of U.S. President George W. Bush is a testament to the political activity and clout of evangelical Christians. President Bush did not waver in his unequivocal support of social conservative positions. He was clearly pro-life and in favour of traditional marriage. He was not ashamed to proclaim his born-again Christianity in the public forum." *Ibid.*

⁴⁷ Cited in McDonald, *supra* note 41 at 49-50.

⁴⁸ Galloway, *supra* note 44.

⁴⁹ There is no doubt that a change in government would lessen the insecurity of lesbians and gay men in Canada. However, the Liberal Party is not without its own, albeit gentler, "family values" agenda.

⁵⁰ Not only does the current political climate make existing rights seem tenuous, it may also result in lesbian and gay activists using more "traditional" arguments for future rights claims.

dismantle same-sex marriage,⁵¹ and there is no reason why other federal laws could not be similarly targeted.⁵² Second, the growing popular and political influence of neo-conservatism in Canada means that even as lesbians and gay men enjoy more legal rights, they continue to be subjected to public ridicule and abuse. For example, during the ultimately successful same-sex marriage campaign it was not unusual to hear religious groups and even politicians make outrageous claims about the behaviour of lesbians and gay men. More than one witness before the Standing Committee on Same-Sex Marriage argued that gay marriage would lead to "sexual activity with babies, children of both sexes, and with animals."⁵³ Many conservative and Christian groups claimed it would "destabilize society" and "weaken the family".⁵⁴ While these views can be easily dismissed, particularly in light of the ultimate victory, to be subjected to them on a daily basis takes an enormous emotional toll on lesbians and gay men. To add to the emotional burden, the task of raising children in such an environment, particularly older children who are cognizant of what is being said, is especially difficult. That Canada has progressive laws can often seem meaningless when the social environment is tainted by hatred.

1.3.2 The fathers' rights movement

While not directly linked to the religious right, though certainly a proponent of many of its neo-conservative values, the increasingly influential fathers' right movement has also contributed to

⁵¹ In December 2006, in fulfilment of an election promise, Conservative Prime Minister Harper sought to re-open the same-sex marriage debate in Canada. The motion was defeated 175-123. It has been speculated that Harper did not put his full support behind the motion. Recognizing the precariousness of his minority government, it is possible that he softened his stance on the issue while still fulfilling his election promise by going ahead with the vote.

⁵² The Christian right also plays a significant role in the politics of some provinces, most notably Alberta.

Provincial laws that are favourable to lesbians and gay men may therefore also be perceived to be under attack.

⁵³ Evidence of Rita Curley of the St. Ignatius Martyr Council, Standing Committee on Human Rights and Justice, 2nd Session, 37th Parliament, No. 15 at 16.

⁵⁴ See, eg, Evidence of Jean Ferrari of the Canadian Christian Women Organization for Life, Standing Committee on Human Rights and Justice, 2nd Session, 37th Parliament, No. 17 at 11.

creating an environment in which lesbian mothers find themselves vulnerable to attack.⁵⁵

Central to the objectives of the fathers' rights movement is the reassertion of the patriarchal (post-separation) nuclear family.⁵⁶ Arguing that fathers have been reduced to little more than sperm donors and wallets, fathers' rights advocates blame women, governments, and the courts for eroding the traditional family and separating men from their children.⁵⁷ Relying on a simplistic construction of equality, fathers' rights advocates demand that mothers and fathers be treated as formal equals, independent of the relationship each parent shares with his or her children or the parental responsibilities performed during the marriage.⁵⁸ Linking their arguments about the importance of fathers to neo-conservative rhetoric about the decline of the

⁵⁵ Through an analysis of government committee submissions and Hansard debates, Susan Boyd has charted the influence fathers' rights advocates have had on custody and access reform debates in Canada. She argues that while the fathers' rights movement has not ultimately determined the outcome of law reform discussions, it has influenced the legal and social discourse around what is "best" for children. The result has been that mothers who seek to limit access between children and their biological fathers are easily "demonized". Susan Boyd, "'Robbed of their Families'? Fathers' Rights Discourses in Canadian Parenting Law Reform Processes" in Richard Collier & Sally Sheldon, eds., *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Portland: Hart Publishing, 2006) 27 at 40-48; Susan Boyd, "Demonizing Mothers: Fathers' Rights Discourses in Child Custody Law Reform Processes" (2004) 6(1) *Journal of the Association for Research on Mothering* 52 [Boyd, "Demonizing Mothers"]; Susan Boyd, "Backlash against Feminism: Custody and Access Reform Debates of the Late 20th Century" (2004) 16(2) *C.J.W.L.* 255 [Boyd, "Backlash"]; Susan Boyd & Claire Young, "Who Influences Family Law Reform: Discourses on Motherhood and Fatherhood in Legislative Reform in Canada" (2002) 26 *Studies in Law, Politics & Society* 43 [Boyd & Young, "Influences"].

⁵⁶ For example, fathers' rights advocates in Australia have argued that "feminists" have "destroyed the time-honoured role of the family, with particular emphasis given to the removal of the father." Miranda Kaye & Julia Tolmie, "Fathers' Rights Groups in Australia and their Engagement with Issues in Family Law" (1998) 12 *Austl. J. of Fam. L.* 19 at 28-33. For a discussion of similar attitudes in Canada see: Carl Bertoia & Janice Drakich, "The Fathers' Rights Movement: Contradictions in Rhetoric and Practice" (1993) 15(4) *Journal of Family Issues* 592.

⁵⁷ Kaye and Tolmie found that lesbian mothers aroused particularly high levels of antipathy amongst fathers' rights advocates. Kaye & Tolmie, *ibid.* at 28-29.

⁵⁸ Representative of this approach is the following statement made before the Special Joint Committee on Child Custody and Access in 1998 by Carey Linde, a Vancouver lawyer whose practice focuses on fathers' custody claims:

"Suppose fifty couples – fifty dads and fifty moms – all come into the courts on the same day. In each case both spouses are seeking an order of exclusive possession of the matrimonial home – seeking to have the other parent kicked out of the house, leaving the kids at home. All the dads and all the moms are equally good parents. All one hundred individuals have exactly the same income and same stable jobs. The kids are all around 10 to 12 years old.

If gender equity prevailed in our courts as some would lead us to believe, at the end of the court day 25 men should be ordered out and 25 women ordered out. Half the parents left in the home with the kids should be dads and half moms. If you believe that, you believe in the tooth fairy."

Carey Linde, Brief to Special Joint Committee on Child Custody and Access, 27 April, 1998. Online: <www.divorce-for-men.com/JOINTCOM.doc>.

traditional family, fathers' rights advocates have also successfully argued that fatherless families are the cause of many of society's ills.⁵⁹ Father absence is increasingly blamed for everything from poor educational outcomes to teenage pregnancy to higher rates of involvement with the criminal justice system.⁶⁰ The solution, as the fathers' rights movement sees it, is to re-instate the father in his rightful place as head of the (married) family. In fact, fathers have come to occupy an almost mythical status in society, capable of alleviating even the most complex social problems.

The "father-as-antidote" rhetoric has, not surprisingly, been absorbed into family law, creating an environment in which it has become very difficult for a mother to preclude

⁵⁹ While much of the literature relating to the connection between father absence and social problems comes from the United States, it has frequently been cited by Canadian fathers' rights groups to support their views on post-separation parenting. For example, Danny Guspie of the National Association of Shared Parenting stated in the Association's submission to Canada's Special Joint Committee on Child Custody and Access that "[s]tatistical information backs up the high cost of fatherlessness or father absence. For girls, never feeling worthy of love from a man, it's teenage pregnancies... For boys, it's not knowing how to be a man or to interact with women. Often violence masks their anger in their father's absence." Guspie went on to say that children have a "God-given right" to shared parenting. Submission of Danny Guspie of the National Association of Shared Parenting to the Special Joint Committee on Child Custody and Access, 11 March 1998, *Proceedings of the Special Joint Committee on Child Custody and Access* (Ottawa: Public Works and Government Services, 1998). For an overview of the American literature see David Blakenhorn, *Fatherless America: Confronting Our Most Urgent Social Problem* (New York: Basic Books, 1995); David Popenoe, *Life Without Father: Compelling New Evidence that Fatherhood and Marriage are Indispensable for the Good of Children and Society* (New York: Martin Kessler Books, 1996); Robert Endleman, *No Fathers* (New York: Psyche Press, 1997).

⁶⁰ What is often ignored by those who make these arguments is that the vast majority of single mothers are forced to raise their children in poverty. It is thus not surprising that outcomes for children of single mothers are less positive than those for two parent families. To reduce the issue to one of father presence versus father absence is thus to miss the complexity of the issue. In fact, research on the effects of continued father/child contact finds little association between access and children's well-being. Rather, the presence or absence of parental conflict appears to be the most significant factor in children's post-separation adjustment. Valerie King, "Variation in the Consequences of Non-Resident Father Involvement for Children's Well-being" (1994) 56 *Journal of Marriage & the Family* 963; Denise Donnelly & David Finkelhor, "Does Equality in Custody Arrangement Improve the Parent-Child Relationship?" (1992) 54 *Journal of Marriage & the Family* 837 at 842-44; J.E. McIntosh, "Enduring Conflict in Parental Separation: Pathways of Impact on Child Development" (2003) 9 *Journal of Family Studies* 63. More recent studies on children's perspectives have found that children often value a continuing relationship with both parents, but that their understanding of shared parenting is linked to the *quality* of the parent/child relationship rather than how much time is spent with each parent. Carol Smart, "From Children's Shoes to Children's Voices" (2002) 40 *Fam. Ct. Rev.* 305 at 314 [Smart, "Children's Shoes"].

father/child access except in the most egregious circumstances.⁶¹ In fact, research has found that maximum father/child contact is increasingly understood by judges, lawyers and politicians to be *definitional* of a child's best interests.⁶² This position will sometimes prevail even in situations of domestic violence and/or child abuse.⁶³ Given the enormous social value judges and lawyers attach to the father/child relationship, a mother who frustrates access or suggests that it might be damaging to a child, is easily demonized.⁶⁴ In fact, with the exception of situations where there is clear evidence of a father's abusive behaviour towards the child, mothers who limit access are invariably described as putting their own needs ahead of those of their children.⁶⁵

The increasing emphasis on the importance of (biological) fathers in children's lives has arguably created an environment hostile to women who choose to parent in the absence of men.

While the majority of legal and social condemnation of these women has fallen on the shoulders

⁶¹ The federal *Divorce Act* does state in section 16(10) that in making a custody or access order, the court "shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact." Often referred to as the "maximum contact" rule, section 16(10) has been interpreted such that contact between a child and his or her access parent should be restricted *only* to the extent that it conflicts with the child's best interests. See, eg, *Young v Young* (1993), 49 R.F.L. (3d) 117 (S.C.C.).

⁶² It is often assumed that continued father/child access will not only benefit the child psychologically, but that it will also increase the father's willingness to provide economic support. Research from the U.S. suggests that the latter assumption is not in fact correct. Judith Wallerstein, "Child of Divorce: A Society in Search of Policy" in Mary Ann Mason, Arlene Skolnick & Stephen Sugarman, eds., *All Our Families: New Policies for a New Century* (New York: Oxford University Press, 2003) 63 at 68.

⁶³ Biological fathers have even been successful in gaining access to their children in situations where they have been violent towards the child's mother and may have engaged in abuse of the child. See, eg, Linda Neilson, *Spousal Abuse, Children and the Legal System: Final Report for the Canadian Bar Association, Law for the Futures Fund* (Fredericton: Muriel McQueen Ferguson Centre for Family Violence Research, UNB, 2001) [Neilson, "Spousal Abuse"]; Melanie Rosnes "The Invisibility of Male Violence in Canadian Child Custody and Access Decision-Making" (1997) 14 Can. J. Fam. L. 31; Linda Neilson, "Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice" (2000) 18 Windsor Y.B. Access Just. 115 [Neilson, "Partner Abuse"]; Helen Rhoades, Reg Graycar & Margaret Harrison, *The Family Law Reform Act 1995: The First Three Years* (Sydney: University of Sydney and the Family Court of Australia, 2000) at 78-82 [Rhoades, Graycar & Harrison, "The First Three Years"]

⁶⁴ Boyd, "Demonizing Mothers", *supra* note 55.

⁶⁵ Helen Rhoades, "The 'No-Contact Mother' Reconstructions of Motherhood in the Era of the 'New Father'" (2002) 16 Int'l J. L. Pol'y & Fam. 71 [Rhoades, "No Contact"].

of single heterosexual mothers, lesbian mothers are also subject to these trends. For example, while courts have, in certain circumstances, extended legal recognition to lesbian families with children, they remain reluctant to exclude a known donor from a lesbian family if it means the child will not have a “father”.⁶⁶

While neo-conservatism and the fathers' rights movement have emerged as powerful influences on the Canadian political landscape in recent years, they have obviously not prevented lesbians and gay men from securing a number of significant legal victories. This apparent contradiction can be explained in a number of ways. First, many of the most significant lesbian and gay legal successes have come at a provincial level where social conservatives have had far less influence. For example, all of the same-sex parenting cases have been won at the provincial level, and it has been provincial governments that have chosen not to appeal those decisions. Second, while “family values”, including the rights of fathers, are central to the platform of Stephen Harper's Conservative Party, the Conservatives are limited by their position as a relatively new minority government.⁶⁷ As illustrated by their attempt to re-open the same-sex marriage debate, the Conservatives simply do not have the numbers to take a particularly hard-line stance on any issue. Finally, the increasing influence of neo-liberal thought in Canadian politics has made it difficult for political leaders to pursue a straightforward conservative agenda. Given its impulse towards privatizing the costs of social reproduction within the family, neo-liberalism is consistent with the expansion of family definitions to capture as many people as possible. As Cossman puts it, neo-liberalism is “generally agnostic” towards lesbian and gay claims to family, “insofar as it is not wedded

⁶⁶ This particular phenomenon will be discussed in Chapter 2.

⁶⁷ The Conservative minority government was elected in 2006.

to any particular family form."⁶⁸ In fact, the more people who sign up for "family", and the responsibilities it entails, the better. Lesbians and gay men have thus benefited from the collision between neo-liberalism and neo-conservatism, at least to the extent that courts and politicians have been willing to include same-sex couples within their wider privatization agenda.⁶⁹

1.4 The current legal framework: recognizing the lesbian family

In this environment of both increased visibility and ongoing backlash, the legal treatment of lesbian parenting relationships has emerged as a contentious issue for Canadian family law. The focus of the debate is actually at the provincial level, as it is primarily provincial statutes (both family law and vital statistics legislation) that define legal parentage and determine who can be listed on a child's birth certificate. While provincial legislatures have largely ignored the questions posed by lesbian motherhood, the courts have exhibited a tentative willingness to recognize lesbian motherhood, particularly at the point of family formation.⁷⁰ While far from complete, and sometimes achieved via problematic argumentation,⁷¹ most provinces and territories now provide at least some method by which non-biological mothers can achieve legal recognition.⁷² For example, in all but two provinces/territories a non-

⁶⁸ Cossman, "Family Feuds", *supra* note 37 at 182.

⁶⁹ For a discussion of the role of neo-liberalism in the same-sex relationship recognition debates see *ibid.* at 181-90.

⁷⁰ Recognition of lesbian legal parenthood at the point of family formation (ie, when the child is born) should be distinguished from recognition in situations of conflict, particularly conflict with donors. In most provinces the law is now able to recognize two legal mothers, but the legal weight accorded to non-biological motherhood appears to diminish in situations of conflict, whether that conflict is with a donor or with the biological mother. See, eg, *K.G.T. v. P.D.* [2005] B.C.J. No. 2935 (SC) [*K.G.T. v P.D.*]; *S.G. v L.C.*, [2004] Q.J. No. 6915 [*S.G. v L.C.*]

⁷¹ The not always progressive terms upon which legal recognition of lesbian motherhood have been achieved in Canada will be addressed in Chapter 2.

⁷² It is important to note that while the courts appear increasingly receptive to extending legal recognition to lesbian parents, non-biological lesbian mothers continue to struggle to achieve legal parenthood in situations in which non-biological fathers would have little difficulty. For example, being in a common law or marriage

biological mother can adopt the biological children of her partner without the biological mother losing her legal relationship to them (a "second parent adoption").⁷³ In addition, a number of provinces allow two mothers to appear on the child's birth certificate from birth without having to complete a second parent adoption (the "gender neutral birth certificate").⁷⁴ In Quebec, which arguably has the most inclusive laws of all the provinces, a series of parental presumptions apply to individuals or couples who conceive using third party gametes.⁷⁵ In cases of "assisted insemination" involving a "parental project", a same-sex couple or single lesbian woman is treated in the same manner as a heterosexual couple or single woman who conceives using the same method. Finally, in a recent case initiated by two mothers and their donor, *A.A. v B.B.*, the Ontario Court of Appeal found that a child could have three legal parents – his two mothers and his donor father.⁷⁶ While the only

relationship with the biological mother does not create, except in Quebec, an automatic presumption in favour of maternity as it does in the heterosexual context, and no amount of caregiving will guarantee that the court will support a non-biological mother's claim. In fact, in a recent constitutional challenge in Saskatchewan to the exclusion from the presumptions of paternity of women who cohabit with female partners, it was made clear by the court that extending the presumption to women would be impossible "simply because a woman could not have provided the seed". It is important to note that in this case the biological mother opposed the application which was brought after the couple had separated. While the decision is likely to have been the same independent of this fact, the support of the biological mother would have inevitably bolstered the claims of the non-biological mother. *P.C. v S.L.*, 2005 S.K.Q.B. 502 at para. 17.

⁷³ Same-sex second parent adoption is permitted in all Canadian provinces and territories except Prince Edward Island and Nunavut. See *Re K* (1995), 15 R.F.L. (4th) 129 (Ont. Prov. Ct.) [*Re K*] (Ontario); *Re A* (1999), 181 D.L.R. (4th) 300 (Q.B.) [*Re A*] (Quebec); *Re Nova Scotia* (Birth Registration No. 1999-02-00420) (2001) 194 N.S.R. (2d) 362 (S.C.) [*Re Nova Scotia*] (Nova Scotia); *Adoption Act*, C.C.S.M., c. A2, s. 10 (Manitoba); *Adoption Act*, S.N.L. 1999, c. A-2.1, s. 20 (Newfoundland & Labrador); *Adoption Act*, S.S. 1998, c. A-5.2, s.23 (Saskatchewan); *Adoption Act*, R.S.B.C. 1996, c. 5, ss. 5, 29 (British Columbia); *Adoption Act*, S.N.W.T. 1998, c.9, s. 5 (Northwest Territories).

⁷⁴ In all but two provinces (Quebec and Manitoba), the availability of the gender-neutral birth certificate has been the result of litigation. The provinces that permit two same-sex parents to appear on a child's birth certificate from birth are British Columbia (*Gill*, *supra* note 9), New Brunswick (*A.A. v New Brunswick* (Department of Family and Community Services), [2004] N.B.H.R.B.I.D. No. 4 [*A.A. v New Brunswick*]), Manitoba (*Vital Statistics Act*, C.C.S.M., c. V60, s 3(6)), Quebec (*Civil Code of Quebec*, S.Q. 1991, c. 64, art. 539.1 [*Civil Code of Quebec*]), Ontario (*M.D.R. v Ontario* (Deputy Registrar General), [2006] O.J. No. 2268 [*M.D.R.*]) and Alberta (*Fraess v Alberta* (Minister of Justice and Attorney-General) 2005 ABQB 889 [*Fraess*]).

⁷⁵ *Civil Code of Quebec*, *ibid*. These new articles were introduced in June 2002 at the same time as Quebec's civil union laws for same-sex couples.

⁷⁶ *A.A. v B.B.*, [2007] O.J. No. 2 [*A.A. v B.B.*]. The interveners at the Court of Appeal level, the Alliance for Marriage and Family, recently sought to be added as a party to the case in order to seek leave to appeal the

decision of its kind (as of December 2007), it suggests that in families in which three adults agree that they are all parents, the courts may be willing to give legal recognition to the arrangement.

While some progress has been made at the provincial/territorial level, the federal legislature has largely failed to engage with the question of lesbian parenthood. Defining legal parentage is primarily the domain of provincial governments. However, subsidiary parentage issues arise in the context of federal laws, particularly those relating to family law. For example, parentage is at least somewhat addressed in the federal *Divorce Act* where the term “child of the marriage” is defined to include a child of “two spouses”, as well as a child of someone who “stands in the place of a parent”.⁷⁷ The gender-neutrality of these provisions – at least partly the result of extending marriage to same-sex couples – suggests that a child born into a same-sex marriage might be presumed to be the child of the parties to the marriage.⁷⁸

However, without specific legislative attention to the issue, it is unclear whether this would actually be the case, particularly given that provincial law makes it clear that a non-biological mother is not a parent unless she takes some positive action to secure her status. Perhaps more telling is the fact that when the *Divorce Act* was amended to include same-sex relationships, legal parentage was not discussed. Thus, while federal family law may be interpreted to include lesbian mothers within it, the question remains unresolved.

decision to the Supreme Court of Canada. The application was rejected on the basis that the Alliance did not have standing to be added as a party. *Alliance for Marriage and Family v. A.A.*, 2007 SCC 40.

⁷⁷ *Divorce Act*, R.S.C., 1985, c-3 (2nd Supp.), ss. 2(1) & 2(2) [*Divorce Act*].

⁷⁸ Importantly, the purpose of the *Divorce Act* is to determine who a child’s parents might be in cases of conflict, usually over child support. The *Divorce Act* does not address legal parentage in the absence of conflict. Thus, the *Act* is of limited assistance to same-sex parents who want to establish a parent/child legal relationship at birth.

While Canadian law stands out internationally for even the limited extent to which it recognizes lesbian families, it remains both inadequate and incomplete. Second parent adoptions still rely on the consent of the biological mother (and the biological father in the case of a known donor), involve a waiting period, usually require hiring a lawyer, and cost several thousand dollars to complete. The waiting period and the ease with which biological mothers can withhold or withdraw consent leave non-biological mothers particularly vulnerable.⁷⁹ The new gender neutral birth certificates are also not without their limitations. First, the value of birth certificates as actual proof of legal parentage remains unclear. Because birth certificates are rebuttable, and thus always open to challenge, their value as a statement of legal parentage is arguably quite weak, particularly in situations where a non-biological parent is listed. Second, the new birth certificate can only be used when a child is conceived via anonymous donor sperm and thus provides no assistance to mothers who seek to sever the parental rights and responsibilities of a known donor.

This latter fact points to a second gaping hole in the current legal framework: the failure of the law to define the rights or responsibilities (if any) of known sperm donors. With little legal guidance in this area, coupled with the above-mentioned influence of neo-conservative and fathers' rights rhetoric in both law and wider society, lesbian mothers remain extremely vulnerable to the unplanned and unwanted intervention of known donors in their family life. While Canada has few reported decisions dealing with such a scenario, cases from other

⁷⁹ In the decision of *K.G.T. v P.D.*, the biological mother not only refused to consent to the non-biological mother's adoption of the child, but instead consented to her new partner adopting. Ultimately, the court held that the new partner could not adopt the child, but that the biological mother could also not be forced to consent to the adoption by the non-biological mother. This was despite the non-biological mother having raised the child from birth and having exercised liberal access since separation. *K.G.T. v P.S.*, *supra* note 70.

jurisdictions indicate that courts are more than willing to "find fathers" for lesbian families.⁸⁰

Until the law explicitly addresses the status of known donors, uncertainty and anxiety will continue to cloud the parenting experiences of lesbian mothers.

While most lesbian mothers wish to exclude donors from the legal family, a small but significant number choose to co-parent with "donor dads". In these families, mothers may wish to extend legal parenthood to their donor (and maybe his partner). Under almost all current laws, however, this cannot be done without one of the two mothers relinquishing her parental status. In other words, in almost all situations the law limits parenthood to two individuals.⁸¹ This situation is problematic for queer families who wish to parent outside of the nuclear norm.

Thus, while lesbian mothers in Canada enjoy a reasonable level of legal recognition, the existing framework is far from complete. It contains significant gaps that, when interpreted in the context of both fathers' rights and neo-conservatism, leave lesbian mothers, particularly non-biological mothers, with inadequate legal protection. In addition, the law's almost exclusive focus on the lesbian nuclear family has meant that those who parent outside of a nuclear model are largely excluded from the law's benefits. Finally, as Chapter 2 will illustrate, because legal change has been achieved primarily through court challenges rather than legislation, lesbian mothers have been forced to mould their claims to current norms,

⁸⁰ 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 [Kelly, "Nuclear Norms"].

⁸¹ The recent decision in *A.A. v B.B.*, in which the Ontario Court of Appeal allowed two mothers and a donor dad to be listed on a child's birth certificate, suggests that at least some courts are willing to entertain the idea of a three parent family. *A.A. v B.B.* is not, however, binding on any other jurisdiction and it is not clear from the decision what criteria other three-parent families would have to meet in order to achieve the same result. *A.A. v B.B.*, *supra* note 76.

leaving little room for an exploration of how lesbian mothers themselves, in all their diversity, would design a framework for legal recognition.

1.5 Seizing the moment: revisiting the law's treatment of lesbian mothers

Given the increased visibility of lesbian mothers, the growing acceptance of lesbian and gay relationships more generally, and the variety of equality rights victories lesbian mothers have already achieved through the courts, the time is ripe for a comprehensive revisiting of the question of how the law might respond to lesbian-headed families. Though legislative reform in this area would not proceed unopposed, and is dependent for its uniformity on agreement amongst the provinces,⁸² the relatively positive legal response to lesbian and gay issues over the past decade suggests that at no other time in Canadian history has the prospect of reform seemed so likely. Capitalizing on the momentum generated by over a decade of change, my study seeks to develop a model of parental recognition that can be utilized by lesbian mothers (as well as other individuals who conceive through some form of alternative conception) to formalize and protect the parenting relationships they have created.

The various models of parental recognition currently available to same-sex parents in Canada are largely the product of the individual equality rights claims of a small number of lesbian mothers. While each of these courtroom victories has been momentous, at no point in the process has there been any qualitative empirical inquiry into what lesbian mothers actually want or need from the law. There does exist a substantial amount of empirical research

⁸² Because parental status in Canadian law is dealt with primarily at a provincial level, the prospect of law reform is dependent on the political will of each individual province.

addressing the sociological and psychological aspects of lesbian parenting.⁸³ However, none of the research to date has explicitly addressed the legal aspects of lesbian motherhood or the issue of law reform.⁸⁴ The absence of empirical data addressing law reform makes it very difficult to develop responsive and inclusive reform proposals. This dissertation is designed to fill the empirical gap by developing, through qualitative interviewing, a parental recognition model grounded in the thoughts, experiences and political motivations of lesbian mothers themselves.⁸⁵ To that end, from February until October of 2005, I conducted interviews with 36 lesbian families (49 lesbian mothers in total) living in the B.C. Lower Mainland and Alberta. While empirically grounded, the project also attempts to grapple with the theoretical and strategic questions raised by lesbian engagement with the law. It questions the terms upon which parental recognition has been achieved thus far, and evaluates the efficacy of a reform agenda focused exclusively on gaining access to the existing legal framework. Ultimately, it seeks to build a law reform model that not only reflects the needs of lesbian mothers and their children, but expands the category of "family" beyond its existing physical and ideological parameters.

⁸³ The only Canadian qualitative empirical research about lesbian motherhood is that of Fiona Nelson, who interviewed lesbian mothers living in Alberta in the early 1990s. Her project focused on how the women had become mothers and what their experiences of motherhood have subsequently been. A number of significant qualitative studies about lesbian motherhood have originated outside of Canada, primarily in the United States and the United Kingdom. Two of the most comprehensive studies, those conducted by Maureen Sullivan in the United States and Gillian Dunne in the United Kingdom, focus primarily on how lesbian mothers experience their family life. Both scholars are particularly interested in the internal caregiving and labour practices of lesbian mothers and the extent to which their families challenge the existing gendered order. American psychologist Charlotte Patterson has also made a significant contribution to the social science research about lesbian motherhood. Though her focus is primarily on quantitative psychological research, she has written about the dissonance between the child's experience of family and the legal reality. Nelson, *supra* note 15; Dunne, "Opting into Motherhood", *supra* note 20; Patterson, "Family Lives", *supra* note 20 at 161-2; Sullivan, *supra* note 20.

⁸⁴ Sociologist Maureen Sullivan's study of lesbian mothers living in the San Francisco Bay Area does touch on legal issues, but law is by no means the focus of her research. Sullivan, *supra* note 20 at 34-9, 213-20.

⁸⁵ While my law reform recommendations are designed to respond to and meet the needs of lesbian mothers, they apply equally to heterosexual parents. Such an approach was taken for several reasons. First, it is unlikely that the reforms would be adopted by government if they did not apply to all families. Second, I would argue that by generating reform proposals that also apply to heterosexuals, there is a greater chance of transforming family relationships more generally.

The project was motivated by four key research questions. The first question focused on how lesbian mothers defined "family". They were asked to describe their own families and who they included within them. During these discussions the significance of concepts such as chosen family, social family and biological family were explored. Family definitions were returned to in the later discussion of law reform. The mothers were invited to explore where they would ideally draw the boundaries around the concept of "family" and why. Discussions tended to centre around whether the mothers favoured maintaining the current focus on the nuclear family structure or whether they preferred a more expansive model, capable of including three or more parents and/or other chosen family.

The second research question involved an exploration of how parenthood is understood and defined within the lesbian family, focusing in particular on parental definitions in the context of the lesbian relationship itself. Mothers were asked to describe their own understandings of parenthood and how these understandings were enacted within their own families. They were also asked whether they drew any distinction between biological and non-biological motherhood and, if not, how they worked to displace the significant social meaning attached to biological relationships.

The third research question focused on the role of sperm donors within the lesbian family. The mothers, whether they had conceived using the sperm of anonymous or known donors, were asked how they understood the role of donors in lesbian families and in what circumstances (if any) they might understand a donor to be a "parent". They were also asked

about the meaning (if any) they attached to the biological connection between donor and child. Those mothers who had conceived using the sperm of a known donor were asked to describe the role (if any) their donor played in their child's life and how they understood his identity. Was he a "father", a "parent", a donor" or something else?

The final research question focused explicitly on law reform: if the mothers were able to create their own model for parental recognition what would they propose? The mothers were first invited to explore their attitudes towards law and legal engagement. They were then asked to describe what *kind* of law reform they would ideally pursue. To initiate the law reform conversation, the mothers were asked to respond to three loosely defined recognition models gathered from the international literature on same-sex parenting. The first model essentially extended the current presumption-based legal framework to the same-sex context. The second model removed all presumptions and instead required the individuals who intended to parent a child to register as the child's parents. The final model involved combining the presumption and registration models to produce a framework that granted automatic parental status to the conjugal couple (or simply the birth mother), while also allowing for additional parents and non-parental figures to "opt-in" to the legal family. Presentation of the proposals was largely designed to provide the mothers with a starting point from which they could develop their own ideas.

1.6 The limitations of pursuing law

As the final research question suggests, while this project is focused primarily on law reform, the limitations of law as a tool for progressive social transformation have not been ignored.

In fact, though legal recognition of their parental relationships was something the mothers I interviewed appeared to both want and need, they were cautious about assuming that legal change would produce either an immediate or widespread change in the social environment in which they parented. The mothers' cautiousness is echoed by many scholars, who suggest that positive legal change and progressive social transformation do not necessarily go hand in hand.⁸⁶ This cautionary note arises for two reasons. First, as I explain below, because law is not the sole site of social power, a singular pursuit of legal strategies is unlikely to completely transform the existing relations of power. In other words, one cannot presume that broad-based social transformation will simply flow from the legal recognition of lesbian motherhood. Second, law itself has an inbuilt conservative tendency limiting what can be realistically achieved through its use. For example, the traditional familial ideology embedded within law is unlikely to be completely displaced, and may sometimes be reinforced, even in situations where lesbian families are afforded legal protection. In fact, there is often a dissonance between law-as-legislation and law-as-practice that ultimately limits the ability of law to transform social relations. While each of these arguments will be outlined briefly below, they will be returned to throughout the dissertation.

To address the first point, while the law remains a significant force in most societies, Michel Foucault has argued that the regulation of the population cannot be understood simply through an analysis of juridical power.⁸⁷ Rather, Foucault argues that there are numerous

⁸⁶ Shelley Gavigan, "Mothers, Other Mothers, and Others: The Legal Challenges and Contradictions of Lesbian Parents" in Dorothy Chunn & Dany Lacombe, eds., *Law as a Gendering Practice* (Don Mills, ON: Oxford University Press, 2000) 100 at 101 [Gavigan, "Mothers"]; Harry Glasbeek, "Some Strategies for an Unlikely Task: The Progressive Use of Law" (1989) 21 *Ottawa L. Rev.* 387; Judy Fudge, "What Do We Mean by Law and Social Transformation?" (1991) 5 *J. L. & Soc'y* 47.

⁸⁷ Colin Gordon, ed., *Michel Foucault - Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Brighton: Harvester Press, 1980).

sites of power, many of which derive from what he labels the "new knowledges": medicine, criminology, epidemiology, psychiatry etc. Each of these "new knowledges" contributes a different dimension to Foucault's "disciplinary society", creating a "closely linked grid of disciplinary coercions whose purpose is in fact to assure the coercion of this same social body."⁸⁸ Evidence of the influence of these "new knowledges" in the disciplining of lesbian mothers can be seen in the judicial use of psychiatric and other medical information to determine whether lesbian mothers are "fit" to parent.⁸⁹

In addition to the "new knowledges" identified by Foucault, there are a variety of other extra-judicial sites of regulatory power that intersect with law to regulate and discipline lesbian mothers. For example, lesbian mothers are subjected to normalizing and moralizing discourses, particularly around issues of sexuality, family, and gender relations,⁹⁰ which are produced and reproduced through the media, educational institutions, government agencies, science, religious institutions, and popular advice literature. Designed to "render 'natural' the perspectives and ideologies of hegemonic interests",⁹¹ these normalizing discourses are inevitably internalized by lesbian mothers and their children. Self-regulation and self-discipline result. In fact, as I will argue in Chapter 2, many of the lesbian and gay litigants who took part in the same-sex marriage cases appear to have internalized the moralizing discourse of familial ideology. What this discussion suggests is that any attempt to change social relations cannot be achieved solely through the enhancement of legal rights. Unless the

⁸⁸ *Ibid.* at 106.

⁸⁹ See, eg, *Re K*, *supra* note 73.

⁹⁰ Gary Kinsman, "Queerness is Not in Our Genes: Biological Determinism Versus Social Liberation" in Sarah Brock, ed., *Making Normal: Social Regulation in Canada* (Toronto: Nelson Thomson Learning, 2003) 262.

⁹¹ Mary Louise Adams, *The Trouble with Normal: Postwar Youth and the Making of Heterosexuality* (Toronto: University of Toronto Press, 1997) at 14.

other sites of social power are simultaneously interrogated, legal change alone will have a limited social effect. In fact, Foucault argues that law is a diminishing site of social power that is being replaced by new forms of surveillance.

While Foucault's conception of power has had an enormous influence on how scholars understand legal and social relations, Smart notes that it remains "very hard to abandon the old concept of power", particularly the traditional understanding of the power of law.⁹² In fact, not only do many activist communities continue to talk about power as a singular commodity derived from law and possessed by a few, they also act as if it were. For example, much of the lesbian and gay activism in the past few decades has focused on obtaining legal rights, with significantly less attention given to the relations of power outside of the law. The focus on legal rights can be explained, at least in part, by the historical (and ongoing) exclusion of lesbians and gay men from many legal protections and benefits. In other words, law's importance is inevitably a function of the degree to which a particular group is excluded from law's purview.⁹³ For a community as marginalized as lesbians and gay men, law's value inevitably increases. At the same time, no social movement can afford to neglect the non-legal sites of power, many of which limit what can ultimately be achieved through law.

While Foucault's conceptualization of power as multi-dimensional is an important insight for lesbian mothers seeking to change the social conditions within which they parent, I agree

⁹² Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 7 [Smart, "Power of Law"].

⁹³ Patricia Williams makes a similar argument with regards to racialized communities who are excluded from law's protection. Patricia Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge: Harvard University Press, 1991) at 152.

with Smart that we should be wary of Foucault's suggestion that law is in fact a *diminishing* site of social power.⁹⁴ In fact, in some areas of society legal regulation is increasing. A key example for lesbian mothers is the growing regulation of alternative insemination, a practice that, prior to 2004, had not been addressed by Canadian law.⁹⁵ I thus support Smart's argument that the most helpful way in which to approach the relationship between law, power and social change is to see law as neither the most significant source of power in society, nor as a diminishing force. Rather, Smart suggests that there are two parallel mechanisms of power, the discourse of rights (traditional law) and the discourse of normalization (the "new knowledges").⁹⁶ While Foucault's focus is primarily the latter, Smart argues that neither can be dismissed.⁹⁷ Rather, each works in tandem to produce the disciplinary society, and focusing on one to the exclusion of the other will inevitably place limitations on what kind of change is possible. It is thus important that lesbian mothers recognize that law reform may neither transform other relations of power, nor produce the regulatory measures they actually desire. Law is neither the sole site of power in society, nor the only disciplinary force. At the same time, because of its continuing regulatory role, lesbian mothers cannot abandon the law.

As noted above, a second reason why law should be understood as an incomplete tool for lesbian mothers seeking progressive social change is its seemingly inherent conservatism. In

⁹⁴ Smart, "Power of Law", *supra* note 92 at 8.

⁹⁵ In fact, Canada's relatively new *Assisted Human Reproduction Act* appears to prohibit the common lesbian practice of conception via self-insemination at home, a practice that had never been addressed by law in the past. *Assisted Human Reproduction Act*, R.S.C. 2004, c. 2, s. 10.

⁹⁶ Law can, of course, also have a "normalizing" impact. For example, Ruthann Robson has argued that the absorption of lesbians into family law is likely to have a "domesticating" effect on lesbian identity and relationships. Ruthann Robson, *Lesbian (Out)law: Survival Under the Rule of Law* (Ithaca, NY: Firebrand Books, 1992) [Robson, "Lesbian (Out)law"]; Ruthann Robson, "Mother: The Legal Domestication of Lesbian Experience" (1992) 7(4) *Hypatia* 172 [Robson, "Mother"].

⁹⁷ Smart, "Power of Law", *supra* note 92.

particular, lesbian mothers must be aware of the traditional familial ideology embedded within law that is likely to limit what can be realistically achieved through its use. To explain this conundrum, it is helpful to consider Chunn and Lacombe's analytic distinction between "law-as-legislation" and "law-as-practice".⁹⁸ If the focus is only on "law-as-legislation" – that is, the law on the books – lesbian mothers appear to have made significant political gains. The vast majority of provinces now have at least one legislative mechanism by which two-mother families can obtain legal recognition. However, a focus on "law-as-practice" – how law actually plays out in the courtroom or in daily life – often reveals the ways in which law continues to be influenced by traditional familial ideology, reproducing hetero-normative discourses even in situations where the "law-as-legislation" appears to entitle lesbian mothers to legal protection. For example, in a recent interim decision in Quebec in which a married lesbian couple conceived through alternative insemination and parented the child together from birth, the judge was unwilling to recognize the child's non-biological mother as the child's legal parent.⁹⁹ Refusing to accept that the two women had engaged in a "parental project", the judge held that the child's second parent was his biological father. This decision prevailed despite some of the most inclusive lesbian parenting laws in Canada.¹⁰⁰ Thus, even in instances where law-as-legislation is designed to protect lesbian mothers, an analysis of legal practices reveals that traditional familial ideology often serves to diminish the effect of even the most progressive legislative reform.

⁹⁸ In developing their distinction between law-as-legislation and law-as-practice, Chunn and Lacombe turned to Carol Smart's research on the uneven impact on women of many of the laws that were designed to help them. For example, Smart found that family law legislation that established formal equality between husbands and wives – legislation that many feminist had advocated for – actually had a negative on many women in practice. This was because women were treated under the new law as if they were equals, when in fact their substantive position remained vastly different from that of men. Similar outcomes can be seen in the context of lesbian parenting. Dorothy Chunn & Dany Lacombe, "Introduction" in Chunn & Lacombe, *supra* note 86 at 11.

⁹⁹ *S.G. v L.C.*, *supra* note 70.

¹⁰⁰ *Civil Code of Quebec*, *supra* note 74 at arts. 538-42.

While law is clearly a limited tool by which to achieve progressive social change, as suggested above, it is difficult for marginalized communities who have historically been excluded from its benefits, to ignore it altogether. As Patricia Williams has argued in the rights context, it is difficult when a particular group does not enjoy a specific right, for members of that group to accept the suggestion that rights themselves are problematic.¹⁰¹

Law plays a significant role in the lives of marginalized communities, not only because it is capable of extending concrete rights to them, but also because of the symbolic content of that action. Thus, while the legal recognition of lesbian families may not eliminate the effects of other sites of social power, it can extend to some families a status that must be acknowledged by significant public bodies, such as hospitals, schools, and Canadian Border Services. At the same time, lesbian mothers must be cognizant of the fact that legal change will not necessarily produce the kind of social change that many of them desire. The resilience of traditional ideological norms within law, as well as the fluid nature of social power, mean that legal change will always be an incomplete solution, and may even generate additional problems. Thus, law must be used in conjunction with other strategies, deployed strategically and never in isolation. As Brickey and Comack put it, "[l]aw offers an important (*although by no means the sole*) source for realizing substantive social change."¹⁰²

1.7 Presentation of the Study

This dissertation is divided into three sections. This chapter and the two subsequent chapters comprise Section One. They address the theoretical and methodological aspects of the

¹⁰¹ Williams, *supra* note 93 at 152.

¹⁰² Stephen Brickey & Elizabeth Comack, "The Role of Law in Social Transformation: Is a Jurisprudence of Insurgency Possible?" (1987) 2 C.J.L.S. 97 at 102 [emphasis added].

research. Chapters Four and Five comprise Section Two and are based on analysis of the interviews. Chapter Four addresses definitional issues, while Chapter Five focuses on law reform. In Section Three, a concluding chapter draws together the main legal, theoretical and policy implications of the study and makes recommendations for further research. Each of these chapters will be discussed in more detail below.

Chapter 2 addresses the theoretical and policy dimensions of the project. In particular, it situates the issue of lesbian and gay parental recognition within the wider debate about the terms upon which lesbians and gay men have sought entry into legal “family”. Focusing initially on relationship recognition, the chapter questions the continued reliance by lesbians and gay men on formal equality or “sameness” strategies, and suggests that these strategies may have the effect of reinforcing existing hierarchies and erasing lesbian and gay difference. The chapter then considers whether the critique of a formal equality strategy in the relationship recognition context resonates in the context of parenting. It posits that while the use of formal equality to achieve parental status raises numerous concerns, there may also be fundamental differences between parental and adult relationship recognition that make the critique less convincing in the parental context. Ultimately, reforms that meld proposals based on both formal and substantive equality may offer the best solutions.

Chapter Three outlines the methodological practice that guided the research process. The procedural, analytic and ethical challenges the study posed are discussed, with a particular focus on the importance of reflexive practice. The narrators and their families are also introduced.

Drawing on the narrators' voices, Chapter Four explores how the mothers understood and defined key familial concepts, including "family" and "parent". The mothers' definitions are discussed in the context of wider debates about the meaning of kinship in contemporary Western society. Particular attention is given to what the mothers understand to be the key signifiers of parental status, analyzed first in the context of their own parent/child relationships and then with regards to donor relationships. Chapter Four also considers the extent to which the mothers embrace or reject some of the key features of the traditional family. For example, it explores their attitudes towards parenting outside of a nuclear model, as well as the relationship between parenting and legal marriage.

Building on the mothers' definitions and understandings of key familial concepts, Chapter Five considers how the mothers might approach law reform directed towards recognizing their parental relationships. Acknowledging that legal engagement may be hazardous for marginalized groups, the chapter begins by considering the mothers' attitudes towards engaging with law. While almost all of them saw parenting law reform as a significant priority, most expressed at least some reservation, suggesting that law reform should not be a singular strategy. The second half of the chapter deals explicitly with law reform. It considers how the mothers' parental definitions might translate into a reform context and what kind of a legislative model would be required. Ultimately, it argues that the most appropriate reform proposal may involve combining reforms grounded in formal equality, with more expansive provisions that capture the desire amongst the mothers for a more substantive definition of family.

In the concluding chapter, I summarize my key research findings, highlighting in particular what my narrators had to say about the strategies for reform they prefer, and the nature of the legal change they desire. I conclude by considering how lesbian mothers might encourage government to pursue legislative change and what additional work still needs to be done.

2 ON WHOSE TERMS? ON WHAT TERMS? LESBIAN AND GAY FAMILY RECOGNITION

2.1 Introduction

As noted in Chapter One, over the past two decades lesbians and gay men in Canada have enjoyed considerable success challenging in court the various legislative provisions that excluded them from the domain of legal “family”. Relying primarily on formal equality – typically a straightforward “sameness” argument that assumes that equality requires no more than equal treatment – lesbians and gay men have successfully challenged everything from the definition of “spouse” in the pension provisions of the federal *Income Tax Act*,¹⁰³ to the differential treatment of same-sex “spouses” under provincial adoption legislation.¹⁰⁴ There is no doubt that within the lesbian and gay community, or at least amongst its most vocal and publicly recognizable members, the dominant perception of the lesbian and gay trajectory towards “family” is a positive one. Legal victories have been understood almost exclusively through the lens of progress. In fact, throughout the recent same-sex marriage campaign, both litigants and their organizational advocates, such as EGALE,¹⁰⁵ went so far as to assert that it was only through access to marriage that lesbians and gay men could achieve “full citizenship” in Canadian society.¹⁰⁶

¹⁰³ *Rosenberg v Canada (Attorney-General)*, [1988] 38 O.R. (3d) 577.

¹⁰⁴ *Re K*, *supra* note 73; *Re A*, *supra* note 73.

¹⁰⁵ “EGALE” stands for Equality for Gays and Lesbians Everywhere. EGALÉ describes itself as a “national organization” that “advances equality and justice for lesbian, gay, bisexual and trans-identified people, and their families, across Canada.” Online: <<http://www.egale.ca>>.

¹⁰⁶ See, eg, Press Release, “After the Vote: CEM Speaks”, Canadians for Equal Marriage, 28 June 2005. The Press Release states that, “Our Parliamentarians have...said that the Canadian thing to do is to end discrimination and to extend full citizenship to lesbian, gay, bisexual and transgender people.” Online: <<http://www.equal-marriage.ca/resource.php?id=464>>.

With lesbian and gay access to the trappings of the traditional family tied to concepts as powerful as “citizenship”, it seems almost impossible to understand the recent spate of legal successes as anything but “victories”. To suggest otherwise might be understood as a rejection of lesbian and gay equality. There has, however, emerged what I have termed a “quiet critique” of the lesbian and gay equality-seeking movement, which has, often in opposition to the most vocal voices within the lesbian and gay mainstream, expressed reservation about the terms upon which family recognition has been argued for and won.¹⁰⁷ Articulated predominantly by lesbian feminists,¹⁰⁸ as well as by lesbians and gay men who might align themselves with a more liberationist agenda,¹⁰⁹ the critique suggests that by seeking inclusion within the family on the basis of formal equality or “sameness”, lesbians and gay men validate and perpetuate the hierarchies, inequalities and oppressions that characterize traditional familial ideology. Because formal equality demands little more than

¹⁰⁷ I have called it a “quiet critique” because it has been characterized by a reluctance on the part of many of its proponents to speak publicly or too loudly in opposition to the current trajectory. It is thus no great surprise that the critique can be found most frequently within academic journals or in the pages of the queer (and thus not mainstream) press. There seems to be a certain consensus amongst the quiet critiquers, at least while the mainstream debates are raging and the voices of opposition are so hateful, that they will not sabotage the current approach by suggesting a division of opinion within the lesbian and gay communities.

¹⁰⁸ See, eg, Susan Boyd & Claire Young, “From Same-Sex to No Sex’?: Trends Towards Recognition of (Same-Sex) Relationships in Canada” (2003) 1(3) *Seattle Journal for Social Justice* 757 at 763-65 [Boyd & Young, “Same-Sex”]; Susan Boyd, “From Outlaw to InLaw: Bringing Lesbian and Gay Relationships Into the Family System” (1999) 3(1) *Yearbook of New Zealand Jurisprudence* 31-53 [Boyd, “Outlaw to Inlaw”]; Judith Butler, “Is Kinship Always Already Heterosexual” (2002) 13(1) *differences: a journal of feminist cultural studies* 14; Julie Shapiro, “A Lesbian-Centered Critique of Second-Parent Adoptions” (1999) 14 *Berkeley Women’s Law Journal* 17; Shane Phelan, *Sexual Strangers: Gays, Lesbians, and Dilemmas of Citizenship* (Philadelphia: Temple University Press, 2001); Didi Herman, “Are We Family? Lesbian Rights and Women’s Liberation” (1990) 28(4) *Osgoode Hall L.J.* 789; Robson, “Lesbian (Out)law”, *supra* note 96.

¹⁰⁹ While it is impossible to define exactly what might be encompassed by a “gay liberationist agenda”, liberationists have tended to focus on the politicization and transformation of both sexuality and gender. As Miriam Smith explains, “gay liberation grew out of the counter-culture of the sixties and its meaning frames were transformational, aimed at the elimination of heterosexism, patriarchy and sex and gender roles.” Thus, the focus of liberation is not on seeking inclusion within existing institutions, but rather the complete transformation or even elimination of certain institutions and practices. Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality Seeking, 1971-1995* (Toronto: University of Toronto Press, 1999) 43-50. See also: Gary Kinsman, *The Regulation of Desire: Homo and Hetero Sexualities* (Montreal: Black Rose Books, 1996) at 288-93.

identical treatment, reforms that evolve out of a formal equality strategy tend to expand existing categories, but rarely question the nature of the categories themselves.

Those who have offered the quiet critique do not suggest that equality-seeking is, in itself, problematic.¹¹⁰ Rather, they challenge the trend amongst lesbian and gay advocacy groups to rely almost entirely on a formal equality model that tends to emphasize the similarities between same and opposite-sex families. In particular, they question why a more substantive version of equality has not been adopted. In contrast to formal equality, substantive equality takes into account social circumstances and differences, and is thus more likely than formal equality to respond to the lived realities of lesbian and gay families. For example, a substantive approach to equality for lesbians and gay men would not presume that equal treatment under Canadian family law would necessarily result in equal familial recognition. Lesbian and gay families are not necessarily structured in the same way as heterosexual families, yet equal treatment will provide familial recognition only to those that are. In contrast, a substantive equality approach, because it favours a wider contextual analysis, is much more likely to produce laws that cater to families of difference, whether they include three parents, non-conjugal co-parents, or involved known donors. Perhaps because of the possibilities presented by a more nuanced version of equality, few proponents of the quiet critique suggest that lesbians and gay men should refuse to engage with the struggle to achieve legal recognition of their familial relationships altogether. Rather, they argue that engagement with the existing framework must be done critically, with a view to effecting progressive social change.

¹¹⁰ Though they may tend to be more skeptical than others about the ability of law to generate progressive social change.

The significant reliance by lesbian and gay rights advocates on formal equality strategies in the face of these criticisms can be explained in a number of ways. First, the tendency to emphasize similarities between opposite and same-sex families may be the product of engaging with Canada's constitutional equality rights guarantee. As part of any equality claim under section 15 of the *Canadian Charter of Rights and Freedoms* ["the Charter"],¹¹¹ it is necessary that the claimant identify a "comparator group" against whom he or she wishes to be compared for the purpose of the discrimination inquiry.¹¹² For lesbian and gay litigants who seek legal recognition of their familial relationships, the most obvious and strategic comparator to choose is heterosexual relationships, and the easiest way in which to frame the claim is to argue that "We, Y group, want the same rights that X group already possesses, because we are essentially the same as X group in terms of the quality and security of our intimate relationships."¹¹³ This formal equality analysis is both straightforward and strategically attractive to lesbian and gay litigants. A second explanation for the heavy reliance by lesbian and gay rights advocates on formal equality strategies may lie in the origins of Canada's most vocal lesbian and gay rights organization, EGALE. Formed in the wake of the 1985 House of Commons Standing Committee hearings on equality rights, EGALE has been committed from the outset to using "constitutional litigation" as a vehicle for change. The limits that characterize equality claims under section 15 have inevitably

¹¹¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11, section 15 [Charter].

¹¹² *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 6 [Law]. The decision in *Law* confirmed that applicants bringing a claim under s. 15 identify a person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry. For a critique of the *Law* decision see: Fay Faraday, Margaret Denike, M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006); Sheila McIntyre & Sandra Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Butterworths, 2006).

¹¹³ Boyd & Young, "Same-Sex", *supra* note 108 at 764.

shaped the claims brought forward by EGALE and its supporters. The final explanation for why lesbian and gay rights advocates have relied so heavily on formal equality is that while it might be an insufficient long term strategy, its remedies to alleviate the most extreme forms of discrimination. As Shelley Gavigan explains, formal equality can never fully resolve relations of inequality, but it can at least *inhibit* them.¹¹⁴

These explanations for why a formal equality strategy has been both attractive and difficult to avoid do not obviate concerns that it is increasingly being understood as an end in itself. Opportunities to rally for more substantive changes once formal equality has been achieved are arguably lost when assimilation into the existing framework is the purpose of the movement. This has played out most recently in the context of same-sex marriage,¹¹⁵ where lesbian and gay entry into the institution has been celebrated as the *final* step, the ultimate equality rights victory.¹¹⁶ That the institution of marriage itself might be problematic simply no longer enters the discourse.

While proponents of the “quiet critique” have now produced a significant body of literature questioning the terms upon which same-sex partnership recognition (including marriage) has been advocated for and achieved, few have considered whether the same arguments resonate

¹¹⁴ Shelley Gavigan, “Equal Families, Equal Parents, Equal Marriage: The Case of the Missing Patriarch” in McIntyre & Rodgers, *supra* note 112 at 320 [Gavigan, “Equal Families”]. While there is certainly some merit to this argument, it may be difficult to generate secondary challenges when large portions of the marginalized group understand formal equality as an end in itself.

¹¹⁵ Though, it should be noted that a similar critique has been made with regard to the legal recognition of same-sex common law relationships. See, eg, Boyd & Young, “Same-Sex”, *supra* note 108 at 763-65; Boyd, “Outlaw to Inlaw”, *supra* note 108.

¹¹⁶ For example, following Senate approval of the same-sex marriage law, Canadians for Equal Marriage stated that “there are no second-class Canadians, lesbian, gay, bi and trans people are full members of the community, without caveat or exceptions.” Marriage was clearly understood as the last remaining hurdle and, once secured, there were no more battles to fight.

in the context of parenting.¹¹⁷ In other words, few people have investigated the terms upon which lesbian and gay parental recognition has been sought or, in the event that a formal equality framework has been relied upon, whether it warrants the same critique as has been directed towards its use in the context of relationship recognition. The fact that the majority of legal efforts in the parenting arena have focused on recognizing the two mother nuclear family suggests that the quiet critique has some relevance in the parenting debate. By arguing for parental recognition on the basis that lesbian parents mirror the heterosexual “norm”, lesbian litigants necessarily exclude from “family” those who parent outside of the traditional model. Furthermore, because lesbian parents often rely in their equality claims on many of the same “family signifiers” as those who advocated for same-sex marriage – monogamy, financial inter-dependence, jointly held property, shared caregiving – they also perpetuate the idea that there is only one way to “do family”.

At the same time, there may be fundamental differences between seeking parental recognition and seeking adult relationship recognition that make the critique of a formal equality strategy less convincing in the parental context. First, it could be argued that the stakes are simply higher in the parenting context and that a pragmatic approach might be more easily justified. For example, failure to legally recognize a non-biological mother could result in the complete severance of the relationship between mother and child.¹¹⁸ Such a scenario is likely to affect not only the non-biological mother, but also the child who has a

¹¹⁷ Some of the few exceptions are: Katherine Arnup & Susan Boyd, “Familial Disputes? Sperm Donors, Lesbian Mothers, and Legal Parenthood” in Didi Herman & Carl Stychin, eds., *Legal Inversions* (Philadelphia: Temple University Press, 1995) 77 [Arnup & Boyd, “Familial Disputes”]; Kelly, “Nuclear Norms”, *supra* note 80 at 133; Shapiro, *supra* note 108.

¹¹⁸ While this outcome is unlikely in Canada, primarily because most provinces permit “non-parents” to seek access rights in relation children with whom they have a relationship, decisions to this effect continue to be made on a fairly regular basis in the United States where there is no such protection.

significant interest, both emotionally and economically, in having her parental relationships recognized. Second, it could be argued that the alternative to the nuclear family – some kind of multiple parent model – is extremely risky for lesbian mothers given the ongoing influence of the fathers’ rights movement in Canada. In fact, by willingly expanding the family beyond a two parent model, lesbians arguably run the risk of having “fathers” imposed upon them.¹¹⁹ Finally, it is possible to argue, as Nancy Polikoff has, that the legal validation of a two mother family supports a woman’s right to make reproductive decisions autonomously from men.¹²⁰ Thus, while the nuclear family is ultimately reinforced when applying a formal equality model, the absence of a patriarch arguably creates space for new meaning. None of this is to suggest that a formal equality approach to parental recognition is not problematic, or that it is the only way in which lesbian mothers can be legally protected. However, these arguments do make the complete rejection of a formal equality strategy more difficult to sustain. Perhaps most importantly, they emphasize the need for critical engagement with law, and ultimately, a willingness to move beyond either/or solutions.

In this chapter, I will situate the issue of lesbian and gay parental recognition within the wider debate about the terms upon which lesbians and gay men have sought entry into legal “family”. First, I will outline the dominant approach taken by the lesbian and gay communities towards family recognition. Focusing in particular on the marriage campaign which is, in many ways, emblematic of the wider discourse, I will highlight the enormous

¹¹⁹ Kelly, “Nuclear Norms”, *supra* note 80.

¹²⁰ Nancy Polikoff, “The Deliberate Construction of Families without Fathers: Is it an Option for Lesbian and Heterosexual Mothers?” (1996) 36 Santa Clara L. Rev. 375 [Polikoff, “Families without Fathers”]; Nancy Polikoff, “This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families” (1990) 78 Geo. L. J. 459 [Polikoff, “Redefining Parenthood”].

reliance key advocates have placed on formal equality. Second, I will provide an overview of the critique of the formal equality approach to family recognition, illustrating the many ways in which "sameness" strategies can reinforce existing hierarchies and render invisible non-normative lesbian and gay relationships and family configurations.¹²¹ Finally, I will consider how these debates, which have unfolded largely in the context of adult relationship recognition, might play out in the parenting context. First, I will consider the extent to which those seeking parental recognition have also relied on a formal equality framework. Then, I will consider whether the critique of a formal equality approach resonates in the context of parental recognition. Finally, I will conclude by considering whether those seeking parental recognition might be able to reframe the debate so that an either/or dichotomy – that is, that one must be either for or against formal equality – is avoided.

2.2 “We are family”: lesbian and gay claims to family

The formal equality framework that has come to dominate lesbian and gay claims to “family” tentatively emerged within lesbian and gay politics in the mid-1980s, no doubt the product of the constitutional entrenchment of the *Charter*, and the coming into force in 1985 of section 15 (equality rights) in particular. Equality-seeking through the courts was not an entirely new strategy for lesbian and gay activists. In fact, alongside political protest and civil rights action, equality-seeking had played a significant role in the early liberation movement.¹²²

What had changed, however, was the “meaning frame” through which litigation was

¹²¹ For example, non-monogamous or non-cohabiting relationships, and non-nuclear families.

¹²² Smith, *supra* note 109 at 70. Unlike the *Charter* litigation of the late 1980s and early 1990s, however, the early lesbian and gay litigation was situated within a wider civil rights framework in which legal strategies were always accompanied by non-legal ones, including lobbying, public pickets and demonstrations, and electoralism. Furthermore, the cases themselves were as much about drawing attention to discrimination and creating political groundswell as they were about winning. See, eg, *Gay Alliance Toward Equality v Vancouver Sun* (1979), 97 D.L.R. (3d) 577 (SCC); *L'Association A.O.G.Q. c. La Commission des ecoles catholiques de Montreal* (1979), 112 D.L.R. (3d) 230.

understood.¹²³ Prior to the *Charter*, litigation was often understood as a means to an end, a tool by which to draw attention to discrimination, politicize a community, and build a social movement.¹²⁴ In other words, what went on in court was only part of the battle; a legal loss could be understood as a “victory” if it contributed to community consciousness. In contrast, after the introduction of the *Charter*, litigation was increasingly (though not always) understood as an end in itself.¹²⁵ Struggles for legislative reform continued,¹²⁶ but in the post-*Charter* era litigation came to dominate the time and resources of the most prominent lesbian and gay rights organizations.¹²⁷ Thus, while not necessarily a new tactic, the courtroom-based equality-seeking strategy that characterizes modern day lesbian and gay claims is guided by a new meaning frame; one that prioritizes legal change, formal equality, and “rights talk”.¹²⁸

The initial lesbian and gay claims to “family” were varied in subject matter, ranging from access to bereavement leave to challenges to the old age security scheme. Despite the diversity of their focus, almost all of the cases involved a challenge to the opposite-sex

¹²³ Smith, *supra* note 109 at 74-75.

¹²⁴ *Ibid.* at 69-70. For a broader discussion of this post-*Charter* phenomenon and its potentially damaging effects see Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989).

¹²⁵ Smith, *supra* note 109 at 76.

¹²⁶ Perhaps the most celebrated of these struggles was the unsuccessful attempt in Ontario to secure legislative recognition of lesbian and gay relationships. For a discussion of this campaign and its outcome: Susan Boyd, “Expanding the Family in Family Law: Recent Ontario Proposals on Same-Sex Relationships” (1994) 7(2) C.J.W.L. 545 [Boyd, “Expanding the Family”].

¹²⁷ Smith, *supra* note 109 at 85.

¹²⁸ Smith describes “rights talk” as a “specific type of political discourse that...privileges the law and the courts as the mechanism for the resolution and processing of political problems such as conflicts of interest and values between groups or conflicts between groups and the state. Rights talk assumes that the technical standards of constitutional law, enforced by courts, can resolve political problems and conflicts.” Similar assertions about the dominance of “rights talk” in modern lesbian and gay rights advocacy have also been made by Gary Kinsman and Tom Warner. Smith, *supra* note 109 at 74-5; Kinsman, *supra* note 109 at 288-93; Tom Warner, *Never Going Back: A History of Queer Activism in Canada* (Toronto: University of Toronto Press, 2002) at 191-246.

definition of "spouse".¹²⁹ This usually took the form of an assertion by the lesbian or gay litigant that his or her same-sex relationship was the same as an opposite-sex spousal relationship. The first in this series of "spousal" cases was *Andrews v Ontario*, an unsuccessful attempt by a lesbian woman, Karen Andrews, to obtain "family" provincial health insurance benefits for her same-sex partner and her partner's children.¹³⁰ Relying on both s. 15 of the *Charter* and the Ontario *Human Rights Code*,¹³¹ Andrews argued that the lives and relationships of same-sex couples closely resemble those of opposite-sex couples, and thus the exclusion of her partner from the definition of "spouse" for the purpose of family benefits was discriminatory. While the Court in *Andrews* rejected the plaintiff's assertion that she and her partner were "the same as" a heterosexual couple,¹³² Brenda Cossman has argued that the case effectively launched the lesbian and gay "We are Family" strategy and the formal equality approach that came to underlie it.¹³³

The first successful challenge to a spousal exclusion at the federal level¹³⁴ came in 1998 with the Ontario Court of Appeal's decision in *Rosenberg v Canada (Attorney-General)*.¹³⁵ *Rosenberg* involved a constitutional challenge to the opposite-sex definition of "spouse" in s. 252(4) of the *Income Tax Act*. The opposite-sex definition meant that a private pension plan

¹²⁹ Gavigan has also noted that, unlike the marriage campaign that would follow a decade or so later, the first wave of relationship recognition cases were informed by materiality. What was being assailed was "the systematic inequality...grounded in the social and economic conditions of the lives of lesbians and gay men." In contrast, same-sex marriage has been advanced as a simple equal rights campaign, grounded in the desire for symbolic recognition. Gavigan, "Equal Families", *supra* note 114 at 340.

¹³⁰ *Andrews v Ontario (Minister of Health)* (1988), 64 O.R. (2d) 258 [*Andrews*].

¹³¹ *Human Rights Code*, R.S.O. 1990, c. H-19.

¹³² The most significant distinction for the court was the inability of same-sex couples to procreate within their relationship. *Andrews*, *supra* note 130 at para 19.

¹³³ Brenda Cossman, "Family Inside/Out" (1994) 44 University of Toronto L. J. 1 at 5-6 [Cossman, "Family"].

¹³⁴ The opposite-sex definition of "spouse" had already been successfully challenged at the provincial level in the second parent adoption decision in *Re K*, *supra* note 73.

¹³⁵ *Rosenberg v Canada (Attorney-General)*, [1998] 38 O.R. (3d) 577.

could only be registered with Revenue Canada if the plan restricted survivor benefits to spouses of the opposite sex. Plans not registered with Revenue Canada could not receive the significant tax benefits available to registered plans. Finding in favour of the applicants, and applying a strict formal equality analysis, the majority held that the opposite-sex definition of “spouse” was indeed unconstitutional and that the words “or same-sex” should be read into the *Act’s* definition.¹³⁶ The effect of this decision was the extension of entitlement to survivor benefits under occupational pension plans to the partners of lesbians and gay men who died while covered by the plan. Choosing not to appeal the decision, the federal government subsequently amended the definition of “spouse” in s. 254(2) of the *Income Tax Act* to include same-sex cohabitants as spouses for all tax purposes.¹³⁷

The next significant decision,¹³⁸ and the first success in a traditional family law dispute, came in 1999 when, in *M v H*, the Supreme Court of Canada expanded the definition of “spouse” in Ontario’s *Family Law Act*¹³⁹ to include same-sex partners for the purpose of spousal support.¹⁴⁰ The case arose when, after a ten year lesbian relationship ended, one of the

¹³⁶ For an analysis of these decisions see Claire Young, “Spousal Status, Pension Benefits and Tax: *Rosenberg v. Canada (Attorney-General)*” (1998) 6 C.L.E.L.J. 435 [Young, “Spousal Status”].

¹³⁷ It is interesting to note that the amendments redefined “spouse”, which had previously included married persons *and* those in opposite sex common law relationships, so that it referred to married persons only. A new definition of “common law partner” was added to the Act. That definition included individuals who lived in a conjugal relationship with a person of the opposite or same-sex for a period of at least twelve months. Despite the multiple categories of relationship, the tax rules applied in exactly the same manner to married persons, unmarried opposite-sex couples, and same-sex couples.

¹³⁸ As Susan Boyd notes, the lesbian applicant in *M* was the first lesbian or gay person in the world to be successful in challenging the opposite sex definition of “spouse” in the highest court of her country. Boyd, “Outlaw to InLaw, *supra* note 108 at 32.

¹³⁹ *Family Law Act*, R.S.O. 1990, c. F.3, s. 1(1).

¹⁴⁰ *M v H*, [1999] 132 D.L.R. (4th) 538 [*M v H*]. Interestingly, judges in the lower Ontario Courts distinguished *M v H* from *Egan v. Canada*, [1995] 2 S.C.R. 513 (upholding provisions in the *Old Age Security Act* that restricted spousal allowances to heterosexual spouses) on the basis that *Egan* dealt with public funds while *M v H* did not. In fact, Charron J.A. of the Ontario Court of Appeal wrote that a second underlying purpose of the spousal support regime was “to alleviate the burden on the public purse by shifting the obligation to provide support for needy persons to those parents and spouses who have the capacity to provide support to these individuals.” This view was reiterated in the Supreme Court of Canada decision (at para 4). For a discussion of

women (M), whose earning capacity was significantly lower than her ex-partner's (H), sought a spousal support order. However, because Ontario's *Family Law Act* allowed only opposite-sex cohabitants and married spouses to make such a claim, it was necessary for M to bring a constitutional challenge to the *Act*'s definition of "spouse". She did so by arguing that the opposite-sex definition in the *Act* discriminated against her on the basis of sexual orientation, and therefore infringed her section 15 *Charter* equality rights. Once again, the claim was presented largely through the lens of formal equality. By highlighting the monogamous, conjugal nature of the relationship, its significant length, the emotional and economic inter-dependency of the parties, and what might be considered a traditional gendered division of labour in which one partner focused primarily on domestic tasks while the other attended to business, M engaged (whether intentionally or not) in an explicit exercise in comparison. In other words, at least part of M's case rested on the perceived similarities between her intimate relationship and what might be described as the "model" heterosexual relationship. Interestingly, the Supreme Court noted in its decision that lesbian litigants need not portray their relationships as "just like" heterosexual ones.¹⁴¹ However, as Boyd and Young note, *M v H* highlights the degree to which "assimilation discourse that reinforces the heterosexual norm has been built into the legal process."¹⁴² Ultimately, the Court's decision rested in large part on the fact that, like heterosexuals, same-sex partners form relationships of permanence that are characterized by financial interdependence.

the role of privatization within the relationship recognition debate see: Boyd, "Outlaw to InLaw", *supra* note 108.

¹⁴¹ *M v H*, *supra* note 140 at 615-16. While the court suggested that a more substantive approach would have been well received, it ultimately used the similarities between same-sex and heterosexual relationships to explain why the dignity of same-sex couples had been violated

¹⁴² Boyd & Young, "Same-Sex", *supra* note 108 at 763.

Discrimination against same-sex couples, particularly in circumstances where their relationships look so much like those of heterosexuals, could therefore not be sustained.

The positive decision in *M v H* forced the federal government, as well as some provinces, to extend the rights and responsibilities enjoyed by opposite-sex cohabitants to same-sex cohabitants.¹⁴³ In fact, the federal government response – the *Modernization of Benefits and Obligations Act* in 2000 – was the single most comprehensive attempt to date to remove legal distinctions between same-sex couples and opposite couples in Canada.¹⁴⁴ The *Act* amended 68 pieces of federal legislation to extend a variety of rights and responsibilities to “common law partners”, which was defined to include same-sex couples. The legislation covered everything from income tax to conjugal visits with same-sex partners in prison. While the *Act* was obviously a major break-through for lesbian and gay relationship recognition advocates, it was generally understood to contain two significant limitations. First, the interpretation section of the *Act* included language defining marriage as an opposite-sex relationship only.¹⁴⁵ Second, a legal distinction was drawn between married “spouses” and “common law partners”, with the “spousal” category reserved for opposite-sex couples only. Thus, while the *Act* extended rights and responsibilities to lesbian and gay couples that had previously

¹⁴³ The decision in *M v H* created the impetus for numerous legislative changes in a number of provinces. For example, Québec amended twenty-eight statutes to grant same-sex couples the same benefits and obligations as opposite sex common law couples (*An Act to Amend Various Legislative Provisions Concerning de facto Spouses*, S.Q. 1999, c. 14). Ontario’s legislative reform as a result of *M v H* – *Amendments Because of the Supreme Court of Canada Decision in M v H Act*, S.O. 1999, c. 6 – was far from ideal. It created a “separate but equal” regime in which same-sex couples were extended equal rights, but were distinguished from unmarried opposite-sex cohabitants by denying them the designation “spouse”. M unsuccessfully sought a re-hearing of the appeal on the basis that the amendments did not comply with the *Charter* or with the decision of the Supreme Court of Canada. The Ontario legislature has since addressed this concern.

¹⁴⁴ *Modernization of Benefits and Obligations Act*, R.S.C. 2000, c.12 [*Modernization Act*].

¹⁴⁵ The *Act* states in the very first clause that, “For greater certainty, the amendments made by this *Act* do not affect the meaning of the word “marriage”, that is, the lawful union of one man and one woman to the exclusion of all others.” This section was included at the last minute following pressure from religious groups across Canada, as well as from some more conservative Liberal MPs. *Modernization Act*, *ibid.* s. 1.1.

been denied, it did so through what might be described as a “separate but equal” legislative framework.

While each of the mounting legal successes was celebrated by lesbians and gay men as a further step towards equal family status, the most celebrated victory of all was the legalization at a federal level in July 2005 of same-sex marriage.¹⁴⁶ Quickly renamed “equal marriage” by its proponents, same-sex marriage was understood by many to be the holy grail of equality claims. Kathleen Lahey, for example, argued that without access to marriage, lesbians and gay men did not have full legal personality.¹⁴⁷ Others saw it as the final goal at the end of a lengthy road to equality. For example, in their joint affidavit, the same-sex couples from Ontario [“the Ontario marriage litigants”] who first challenged the opposite-sex definition of marriage, argued that marriage was “the last bastion of discrimination against lesbians and gays and bisexuals in Canada’s legal culture.”¹⁴⁸ Thus, perhaps more than any other legal victory, “equal marriage” was understood by a significant portion of the lesbian and gay population to bring them, and the relationships they formed, within the domain of “family”. Success was achieved, however, through an extremely narrow formal equality paradigm. In fact, it might be argued that more than any other lesbian and gay rights campaign, “equal marriage” was about “sameness”.

Shelley Gavigan has insightfully argued that the campaign for equal marriage was organized on two fronts: first, at the formal level as an equality right to equal treatment and benefit of

¹⁴⁶ *Civil Marriage Act*, R.S.C. 2005, c. 33 [*Civil Marriage Act*].

¹⁴⁷ Kathleen Lahey, *Are We 'Persons' Yet? Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999).

¹⁴⁸ Factum of Applicant couples, *Halpern v Ontario in the Ontario Division Court*, 28 August 2001 at para 2 (on file with author). Online: <<http://www.egale.ca/extra%5CON-ApplicantsFactum.doc>> [*Halpern factum*].

the law, and, second, at the equally important ideological level.¹⁴⁹ Arguably one bled into the other. The positioning of the equality right as one of *formal* equality, necessarily invoked a particular ideological framework: the existing one. Thus, marriage was understood, somewhat ironically, by both (lesbian and gay) supporters and (heterosexual) opponents of same-sex unions as “without dispute” one of the most basic elements of social organization and civic life.¹⁵⁰ For example, the Ontario marriage applicants described the “freedom to marry” as “central to our definition of humanity”,¹⁵¹ while opponents of same-sex marriage, such as the Interfaith Coalition on Marriage and the Family, similarly characterized marriage as one of Canada’s “foundational social institutions.”¹⁵² With this kind of deference to the existing institution exhibited by *both* sides of the debate, it is not surprising that the lesbian and gay marriage litigants supported their claims by highlighting how same-sex relationships compared favourably to the heterosexual “norm”.

In proving the “sameness” of their relationships, the various lesbian and gay litigants tended to focus on three particular qualities: (i) monogamous conjugality; (ii) the capacity to maintain long term relationships; and (ii) economic interdependency. Each of these qualities was understood to be fundamental to the (idealized) institution of marriage, and thus each of the litigants pointed to the ways in which their own relationships emulated the “norm”. The following statement, typical of those made by other litigants, epitomizes this trend:

¹⁴⁹ Gavigan, “Equal Families”, *supra* note 114 at 332.

¹⁵⁰ For the views of the supporters of same-sex marriage see, eg, *Halpern* factum, *supra* note 148. For examples of the same rhetoric being used by opponents of same-sex marriage see the Focus on the Family national advertising campaign in which it was stated that “marital commitment is the foundation of our society”. Similarly, politicians who opposed same-sex marriage frequently asserted that marriage was the “bedrock of society”. Alberta went so far as to amend its *Marriage Act* so that it stated that “without [marriage] there would be neither civilization nor progress.” *Marriage Act*, R.S.A. 2000, c. M-5.

¹⁵¹ *Halpern* factum, *supra* note 148 at para 1.

¹⁵² Factum of the Intervenor, Interfaith Coalition on Marriage and Family, *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 76, para. 1.

During our thirty-two years together, Bob and I have shared our lives, plans and finances. We have always purchased things together and have never owned anything separately. We have always had joint bank accounts, we owned a home together and we have wills, leaving all of our possessions to each other.¹⁵³

Similarly, a second litigant provided the following reasons for why she and her partner should be able to marry:

I love Michelle. She is the only person I ever want to be with. I want to raise children with her, build a family, and buy a house, a car, and a deep freezer...My parents just celebrated their 25th wedding anniversary. There is nothing I look forward to more than Michelle and our family celebrating ours.¹⁵⁴

By pointing to the economic interdependence¹⁵⁵ and long-term, monogamous nature of their relationships, the marriage case couples asserted that they were virtually the same as heterosexual couples.¹⁵⁶ In fact, as Boyd and Young argue, the litigants seemed to imply that the only difference between themselves and heterosexual couples was their sexual orientation.¹⁵⁷ As noted above, the invocation of formal equality by the couples was not necessarily an active "choice". Narrow judicial interpretation of section 15 has meant that

¹⁵³ Affidavit of Lloyd Thornhill, *EGALE Inc. v Attorney-General of Canada*, 15 December 2001. Online: <<http://www.egale.ca/index.asp?lang=E&menu=50&item=441>>.

¹⁵⁴ *Halpern* factum, *supra* note 148 at para. 6.

¹⁵⁵ The emphasis the litigants place on consumption – from property ownership to cars and white goods – helps make the litigants' relationships and lifestyle palatable to courts and politicians who increasingly understand family relationships through a privatized lens. By alluding to the middle class, consumerist nature of their lives, the litigants place themselves squarely within what has been referred to as the "gayoisie". For a discussion of the relationship between lesbians and gay men and capitalism see: Amy Gluckman & Betsy Reed, eds., *Homo Economics: Capitalism, Community, and Lesbian and Gay Life* (New York: Routledge, 1997).

¹⁵⁶ Similar statements were made during the House of Commons Standing Committee on Justice and Human Rights hearings on same-sex unions in 2003. See, eg, Committee *Minutes*, 19, 1 April 2003 at 50 (Martha Dow); Committee *Minutes*, 29, 1 April 2003 at 76 (Dawn Barbeau).

¹⁵⁷ Boyd & Young, "Same-Sex", *supra* note 108 at 773.

equality arguments under the *Charter* typically require a comparative analysis and, in the context of “family”, this often involves comparing oneself to a relatively conservative norm.¹⁵⁸ However, it should be noted that none of the litigants attempted in any way to assert a more substantive model of equality, despite the availability of such an argument under section 15.¹⁵⁹ For example, none of the litigants argued that while their relationships might differ in some ways from the (idealized) norm, they should still be entitled to equal access to marriage.

Interestingly, many of the marriage case litigants also pointed to the procreative nature of their relationships as further evidence of the similarities they shared with heterosexual couples. For example, the Ontario marriage case factum stated that, “six of the seven Applicant couples are or plan to be parents. They, like many other same-sex couples, believe that marriage will benefit their children.”¹⁶⁰ Adopting language that bears a startling resemblance to that used by conservatives to decry the increase in divorce and single parent households, many of the couples argued that they should be allowed to marry because it would provide their children with a “better sense of legitimacy and belonging”.¹⁶¹ Applicants also relied on “expert” evidence to assert that allowing same-sex couples to marry would be good for their children because marriage “promotes emotional well-being, greater maturity,

¹⁵⁸ In fact, as argued below, the “norm” to which one must compare oneself is more of a “familial fantasy” than any kind of familial reality.

¹⁵⁹ While the decision in *Andrews*, rejected the “similarly situated” test and opened the door for section 15 to be interpreted through the lens of substantive equality, more recent Supreme Court decisions suggest that Canadian equality jurisprudence is retreating from a substantive equality framework. The trend began with the decision in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S. C. R. 497 [Law], and has continued more recently in decisions such as *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, *Walsh v. Nova Scotia (Attorney General)*, [2002] 4 S.C.R. 325, and *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835 [Trociuk]. It is thus not particularly surprising that the marriage case litigants presented their cases as claims to formal equality.

¹⁶⁰ *Halpern* factum, *supra* note 148 at para. 23.

¹⁶¹ *Ibid.* at para. 27.

and better psychological adjustment.”¹⁶² One of the litigants went so far as to state that she wanted to marry her partner because she would “never bring a child into this world without the safety net that a legally recognized marriage creates.”¹⁶³ As Gavigan notes, the couples never precisely identify the danger to which children of unmarried same-sex couples are exposed,¹⁶⁴ but there is no doubt that they believe that marriage provides some kind of “insurance” against it. Thus, while the marriage case litigants stopped short of arguing that procreation was an essential element of marriage, they did use the fact that many of them were parents to further bolster their claim to “sameness”.

The rhetoric of “sameness” during the marriage debate was by no means the sole domain of the litigants. Sameness arguments were also invoked by lesbian and gay advocates during the hearings of the House of Commons Justice and Human Rights Committee on same-sex marriage that preceded the introduction of the marriage law bill.¹⁶⁵ Assertions of sameness also dominated the more progressive elements of the mainstream press.¹⁶⁶ Supportive media outlets, for example, profiled same-sex couples who excelled in their middle class, white, “ordinariness”.¹⁶⁷ A Globe and Mail editorial went so far as to suggest that lesbians and gay men should be commended for their desire to reinforce traditional marriage:

¹⁶² *Ibid.* at para. 89. The suggestion gays and lesbians need to “mature” and become better “adjusted” has its origins in the medicalization of homosexuality in the 1800 and 1900s. For a discussion of the relationship between homosexuality and medicine see: Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* (Chicago: University of Chicago Press, 1999).

¹⁶³ Halpern factum, *supra* note 148 at para. 4.

¹⁶⁴ Gavigan, “Equal Families”, *supra* note 114 at 335.

¹⁶⁵ For a discussion of the extent to which “sameness” arguments were invoked during the hearings, both by lesbian and gay advocates and politicians, see Claire Young & Susan Boyd, “Losing the Feminist Voice? Debates on the Legal Recognition of Same Sex Partnerships in Canada” (2006) 14 *Fem. Legal Stud.* 213 [Young & Boyd, “Losing”]

¹⁶⁶ The more conservative mainstream press tended to oppose same-sex marriage.

¹⁶⁷ See, eg, Tracey Tyler & Tracy Huffman, “Gay couple married after ruling”, *Toronto Star* (11 June 2003). Online: <<http://www.freerepublic.com/focus/f-news/926892/posts>>. Brian Morton & Nicholas Read, “Gay marriage makes B.C. history: Ceremony minutes after Appeal Court lifts ban”, *Vancouver Sun* (9 July 2003).

By embracing marriage, homosexuals remind others that it is, or should be, the norm for committed couples. It is the best place to experience love, sex and companionship together. It is the best place to raise children. Marriage's "till death do us part" pledge of permanence gives people the security they need to give themselves fully to the other. It is one of the ironies of the same-sex marriage debate that conservatives who once condemned the hedonistic, selfish and licentious "gay lifestyle" would now deny homosexuals the right to opt in to the bourgeois comfort of marriage.¹⁶⁸

The presumption behind this statement seems to be that lesbians and gay men have now "grown up", and that any negative attributes that might have once characterized their relationships have evaporated through the process of maturation.¹⁶⁹ Furthermore, having now shed the trappings of their "hedonistic" and "selfish" past, lesbians and gay men are proving to be no different than their heterosexual counterparts. The rhetoric of formal equality also dominated the statements of groups such as EGALE¹⁷⁰ and Canadians for Equal Marriage ("CEM"). For example, emphasizing the simplicity of the formal equality argument, CEM produced "public service advertisements" comparing the treatment of same-sex couples in Canada to the treatment of African-Americans under the "separate but equal" Jim Crow laws

¹⁶⁸ Editorial, "Gays in the 'hood", *Globe and Mail* (31 January 2005) A12.

¹⁶⁹ The assumption is, of course, that the "differences" that made lesbians and gay men ill-suited to marriage in the past were grounded in selfishness, hedonism and licentiousness.

¹⁷⁰ It is impossible to talk about the same-sex marriage campaign without drawing attention to the fundamental role played by EGALE. As noted earlier, EGALE was founded in the context of the parliamentary hearings on section 15 equality rights, and thus began its existence firmly rooted in a formal equality and litigation paradigm. As Smith explains, "[EGALE's] meaning frame and strategy [are] clearly anchored in and shaped by *Charter*-based equality-seeking. Its meaning frame [draws] on formal legal equality – that lesbians and gays [are] similar and entitled to the same legal protections, especially with respect to relationship recognition." While EGALE has been involved in equality-seeking litigation since the 1980s, it was during the marriage campaign that it emerged as the central organizational player in lesbian and gay politics in Canada. A party to almost all of the early provincial marriages cases, it referred to itself in court documents as the "only national [lesbian and gay] equality rights organization" in Canada. It is thus not surprising that EGALE was understood by both the media and government as *the* authorized voice of Canadian lesbians and gay men. Whether EGALE actually represented the views of gays and lesbians in Canada, or whether it was even possible to identify a unified voice, was rarely considered. Smith, *supra* note 109 at 77.

of the southern United States.¹⁷¹ Depicting identical park benches and public telephones with signs on them saying “Gay” and “Straight”, the advertisements presented the issue as one of straightforward equal access.

While there were no doubt opportunities over the years for lesbians and gay men to demand inclusion within the “family” without invoking its most traditional characteristics, few activists have taken such a position. Rather, from the early claims to state benefits through to the recent marriage litigation, lesbians and gay men have succeeded in the courts on the basis of arguments about their “sameness”. In fact, there is little evidence within the mainstream debate that the terms upon which entry into legal family has been achieved are anything but positive.

2.3 “We are not family” (at least as you define it): the quiet critique

The dominance of the formal equality framework, and the attractiveness of its simple comparative logic, makes it very difficult to assert an alternative meaning frame. In fact, as noted earlier, to do so might be understood as a challenge to lesbian and gay equality claims. Despite the risks associated with critiquing the formal equality discourse, a small group of lesbian feminists and gay liberationists have questioned the terms upon which lesbian and gay inclusion within the “family” has been achieved. While advocates of this critique raise numerous concerns with regard to the use of formal equality, two issues dominate their

¹⁷¹ For an interesting critique of the role of race in the same-sex marriage debate see Suzanne Lenon, “Marrying Citizens! Raced Subjects? Re-thinking the Terrain of Equal Marriage Discourse” (2005) 17(2) C.J.W.L 405. Drawing on the affidavits in the BC and Ontario marriages cases as well as from the EGALÉ submission to the House of Commons Standing Committee on Justice and Human Rights, Lenon explores the ways in which appeals to a “universal gay/lesbian identity” and to the notion of the freedom to marry “produce a white legal subject and rely on an unmarked whiteness for their success.” She argues that the affidavits and submissions produce a legal subject that is racialized as white, thus normalizing whiteness as a characteristic of the “essential” lesbian/gay subject.

position. First, they argue that by seeking entry into the “family” on the basis of formal equality, lesbians and gay men effectively reify traditional familial ideology and thus reinforce its internal inequalities and oppressions. Second, by seeking entry into the family on the basis of its existing terms, opportunities to problematize marriage as a raced, gendered and classed institution are greatly diminished. While those who challenge the formal equality framework recognize why it has been so heavily relied upon, and generally avoid attacking those who have chosen to do so, they worry that the effect of a formal equality framework may be further exclusions.

2.3.1 Reifying the (unequal) family

The most common argument made by those who critique the formal equality approach is that by seeking entry into “family” on the basis of “sameness”, lesbians and gay men reinforce the inequalities that characterize traditional familial ideology, and ultimately subject themselves to a process of assimilation. The effect of adhering to the existing framework is that lesbians and gay men become participants in the system of exclusions and oppressions that operates within it. Arguably, this not only maintains the status quo, but also leads to new hierarchies within the lesbian and gay communities. Ruthann Robson has referred to this process as one of “domestication”, whereby lesbian and gay cultural categories and concepts are replaced by those of the heterosexual “mainstream”.¹⁷² As Robson explains, “domestication occurs when the views of the dominant culture become so internalized that they seem like common sense.”¹⁷³ For example, lesbians and gay men who internalize

¹⁷² Robson, “Lesbian (Out)law”, *supra* note 96 at 18.

¹⁷³ *Ibid.* at 18.

heterosexual "norms", such as monogamy and financial inter-dependence, in order to gain access to marriage become "domesticated".

The process of domestication has the potential to create new exclusions within the lesbian and gay communities, primarily between those who endorse traditional norms and those who are unable or unwilling to conform. "Good" gays and lesbians (or "clean sexual deviants" as Joan Nestle refers to them) are those who embrace marriage and who organize their relationships in accordance with heterosexual norms.¹⁷⁴ In contrast, "bad" gays and lesbians are those who resist the mainstreaming of their intimate relationships or who suggest that the institution of "family" itself is in need of reform. Thus, rather than alleviating exclusions, formal equality simply creates a new set of hierarchies and a new kind of surveillance in the lives of lesbian and gay men.¹⁷⁵ The crucial difference is that the new hierarchies are now embedded within the lesbian and gay communities themselves, creating the possibility of an internalized "policing" of lesbian and gay behaviour. In addition, the people most capable of transforming the institution of family – arguably the "bad" gays and lesbians – remain largely excluded from the conversation.

¹⁷⁴ Joan Nestle, *A Restricted Country* (Ithaca, NY: Firebrand Books, 1987) at 123. The notion of respectable or "good" gays and lesbians is not new. Early gay and lesbian groups such as the Daughters of Bilitis, a lesbian rights organization that formed in San Francisco in the 1950s as an alternative to the bar scene, also sought to capitalize on the notion of "good" lesbians. By locating themselves outside of the largely working class bars, the Daughters of Bilitis sought to position themselves as a respectable, middle class organization.

¹⁷⁵ This is not to suggest that lesbians and gay men themselves have not been subject to surveillance. In fact, the strict regulation of homosexuals and their sexual activities is deeply ingrained in both law and society and the gay liberation movement has worked for several decades to reduce to the policing by the state of lesbian and gay life. However, prior to their recent legal successes, lesbians and gay men have not typically been expected to adhere to heterosexual norms within their own relationships. In fact, the very nature of homosexuality has traditionally been understood as antithetical to these norms. Thus, lesbians and gay men, in seeking inclusion within the existing framework, have arguably added a new level of surveillance to their lives. For a discussion of state surveillance of lesbian and gay life and the liberationist opposition to it see: Kinsman, *supra* note 109 at 217, 228; Steven Maynard, "On the case of the case: the emergence of the homosexual as a case history in early-twentieth-century Ontario" in Franca Iacovetta & Wendy Mitchinson, eds., *On the Case: Explorations in Social History* (Toronto: University of Toronto Press, 1998).

A related issue raised by adopting a formal equality framework is that the “norms” to which lesbians and gay men must necessarily subscribe arguably have little foundation in reality. They are not reflective of actual practice, but rather represent what Judith Butler has referred to as a “fantasy of normativity”.¹⁷⁶ In other words, the existing framework “does not always seek to order what exists but to figure social life in certain imaginary ways.”¹⁷⁷ What this means is that while lesbians and gay men can turn to formal equality as a means by which to render their families “family”, formal equality commits them to a familial ideology that, while powerful, is little more than fiction. The effect of this need to position oneself as “straighter than straight” is illustrated quite clearly in the marriage case affidavits,¹⁷⁸ as well as in the submissions of lesbians and gay men before the House of Commons Standing Committee on same-sex unions,¹⁷⁹ where it was not uncommon to hear parties describe their relationships in language usually associated with the 1950s.¹⁸⁰

Those who critique the formal equality strategy have also argued that it has the potential to co-opt lesbians and gay men into the systems of oppression that characterize the traditional

¹⁷⁶ Butler, *supra* note 108 at 28.

¹⁷⁷ *Ibid.*

¹⁷⁸ See, eg, the following statement made by a party to the Ontario marriage litigation: “I was raised in a family where marriage was understood as a life commitment to be entered into when you love someone. I grew up reading books about people who, when they fell in love, got married. The television shows that I watched had people who, when they wanted to make a life commitment to each other, got married. I understand marriage as a defining moment for people choosing to make a life commitment to each other.” Halpern factum, *supra* note 148 at para. 18.

¹⁷⁹ See, eg, the following statement made by a lesbian woman before the House Committee: “I come to you as a traditional lesbian, who’s been together for 19 years and has children. My partner is quitting work in a couple of weeks so she can stay home with our children. We need to be recognized with other couples who make choices.” House of Commons Standing Committee on Justice and Human Rights, Committee *Minutes*, 19, 1 April 2003 at 50 (Martha Dow). For an analysis of the submissions made to the Committee see Young & Boyd, “Losing”, *supra* note 165.

¹⁸⁰ In fact, as noted earlier, lesbians and gay men who favoured the legalization of same-sex marriage evoked much of the same language as the heterosexuals and religious groups who opposed it. That is, both groups understood marriage and “the family” in deeply traditional terms.

family and its accompanying legal structures. Because formal equality requires lesbians and gay men to subscribe to the existing framework, they may find themselves simultaneously subscribing to its inequalities. The family is not an innocent institution. Rather, it is classed, raced and gendered. In fact, as Boyd and Young argue, “the struggles over the last few decades [to secure lesbian and gay relationship recognition] have been about the acquisition of a limited set of legal rights that themselves rest on profoundly hierarchical social relations.”¹⁸¹ The effect of these embedded hierarchies is that inclusion within the family has a differential impact, particularly with regard to class, race and gender.

It is commonly assumed that inclusion within the family will produce only positive outcomes for lesbians and gay men when, in fact, it may lead to economic disadvantages, particularly for lesbians and the poor. This is because built in to the existing framework are a number of classed, raced and gendered inequalities. For example, the recognition of a non-biological lesbian mother as both a “spouse” and “parent” has the effect of reducing state assistance for the family.¹⁸² Because the child now has a second parent whose income is combined with that of the biological mother, the family is not only taxed at a higher rate,¹⁸³ but also experiences a reduction in any income-tested benefits they may receive, such as the Child Tax Benefit. This obviously has the greatest impact on the poorest families who are more likely to receive income-tested benefits in the first place. Gender and racial inequalities are also implicated. Because women (especially women of colour) earn, on average, less than

¹⁸¹ Lenon, *supra* note 171; Boyd & Young, “Same-Sex”, *supra* note 108 at 771; Young & Boyd, “Losing”, *supra* note 165 at 218-19.

¹⁸² For a discussion of the tax implications of lesbian and gay relationship recognition see: Claire Young, “Taxing Times for Lesbians and Gay Men: Equality at What Cost? (1994) 17 Dal. L. J. 534 [Young, “Taxing”].

¹⁸³ The higher rate of taxation is caused by the requirement that spouses’ incomes are combined for the purpose of determining entitlement to both the GST tax credit and Canada Child Tax Benefit.

men, and because lesbians are more often parents than gay men, it is lesbians (especially lesbians of colour) who are likely to suffer the majority of the negative consequences of legal recognition. Thus, in seeking entry into “family” on the basis of its existing terms, lesbians and gay men arguably become party to economic, racial and gender-based oppression, oppression felt even within their own ranks.

A second, but related, economic implication of the formal equality approach is that it results in lesbian and gay support, whether intentional or not, for the privatization of economic and social responsibility within the family. By relying so heavily on their financial inter-dependence as evidence of their “sameness”,¹⁸⁴ lesbians and gay men effectively accept that an individual’s economic security is the responsibility of the private family. When this position is asserted in the context of widespread cuts to social welfare programs,¹⁸⁵ lesbians and gay men arguably become participants in the wider “privatization project”.¹⁸⁶ The effect of familial privatization is that spouses will be expected to absorb economic hardship within the private domain, whether by way of provision of home-based care, retirement planning, spousal support, or child support.¹⁸⁷ An inability to absorb economic hardship within the

¹⁸⁴ Perhaps more than any other characteristic, the marriage case litigants emphasized their financial inter-dependence. They provided evidence of their shared finances, joint home ownership, and their willingness to financially support each other in a situation of crisis. Financial inter-dependence also emerged in the House of Commons Standing Committee on Justice and Human Rights hearings on same-sex marriage as a central feature of committed lesbian and gay relationships.

¹⁸⁵ For a discussion of the specific impact of policies of neo-liberal privatization on women living in British Columbia see: Gillian Creese & Veronica Strong-Boag, *Losing Ground: The Effects of Government Cutbacks on Women in British Columbia, 2001-2005*, Prepared for the B.C. Coalition of Women's Centres, The UBC Centre for Research in Women's Studies and Gender Relations, and the B.C. Federation of Labour, March 2005.

¹⁸⁶ My use of the term “privatization project” refers to the movement of economic responsibility for the individual from the public or state domain, to the private realm of the individual, family, or charity. The trend towards economic privatization is frequently linked to a neo-liberal political philosophy. For a feminist analysis of the impact of privatization in the family law context see Cossman, “Family Feuds”, *supra* note 37.

¹⁸⁷ Employers also play a significant role in the privatization project. An increasing number of benefits that were once the primary responsibility of government are now expected to be provided by employers (eg, employer pension schemes, health benefits). Of course, whether an individual employer actually provides these

family is likely to be understood as an instance of individual, rather than collective, failure. Furthermore, by situating *responsibility* for social welfare within the private family, cuts to welfare programs are more easily justified.¹⁸⁸ As Boyd and Young argue, “trends that bolster privatization of economic responsibility tend to diminish general public support for publicly funded programs.”¹⁸⁹ Thus, by endorsing, through their emphasis on financial interdependence, an essentially privatized model of family, lesbians and gay men become participants in privatization. Furthermore, lesbian and gay willingness to endorse a privatized vision of family inevitably makes it harder for others to oppose it.

2.3.2 Formal equality and the limits of change

A second critique of the formal equality approach to have emerged from within progressive circles is that formal equality necessarily forecloses the possibility of problematizing the institution of “family” itself. Because entry into the family is sought on the basis of sameness – the extent to which lesbians and gay men mirror the existing framework – it becomes very difficult to simultaneously suggest that the existing framework is in any way flawed. The challenge is further accentuated by the fact that those who oppose lesbian and gay inclusion within the family prioritize its most traditional aspects. In order to meet this most conservative of standards, lesbians and gay men must silence any doubts they have about the institution itself. By relinquishing the ability to critique the existing social, legal and

benefits is a separate issue. Furthermore, receiving employer-based benefits is obviously premised on actually being employed. For those who remain outside the paid workforce (usually women) these benefits become unobtainable.

¹⁸⁸ Social welfare programs become harder to justify when the state assumes that spouses will take responsibility for the economic wellbeing of each other. See Shelley Gavigan, “Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian and Gay Engagement to Law” (1993) 31 Osgoode L.J. 589 [Gavigan, “Paradise Lost”].

¹⁸⁹ Boyd & Young, “Same-Sex”, *supra* note 108 at 777.

ideological framework, lesbians and gay men arguably diminish the possibility of achieving significant social change.

There is no doubt that the legal recognition of same-sex relationships has had an impact on Canada's conception of "the family". In fact, the public's growing support for same-sex relationship recognition over the past two decades suggests that an increasing number of Canadians understand "family" as an evolving and diverse institution.¹⁹⁰ In critiquing formal equality, the growing public support it has generated for lesbians and gay men should not be downplayed. However, the prospect of achieving more radical social change is severely curtailed if formal equality is the only strategy employed. When the process of inclusion is focused entirely on illustrating sameness, there is simply no forum in which to suggest that marriage, for example, is implicated in women's inequality, or that spousal relationships should not be the primary site to which state benefits flow. In other words, the extent, as well as the kind of social change available, is limited by the framework within which change is sought. By limiting themselves to a comparative framework, the kind of social change lesbians and gay men can actually achieve is relatively narrow.

Some participants in the relationship recognition debates did attempt to turn the conversation towards a more transformative agenda. In most instances, this was done by suggesting that discrimination might be best addressed through a more substantive model of equality. For example, in its submission to the House Committee on same-sex marriage, West Coast

¹⁹⁰ In an Environics survey conducted almost a year after same-sex marriage was introduced at a federal level, sixty-four per cent of the 2000 people surveyed supported the extension of marriage to include same-sex couples. Perhaps more telling, those who strongly agreed with equal marriage outnumbered those who strongly disagreed by thirty-six per cent to twenty-four per cent. Online: <http://erg.environics.net/media_room/default.asp?aID=609>.

LEAF, a feminist organization focused primarily on seeking equality for women, attempted to introduce a gendered analysis of marriage.¹⁹¹ West Coast LEAF's submission noted that marriage plays a significant role in women's inequality, and that equal access to marriage by previously excluded groups will not change the hierarchical nature of marriage itself.¹⁹² Revealing the inability of the Committee to see beyond a formal equality framework, only one member actually responded to West Coast LEAF's critique, and then only to use it to suggest that lesbians and gay men should not have access to marriage.¹⁹³ West Coast LEAF's experience was by no means unique. Other witnesses who attempted to make more nuanced arguments were also met with a combination of silence and confusion.¹⁹⁴ It was as if Committee members could not understand a position that was neither for nor against same-sex marriage.¹⁹⁵ In other words, the formal equality framework within which the debate unfolded had rendered "unintelligible" options beyond the existing norm.¹⁹⁶

2.4 Parental recognition and the "we are family" debate

As the discussion above suggests, while a small but significant group of scholars and activists have questioned the terms upon which lesbian and gay claims to "family" have been

¹⁹¹ House of Commons Standing Committee on Justice and Human Rights, Submission of West Coast LEAF, Committee Minutes, 29, 1 April 2003 at 61.

¹⁹² *Ibid.*

¹⁹³ See comments of Vic Toews (Canadian Alliance), Committee Minutes, 29, 1 April 2003 at 64.

¹⁹⁴ For example, Gary Kinsman's submission included the suggestion that state sanctioned marriage should be abolished on the grounds that it is a patriarchal institution and that state sanctioning of marriage is itself a state practice in discrimination against other forms of social and sexual relationships. Kinsman went on to suggest that society should be focusing less on consolidating the institution of marriage and more on lending support to alternative forms of intimacy, such as non-monogamous or polyamorous relationships. Similar arguments were made by a number of my narrators, including Helen and Tracey who are profiled in Chapter 4. In a similar vein, Lise Gotell argued that allowing same-sex couples to marry would not necessarily lead to substantive equality for lesbians and gay men. For example, permitting same-sex marriage was unlikely to eliminate homophobia. Submission of Lise Gotell, Committee Minutes, 30, 2 April 2003 at 23. Submission of Gary Kinsman, Committee Minutes, 35, 9 April 2003 at 4, 5.

¹⁹⁵ Young & Boyd, "Losing?", *supra* note 165 at 232.

¹⁹⁶ Butler, *supra* note 108 at 18-19.

made, their focus has been almost exclusively on adult relationship recognition. Very little attention has been given to whether the same critique resonates in the parenting context.¹⁹⁷ This is somewhat surprising given that lesbian and gay claims to parental status have also relied on formal equality arguments, and that references to same-sex parenting have often been made in the context of relationship recognition cases.¹⁹⁸ The absence of a critique may stem from a sense that parental recognition is somehow different from adult relationship recognition. In the remainder of this chapter, I will investigate this question. First, I will provide a brief overview of the use of formal equality arguments in the parental recognition debates. Second, I will consider whether the critique of a formal equality approach resonates in the parenting context. Finally, I will consider whether the complexity of the parental recognition debate might provide some unique opportunities to think about legal recognition issues beyond the family/not family dichotomy.

2.4.1 Equal families, equal parents: recognizing lesbian motherhood

Given the success of the formal equality approach in the relationship recognition context, it is not surprising that lesbian and gay parental claims have proceeded on a similar basis.

Focusing on their “sameness”, lesbian parents have argued that their families function in the same way as heterosexual families with children, and that the children lesbian mothers raise are identical to those raised by heterosexual parents. To provide “proof” of these claims, lesbian mothers have focused on the traditional nature of their intimate relationships, the

¹⁹⁷ Some attention has been given to the issue by Arnup & Boyd, *supra* note 117; Shapiro, *supra* note 108; Kelly, “Nuclear Norms”, *supra* note 80; Gavigan, “Equal Families”, *supra* note 114.

¹⁹⁸ One of the few scholars to highlight the use of “best interests of child” rhetoric in support of the right to equal marriage is Shelley Gavigan. *Ibid.* at 332-39.

nuclear structure of their families, and social science evidence that reveals the similarities between children raised by lesbian mothers and children raised by heterosexual parents.¹⁹⁹

The first Canadian decision to extend second parent adoption rights to non-biological lesbian mothers, *Re K*, exemplifies the use of formal equality in the parental context.²⁰⁰ In fact, almost all parental recognition litigants since those in *Re K* have adopted a similar analysis.²⁰¹ In *Re K*, the mothers made two assertions to support their section 15(1) *Charter* claim: (i) that their intimate relationships were no different than those of heterosexual “spouses”; and (ii) that their children were the same as children raised in heterosexual families.²⁰² In order to “prove” the sameness of their intimate relationships, the mothers in *Re K*, not unlike the marriage case litigants, pointed to their economic inter-dependence, the length of their relationships, and the nuclear nature of their families. In fact, the picture of “normality” that they created was so striking that the judge noted in his judgment that the mothers’ intimate relationships had “all the characteristics of...[relationships] formalized by marriage”.²⁰³ As he explained:

Each of the couples have cohabited together continuously and exclusively for lengthy periods, ranging from six to 13 years; their financial affairs are interconnected; they share household expenses, have joint bank accounts and in some cases, they own property together in joint tenancy; they share the housekeeping

¹⁹⁹ For a relatively recent summary of this research see: Millbank, “Meet the Parents”, *supra* note 4.

²⁰⁰ *Re K*, *supra* note 73. *Re K* dealt explicitly with the issue of second parent adoption on the part of a non-biological lesbian mother. The case emerged in the case of the failure in 1995 of Bill 167, which would have allowed lesbian and gay couples in Ontario to adopt as couples. Lesbians and gay men in Ontario could already adopt as individuals.

²⁰¹ The one exception to this is *A.A. v B.B.*, in which three parents (two mothers and a father) sought legal recognition. *A.A. v B.B.*, *supra* note 76.

²⁰² The mothers in *Re K* were challenging section 136(1) of the *Child and Family Services Act*, R.S.O. 1990, c. C.11, which defined “spouse” in a manner that excluded same-sex spouses.

²⁰³ *Re K*, *supra* note 73 at para. 9.

burdens to the extent that they are able in light of their respective careers and employments; the individual partners share a committed sexual relationship. Most importantly, they all share equally the joys and burdens of child rearing.²⁰⁴

In addition to evidence pertaining to the traditional nature of their relationships, the mothers also provided social science evidence that illustrated the similarities between their children and the children of heterosexual parents.²⁰⁵ Central to this evidence were findings that the children of lesbian mothers are no more likely than children raised by heterosexual parents to develop gender roles or identities “inconsistent with their biological sex” or outside of the “normal range”.²⁰⁶ Also relied upon by the Court was research showing that the children of lesbian mothers are no more likely than the children of heterosexual parents to be lesbian or gay themselves.²⁰⁷ In other words, central to the mothers’ claim for recognition was the assertion that their children, when compared to the children of heterosexuals, were “normal”.²⁰⁸ This assertion provided great comfort to Nevins J. who, no doubt influenced by

²⁰⁴ *Ibid.*

²⁰⁵ The social science evidence provided by the mothers in *Re K* was presented principally through the lengthy affidavits of Dr. Margrit Eichler, Dr. Rosemary Barnes, and Dr. Susan Bradley. Their affidavits were accompanied by research papers that were described as reviewing “in considerable detail the scientific literature and research that has accumulated in this area over the last 50 years, and in particular since the mid-1970s.” In addition, the court heard viva voce evidence from Dr. Bradley. *Ibid.*

²⁰⁶ *Ibid.* at para. 37. This kind of evidence must be understood in its historical context. While deeply problematic in the current climate, it was originally used by organizations such as the Lesbian Mothers Defence Fund to support lesbian mothers who were at risk of losing custody of their children on the basis of their homosexuality. Proving that the children of lesbian mothers were “normal” and that the mothers were “fit” parents was necessary if these mothers were successful secure custody of their children.

²⁰⁷ *Ibid.* at para. 37.

²⁰⁸ The similarities between children raised by lesbian mothers and those raised by heterosexual parents have recently been questioned by Judith Stacey and Timothy Biblarz. In their review of over thirty years of research on the children of lesbian mothers, Stacey and Biblarz found that there are some discernable differences between the two groups. Those differences, which Stacey and Biblarz argue need not be understood as negative, have arguably been hidden in the court room out of fear. For example, Stacey and Biblarz found that girls raised by lesbian mothers reported greater interest in activities associated with both “masculine” and “feminine” qualities, and reported higher aspirations to non-traditional gender occupations than girls raised by heterosexual mothers. Similarly, at least some sons of lesbian mothers behave in less traditionally masculine ways than boys raised by heterosexual parents, though they remain as likely to pursue occupations traditionally associated with men. A second notable finding is that while children of lesbian and gay parents are no more likely to identify as

the materials he had been provided by the parties, clearly understood “difference” as deficit. In fact, the irony of extending legal recognition to lesbian mothers, on the premise that they raise heterosexual children, is completely lost on the Court. Interestingly, the mothers in *Re K* also attached their curricula vitae to their affidavits. Obviously impressed by what he read, Nevins J. referred to the mothers’ credentials as “nothing short of staggering.”²⁰⁹ The reference suggests that the women bringing the claim – well-educated and economically privileged – were significantly assisted by their class position. A court may not have looked so favourably upon a group of women with less privilege. Thus, their “sameness” operated at multiple levels. The mothers were not just “the same as” any old heterosexual parents; they were the same as middle class, well-educated parents.

In the more recent two mother birth certificate cases a similar pattern of “sameness” analysis emerged. For example, in the 2006 decision of *M.D.R. v Ontario*,²¹⁰ the lesbian litigants framed their case using an extremely narrow formal equality lens. Relying on section 15 of the *Charter*, and choosing “heterosexual non-biological fathers who plan a pregnancy with a spouse using assisted reproductive technology” as their comparator group, the mothers left little room for non-normative family practices. Their equality was based on looking like a heterosexual nuclear family with a fertility problem.²¹¹ The effect of this choice was that lesbian women who parented outside of the nuclear norm – that is, those who conceived

lesbian or gay themselves, they are significantly more likely to report having thought they might experience homoerotic attraction or relationships. Stacey and Biblarz argue that such evidence suggests that lesbian parenting “may free both daughters and sons from a broad but uneven range of traditional gender prescriptions.” Judith Stacey & Timothy Biblarz, “(How) Does the Sexual Orientation of Parents Matter” (2001) 66(2) *American Sociological Review* 159 at 168-70 [Stacey & Biblarz, “Sexual Orientation”].

²⁰⁹ *Re K*, *supra* note 73 at para. 24.

²¹⁰ *M.D.R.*, *supra* note 74.

²¹¹ Whether this is how they actually saw their families, or whether it is an example of the way in which law forces parties to frame their arguments in stark terms in order to increase the chance of success, is not known.

using the sperm of a known donor and are thus the most vulnerable – were excluded from the benefits of the decision. In fact, on more than one occasion the Court distinguished the claim in *M.D.R.* from a concurrent claim being made by a three parent queer family, who were considered to be justifiably excluded from recognition because they challenged the nuclear norm.²¹²

The pervasiveness of nuclear family rhetoric – an inevitable by-product of adopting a formal equality framework – is hard to ignore in the parental recognition cases. It is, after all, the lesbian *nuclear* family to which both second parent adoption and the gender neutral birth certificate extend protection. Neither option is capable of providing any form of recognition to a three or four parent family or any guidance as to the circumstances in which such a family might be recognized.²¹³ The pervasiveness of nuclear family rhetoric can also be seen in a second lesbian parenting context that arguably involves quite different dimensions: that of access disputes between lesbian mothers and their sperm donors. Asserting their right to parent free from donor intervention, lesbian mothers who find themselves subject to unanticipated access claims often argue that donors should be denied access because they fall outside the parameters of the nuclear family. For example, in one of the first reported donor access decisions, the U.S. case of *Thomas S. v Robin Y.*, the child's two mothers sought to exclude the donor from the life of his biological child on the basis that their family was already "complete".²¹⁴ Comparing themselves to any other two parent nuclear family, the

²¹² *A.A. v B.B.*, *supra* note 76. At the time *M.D.R. v Ontario* was decided, the Court of Appeal decision in *A.A. v B.B.*, which found that a child *could* have three legal parents, had not yet been handed down.

²¹³ The decision in *A.A. v B.B.* may, of course, open up additional possibilities for non-nuclear family recognition

²¹⁴ *Thomas S. v Robin Y.*, 599 N.Y.S. 2d 377 (Fam. Ct. 1993) [*Thomas S.*]. At the Family Court level the mothers were successful.

mothers argued that their nuclear family unit was equally entitled to the protection of the law. At the same time, they argued that their donor was neither a “parent” nor “family” because he existed outside of the nuclear framework.²¹⁵ While the mothers eventually lost their case,²¹⁶ their assertion of the lesbian nuclear family as a functional equivalent of the heterosexual nuclear family continues to dominate these kinds of disputes. That the argument fits very neatly into a formal equality framework is not altogether surprising.

There are only two Canadian decisions addressing the issue of donor access.²¹⁷ Both were decided in Quebec, the only province in Canada where parenting presumptions apply equally to lesbian parents who conceive using donor sperm as they do to heterosexual parents who conceive through the same method.²¹⁸ Thus, the need to rely on nuclear family rhetoric is lessened by the fact that the legislative scheme itself is framed in the terms of a nuclear family. In both cases, however, the mothers do rely on the “completeness” of their nuclear families as at least part of the justification for excluding the donors from access. In both situations, the mothers assert that the donor was simply a third party gamete provider to their lesbian nuclear family.²¹⁹ While the mothers provide significant evidence that this was in fact the case, unfortunately their claims are framed by a nuclear family discourse.

²¹⁵ The question of whether the donor should be considered to be inside or outside of the lesbian family caused a great deal of controversy within the lesbian and gay community itself. See, eg, Letters, 33(1) *Lesbian/Gay Law Notes* 1-4.

²¹⁶ *Thomas S.*, *supra* note 214. The New York Supreme Court overturned the Family Court decision and found in favour of Thomas S.

²¹⁷ *S.G. v L.C.*, *supra* note 70; *L.O. v. S.J.* (2006). J.Q. No. 450 [*L.O. v S.J.*].

²¹⁸ *Civil Code of Quebec*, *supra* note 74 at arts. 538-42.

²¹⁹ The mothers in *S.G. v L.C.* were ultimately unsuccessful in their assertion, in large part because of the initial ambivalence the non-biological mother had shown towards the idea of becoming a parent. While she subsequently supported the plan and became an active parent, the court treated her initial ambivalence as proof of the fact that the intention to parent was actually shared by the biological mother and the donor. However, the decision was based entirely on the uncontested affidavit of the donor. Its precedential impact is thus limited. In contrast, the court in *L.O. v S.J.* found in favour of the two mothers. The court held that the intention to parent was clearly that of the two women and the donor was simply a third party gamete provider. This conclusion was

The only instance in the Canadian context in which a formal equality, and thus a nuclear family, analysis has not been relied upon in the parenting context is the 2007 case of *A.A. v B.B.*²²⁰ The parties in *A.A. v. B.B.*, a lesbian couple and their gay sperm donor (who was listed on the child's birth certificate), jointly petitioned the court to recognize that their son had three legal parents. In order to achieve this outcome, the court was asked to extend legal recognition to the non-biological mother without simultaneously severing the parental status of the donor.²²¹ While the mothers were the child's primary caregivers and the donor played a much more minor role, the parties felt that it was in the child's best interests to have all three of them legally recognized.²²² Thus, rather than relying on a purely comparative analysis grounded in the (same-sex) nuclear family, the mothers and donor sought to assert an alternative version of family grounded much more in their common intention and the relationships between the child and relevant adults. Whether *A.A. v B.B.* will elicit a legislative response remains unknown, but there is no doubt that the decision signals a possible deviation from the application of a straightforward formal equality analysis.²²³

strongly supported by the limited role the donor had played in the child's life and the fact that the women already had two children conceived using the sperm of a different donor.

²²⁰ *A.A. v B.B.*, *supra* note 76.

²²¹ Prior to the decision in *A.A. v B.B.*, a child could have two legal mothers but only if the donor was willing to relinquish his parental rights.

²²² Interestingly, the mothers in this case chose to list the donor on the child's birth certificate, despite the availability of a two mother birth certificate via a second parent adoption. The issue in the case was therefore whether the non-biological mother could be added to the birth certificate as a third parent. While the decision to list the donor and not the non-biological mother was no doubt the product of a particular legal strategy (when the case was first heard it was not possible to list two mothers on a child's birth certificate in Ontario so it made sense to include the parties who could be listed), the framing of the dispute in this way belied the actual day-to-day arrangements of the family. In reality, the two mothers were the undisputed primary caregivers and the donor played a significantly diminished role. Yet the donor's parental status was never in question. In fact, at one point the Court of Appeal notes that having the child's biological father involved in his life is in the child's "best interests". Thus, while the case does involve a departure from the nuclear family model, it also includes some oddly heterosexist moments.

²²³ It should be noted that the legal recognition of three parents may also appeal to advocates of neo-liberal privatization on the basis that it enables the privatization of financial responsibilities within an ever expanding

Despite the decision in *A.A. v B.B.*, it is fair to say that lesbian parental recognition has been achieved, by and large, through the application of a formal equality framework. Lesbian mothers have asserted their right to legal recognition on the basis that their families and children closely resemble the heterosexual norm. The mothers' claims have only been bolstered by the work of social scientists who also tend to adopt a comparative analysis. The question that then arises is whether relying on formal equality in the parenting context is as problematic as it is in the relationship recognition context, or whether aspects of the parenting debate make the critique more difficult to sustain.

2.4.2 Critiquing formal equality and the parenthood debate

There is no doubt that relying on a formal equality framework to achieve parental recognition raises many of the same concerns as it does in the adult relationship context. By asserting the "sameness" of their families, lesbian mothers necessarily reinforce the traditional nuclear family, and dyadic parenting in particular. In other words, and not unlike their relationship recognition counterparts, lesbian mothers have ultimately achieved their legal victories by asserting that they are "just like" heterosexuals. The impact of this approach is two fold. First, it leaves little space for those lesbian mothers who understand difference from heterosexual norms in a positive light. Second, it excludes from recognition those women who parent outside of a dyadic framework, or with individuals who are not their conjugal

legal family. In a recent decision of a Pennsylvania Superior Court, both a donor and a non-biological mother were ordered to pay child support for two child conceived by way of donor insemination. The donor was found to have a substantial parental relationship with the children and was therefore liable for child support like any other "parent". The non-biological mother was understood to be a "de facto" parent and therefore legally obligated to contribute to their support. In reaching these conclusions, the court asserted that, at least for the purposes of child support, the children had three parents, all of whom bore financial obligations to them. See *Jacob v. Shultz-Jacob*, 2007 Westlaw 1240885, 2007 PA Super 118.

partners. Thus, as Julie Shapiro argues, formal equality strategies may ultimately “divide those [they were] intended to benefit.”²²⁴ Furthermore, by focusing exclusively on formal equality, and thus the nuclear family, the opportunity to challenge the nuclear family as the optimal or only framework within which to raise children is arguably lost. This latter point is extremely problematic, as it has the potential to limit the kind of change that is possible.

While the use of formal equality to achieve parental status raises numerous concerns, there are arguably fundamental differences between parental and adult relationship recognition that make the critique less convincing in the parental context. In fact, this belief emerged amongst my own narrators, many of whom supported the legal recognition of their parental relationships but remained ambivalent about or actively opposed to same-sex marriage. The most obvious distinction between the two scenarios is the presence of a vulnerable third party – a child – whose protection and security arguably rests on the law recognizing the adults (however many or few) who parent them. For example, a non-biological parent who has no legally recognized relationship with her child cannot consent to the child’s medical treatment or enroll her in school. In the event of the death of a biological parent, a non-biological parent has no automatic legal rights in relation to the child and must seek leave of the court to even apply for custody.²²⁵ These restrictions on a non-biological parent's ability to carry out the daily tasks of parenting put the children of lesbian mothers in an extremely vulnerable position and ultimately deny them the equal protection of the law. In some situations it could, quite literally, render a child “parentless”. My own narrators, particularly those who had their children prior to the introduction of the second-parent adoption laws, alluded frequently to

²²⁴ Shapiro, *supra* note 108 at 31

²²⁵ Similar scenarios might arise in situations where a child is parented by three or four individuals, some of whom have no legal recognition as parents.

the daily burden of these inequalities. It should thus be argued that the stakes are higher in the parenting context, and that a pragmatic approach, such as that provided by formal equality, might be more easily *justified*.

A second reason why formal equality might hold more appeal in the parenting context is that the alternatives to it, such as a more substantively based multiple-parent approach, are extremely risky for lesbian mothers in light of the dominance of fathers' rights rhetoric in Canadian family law. As several of my own narrators argued, by embracing a more expansive concept of "family" that extends beyond the nuclear model, lesbians run the risk of having "fathers" imposed upon them.²²⁶ In fact, as discussed in Chapter One, biological fatherhood has emerged as one of the most protected identities in Canadian family law.²²⁷ Whether motivated by neo-conservative arguments about the importance of fathers to the healthy raising of children,²²⁸ or neo-liberal arguments about the economic benefits to the state of maintaining father/child relationships,²²⁹ courts are generally willing to extend parental status (and at least financial responsibilities) to biological fathers in the absence of a social, or even healthy, relationship with the child.²³⁰ In other words, father/child contact, independent of the actual relationship between them, is increasingly understood as being in a

²²⁶ Kelly, "Nuclear Norms", *supra* note 80.

²²⁷ For a discussion of the resurgence of the significance of biological fatherhood in Canadian family law see: Hester Lessard, "Mothers, Fathers and Naming: Reflections on the Law Equality Framework and *Trociuk v. British Columbia (Attorney General)*" (2004) 16(1) C.J.W.L. 165; Susan Boyd, "Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality And Responsibility" (2007) 25 Windsor Y.B. Access Just. 63 [Boyd, "Gendering"].

²²⁸ See, eg, Blakenhorn, *supra* note 59.

²²⁹ For a discussion of the influence of neo-liberal rhetoric on child support law see Cossman, "Family Feuds", *supra* note 37 at 190-201

²³⁰ Biological fathers have even been successful in gaining access to their children in situations where they have been violent towards the child's mother and may have engaged in abuse of the child. See, eg, Neilson, "Spousal Abuse", *supra* note 63; Rosnes, *supra* note 63; Neilson, "Partner Abuse", *supra* note 63.

child's best interest.²³¹ The fact that the "father" is actually a sperm donor is of little consequence.

The most resounding recent statement on the rights of biological fathers can be found in *Trociuk v British Columbia*, in which the Supreme Court of Canada affirmed Darrell Trociuk's parental status (and thus parental rights), even though he had almost no social relationship with his three biological sons.²³² The issue in *Trociuk* was whether a biological father had a right to have his children share his surname, which required that he be named on the birth certificate. The case arose after the children's mother, Rene Ernst, recorded their father as "unacknowledged" on their birth certificates and gave them her surname only. While Ernst later expressed a willingness to hyphenate the children's names, she otherwise refused to alter the birth registration.²³³ As she explained at trial, she "felt that there was no reason why the children should bear the last name of someone that [she] was not married to and had no plans to set up a life with."²³⁴ Her assertion was well supported by the sporadic nature of her relationship with Trociuk and his apparent lack of interest in the children. Ernst and Trociuk had never lived together for long enough to qualify as "spouses" under B.C.'s

²³¹ For example, in her review of reported Canadian custody and access cases from 1990 to 1993, Bourque found that, "Paternal access is viewed by judges as paramount in the "best interests of the child" test, eclipsing virtually all other factors. A child's supposed "need" for or "right" to a father, irrespective of the quality or quantity of his parenting, has superseded virtually all other considerations." Similarly, Boyd found that although Canada has never adopted a presumption in favour of joint custody, the philosophy behind it – that maximum contact is in the best interests of children – "nevertheless influences the broader trends in redefining custody and access". Dawn Bourque, "'Reconstructing' the Patriarchal Nuclear Family: Recent Developments in Child Custody and Access in Canada" (1995) 10 C.J.L.S. 1 at 6 [Bourque, "Reconstructing"]; Susan Boyd, "Is There an Ideology of Motherhood in (Post)Modern Child Custody Law?" (1996) 5 Social & Legal Studies 495 at 502 [Boyd, "Ideology of Motherhood"].

²³² *Trociuk v British Columbia*, [2003] 1 S.C.R. 835 [*Trociuk*].

²³³ Darrel Trociuk rejected the hyphenation option and continued to argue that the children should bear his name only.

²³⁴ *Trociuk*, *supra* note 232 at para. 172.

*Family Relations Act*²³⁵ and, though he was awarded six hours of access per week, Trociuk had exercised access only twice in the six months following the order. Despite the evidence that he had developed almost no social relationship with his children, Trociuk asserted that his mere biological connection to them justified his right to appear on their birth registrations and participate in the process of their naming.

Finding in favour of Trociuk, the Supreme Court prioritized biological fatherhood over all other factors. Noting that biological ties between a parent and child are “a significant means by which some parents participate in a child’s life”,²³⁶ the court asserts an almost purely biological model of parenting. It ignores both the quality of the social relationships parents share with their children, as well as the question of which parent actually bears *responsibility* for them. In fact, as Boyd notes, the Supreme Court judgment repeatedly emphasizes fathers’ rights, while making only one reference to parental responsibilities.²³⁷ Significantly, the Supreme Court also holds that allowing a mother to exclude a biological father from a child’s birth certificate “cannot be presumed to be in the best interests of the child.”²³⁸ By linking children’s best interests to the protection of fathers’ rights, the Court makes it almost impossible to assert an alternative position.²³⁹ In fact, the co-opting of children’s rights rhetoric by the fathers’ rights movement has perhaps been its greatest strategic success.

²³⁵ *Family Relations Act*, R.S.B.C. c. 128, s. 1 [*Family Relations Act*].

²³⁶ *Trociuk*, *supra* note 232 at para. 16.

²³⁷ Actual responsibility for the child, particularly with regards to day-to-day caregiving, presumably falls on the mother, as there is no suggestion by the SCC that fathers’ rights bring with them anything other than financial responsibilities. Boyd, “Gendering”, *supra* note 227 at 15.

²³⁸ *Trociuk*, *supra* note 232 at para. 31.

²³⁹ Lessard, *supra* note 227.

What the pro-father legal climate, exemplified by decisions such as *Trociuk*,²⁴⁰ suggests is that any attempt by a mother to assert that her child does not have or need a father will almost definitely fail. Courts are simply unwilling to entertain the idea that a father who seeks parental status should have that status denied. It is thus not surprising that when *lesbian* mothers have sought to exclude sperm donors on the basis that it was not their intention that the men actually parent, courts have almost never found in the mothers' favour.²⁴¹ Relying almost entirely on the assertion that it is in a child's best interest to have a relationship with his or her "father", courts have happily imposed donors on lesbian families even when it was never intended that they play a parental role. In fact, the only decision in Canada to have ever barred a sperm donor from access to a child born into a lesbian relationship was a 2006 Quebec decision where the mothers appeared to be protected by the legislative framework.²⁴²

Given the legal and ideological climate currently pervading Canadian family law, lesbian mothers would arguably be taking a great risk in adopting a more fluid approach to "family" than formal equality might allow. By expanding "family" to allow for the inclusion of multiple parents, including known sperm donors, lesbians run the risk of having *all* donors treated as "fathers". Furthermore, if three or four parents could be granted legal recognition,

²⁴⁰ See also the decision in *Johnson-Steeves v Lee*, [1997] A.J. No. 512 (Q.B.) in which the Court of Queen's Bench held that a mother who had arranged to conceive a child with a friend (who she understood as a sperm donor) could not "bargain away" the child's right to access with his "father". Relying on expert evidence presented at trial, the Court noted that having a father is "good news not bad news", and that it is "better for children to have a relationship with their father than not to have one" (at paras. 39-40).

²⁴¹ The list of lesbian losses that fall into this category is seemingly endless, though very few cases of this nature have been heard by Canadian courts. For a selection of cases from a variety of jurisdictions see: *S.G. v L.C.*, *supra* note 70 (Canada); *Re Patrick (An Application Concerning Contact)* [2002] F.L.C. 93-096 (Australia) [*Re Patrick*]; *P v K*, [2003] 2 NZLR 787 (New Zealand); *Thomas S.*, *supra* note 214 (United States); *B v A* [2005] EWHC 2 (Fam) (England); *Child A*, unreported decision of the Glasgow Sheriff Court, 6 March 2002, per Duncan S. (Scotland).

²⁴² *L.O. v. S.J.*, *supra* note 217. This decision was recently affirmed by the Quebec Court of Appeal. *L. O. c. S. J.*, [2007] C.S.C.R. no 270.

it is likely to become even harder for lesbian mothers to assert that *their* child does not need a father. Given these complexities, it is not surprising that most lesbian mothers have focused on formal equality and thus the legal recognition of the lesbian nuclear family.²⁴³ By fixing the legal boundaries around the two mother unit, mothers seek to protect themselves from a legal environment in which fathers' rights have (re)gained considerable ideological purchase.

In a somewhat related point, it can be argued that the legal validation of the two mother nuclear family, to the exclusion of a biological "father", protects a woman's right to make reproductive and parenting decisions autonomously from men.²⁴⁴ This is no minor issue for women who have, for centuries, endured male regulation of their reproductive capacities. Permitting women to draw the boundaries of their family around the two mother unit would thus extend to them a measure of social control that has historically eluded them. While the effect of this new freedom is the reinforcement of the nuclear family, the absence of a patriarch within it arguably creates space for new meaning. With no clear identities to "perform" or internal gender hierarchy to maintain, lesbian nuclear families may ultimately break new ground in debates about the "naturalness" of gender roles within all families.²⁴⁵

²⁴³ In fact, my own narrators were only willing to support the legal recognition of three or four parent families if the primary parents (usually the two mothers) were the ones who decided where the boundaries of family would be drawn. That is, additional parents could be added only if the primary parents consented to such an action. See Chapter 5 for a discussion of this issue.

²⁴⁴ Polikoff, "Families without Fathers", *supra* note 120; Polikoff, "Redefining Parenthood", *supra* note 120.

²⁴⁵ For example, Maureen Sullivan has suggested that lesbian nuclear families can make a unique contribution to the debate about the "naturalness" of the gendered family, particularly in the context of child rearing. This is because within a same-sex relationship power is necessarily separated from the normative prescriptions associated with gender, creating an environment in which traditionally gendered responsibilities are negotiable rather than prescribed. As Sullivan explains, "If two parents within a family are of the same gender, the power exercised relationally between them will not be attached to gender: that is, it will not be the expression of power immanent to the social construction of sexual distinction." Lesbian families therefore have the potential to challenge the constitutive substance of gendered social power within the family. This does not mean that lesbian relationships are immune from power differentials. Numerous sites of oppression, such as class, race and ability, continue to operate in lesbian relationships, and can contribute to relationship inequality. Sullivan, *supra* note 20 at 8.

None of this is to suggest that a formal equality approach to parental recognition is not problematic, or that formal equality is the only way by which lesbian mothers can achieve legal protection. The discussion does, however, make the complete rejection of a formal equality strategy more difficult to sustain. A certain pragmatism, one that was often evident in my own narrators' deliberations, may be necessary to ensure that lesbian mothers and their children enjoy some modicum of legal stability. Thus, what might ultimately be needed are strategies that move beyond an either/or framing of the issue.

2.4 Conclusion: moving beyond either/or

Moving beyond either/or is a complicated matter. The legal recognition that formal equality provides promises benefits that lesbian mothers and their children desperately need. At the same time, formal equality involves accepting harmful exclusions and restraints. Thus, it appears that one must be either for or against formal equality. To avoid the political impasse that will necessarily result from the framing of the issue as one of either/or, I have turned to Julie Shapiro's critical analysis of second-parent adoption.²⁴⁶ One of the few legal commentators to apply the relationship recognition critique to the parenting context, Shapiro argues that the solution lies in a *critical* engagement with law. As she explains, critical theory does not conclude that lesbians should never engage with the existing legal framework, "but teaches that *when* they do, it must be with a skeptical view and vigilant attention to the alluring perils that may await."²⁴⁷

²⁴⁶ Shapiro, *supra* note 108 at 21.

²⁴⁷ *Ibid.*

Thus, the first step in responding to the either/or dilemma may well be to acknowledge the potentially damaging effects of a recognition strategy grounded solely in formal equality. In other words, some skepticism and vigilance needs to be injected into the current debate. Acknowledging that the existing solutions are imperfect is perhaps all the more important given the dearth of critical commentary around the issue of parental recognition. In fact, as Shapiro argues, there has been an almost uncritical acceptance of reforms such as second-parent adoption.²⁴⁸ While the lack of critique may stem from the additional complexity of the parental recognition debate, this alone does not explain the absence of critical work. Thus, an important first step in moving forward is the encouragement of dialogue about the implications of adopting a formal equality approach to parental recognition, and an acknowledgement of its limitations as a strategy. At the same time, for those who have adopted a critical position with regard to relationship recognition, it will be important to acknowledge that the unique vulnerabilities of lesbian mothers make a complete abandonment of formal equality in the parenting context more difficult to sustain.

Once the limitations of formal equality are acknowledged, the law reform process can be pursued with a more critical eye. Formal equality is unlikely to be abandoned altogether, but future reform efforts will hopefully involve an interrogation of its limitations and at least some attempt to counteract them. Oppositional strategies might include litigants refusing to invoke the most traditional aspects of familial ideology,²⁴⁹ or activists and academics proposing reform models that at least *diminish the significance* of the nuclear family. As

²⁴⁸ *Ibid.*

²⁴⁹ As the Supreme Court of Canada noted in *M v H*, it is not actually necessary for lesbian and gay litigants to portray their relationships as “just like” traditional heterosexual relationships. *M v H*, *supra* note 140 at 615-16.

Weeks, Heaphy and Donovan have argued in the U.K. context, perhaps the goal for progressive reformers should be to:

Not necessarily...make governments give [same-sex families] equal access to the same legislative and policy provisions heterosexuals enjoy, but [to consider] how approaches to legislative and policy provisions can be changed to include a plurality of relationships without a hierarchical ordering of them.²⁵⁰

This kind of approach arguably presents a middle ground that acknowledges the importance of legal recognition for lesbian mothers, but refuses to accept that recognition be at the expense of those who eschew traditional family forms. In many ways, it is this middle ground that my own narrators occupied. By choosing a reform proposal that includes both formal and substantive elements, my narrators sought to overcome the dilemma posed by either/or solutions.

Finally, lesbians must continue working to change the social conditions that make recognition as a traditional family so important in the first place. In other words, while it might be necessary within the current political and legal climate to focus at least some attention on the extension of legal recognition to the lesbian nuclear family, it is important that lesbians simultaneously work to strengthen the social and collective responsibility owed to those who are *not* regarded as family (or the “right kind” of family).²⁵¹ For example,

²⁵⁰ Jeffrey Weeks, Brian Heaphy & Catherine Donovan, *Same Sex Intimacies: Families of Choice and Other Life Experiments* (London: Routledge, 2001).

²⁵¹ Similar argument have been made by Davina Cooper, as well as Boyd and Young. Davina Cooper, “Like Counting Stars?: Re-structuring Equality and the Socio-Legal Space of Same-Sex Marriage” in Robert Wintemute & Mads Andenaes, eds., *Legal Recognition of Same-Sex Partnerships: A Study of National European and International Law* 75 at 92-6; Boyd & Young, “Same-Sex”, *supra* note 108 at 779-81.

lesbians need to be part of the debate around the extension of family status to non-conjugal relationships. They must also reject the continuing emphasis on the middle class nuclear family as the primary site to which state benefits flow. It is also important that they oppose welfare cuts that drive single mothers and their children further and further into poverty. All of these issues are lesbian issues for no other reason than each of them involves the prioritizing of one form of family over others. Lesbian mothers should thus see themselves as political allies of those engaged in these debates, as women who have an interest in protecting *all* forms of family.

Because there has been so little acknowledgement of the potentially damaging effects of the current approach to parental recognition, there has also been little exploration of how law reform might be addressed differently. For this reason, one of the questions driving this research was what parental recognition framework lesbian mothers themselves might choose if they were given the opportunity to draft such a framework. Would they favour a formal equality approach or was the current attachment to it simply a product of engaging with a limited legal framework? What kind of critique (if any) might they have of formal equality, and would it resonate with that expressed by critical scholars and activists? If formal equality was not understood to be capable of meeting their needs, what alternatives would they suggest and would any of them provide a solution to the either/or dilemma? Finally, would they have any reservations about engaging with law at all? In the next chapter, I will describe the methodological process that guided me in the asking of these questions.

3 RESEARCHING LESBIAN MOTHERHOOD: THE STUDY DESIGN, METHOD AND NARRATORS

3.1 Introduction

As noted in Chapter 1, while increasingly visible, lesbian mothers remain a vulnerable and stigmatized population. Their decision to parent is frequently judged by those who believe it is “unnatural” or even harmful to children.²⁵² The failure of the law to fully recognize lesbian families only increases their social stigmatization. However, due to the unique insights lesbian parents might offer to discussions about family, gender, biology and child development, lesbian mothers have recently become somewhat of a *cause célèbre* amongst researchers. In fact, many of my narrators noted that they had participated in three to four studies per year since their child was born.²⁵³ None of the previous studies had, however, addressed the legal aspects of their lives.

While it is exciting that the topic of lesbian motherhood is attracting positive academic attention, there is a risk, particularly given lesbian women’s vulnerable social position, of exploitation. In particular, the “inherently unequal reciprocity” that characterizes qualitative research means that in some cases researchers may gain far more from the experience than

²⁵² See, eg, Professor Margaret Somerville, who is one of Canada’s most vocal and well known opponents of lesbian and gay parenting (and same-sex marriage). Somerville’s views have presumably attracted considerable attention in Canada because of her position as a professor of both law and ethics at McGill University. Somerville has argued in both the national press and before several parliamentary committees that same-sex parenting and same-sex marriage are harmful to children because they are contrary to biology. She argues that every child has a right to be raised by his or her biological parents. Her submission to the Standing Committee on same-sex marriage can be viewed online: <http://72.14.253.104/search?q=cache:qHf9OHJ6LiIJ:www.marriageinstitute.ca/images/somerville.pdf+%22margaret+somerville%22&hl=en&ct=clnk&cd=1&gl=ca>. A more recent explication of her views can be found at: Margaret Somerville, “Gay Rights, Children’s Rights”, *National Post* (14 July 2005) [Somerville, “Gay Rights”]

²⁵³ The other studies mothers had participated in were conducted by sociologists and psychologists and addressed issues such as the role of non-biological lesbian mothers, lesbian experiences of motherhood in wider society, and lesbian birth experiences.

those they are studying.²⁵⁴ As Stacey put it, “[t]he lives, loves, and tragedies that fieldwork informants share with a researcher are ultimately data – grist for the ethnographic mill, a mill that has a truly grinding power.”²⁵⁵ In fact, even the best intentioned researchers must be mindful of the possibility of their research contributing to the ongoing stigmatization of lesbian mothers. For example, comparative research that seeks to legitimize lesbian families by illustrating the extent to which they mirror the heterosexual “norm” may ultimately have a harmful effect on lesbian mothers. Though often politically expedient,²⁵⁶ comparative research tends to reinforce the “difference as deficit” model, leaving little room for the validation of alternative models of kinship. In addition, because “difference” is understood only as problematic, opportunities to learn from the alternative parenting practices of lesbian mothers may be lost. In developing my own study I therefore felt it was important to think carefully about the research process. While the stories my narrators told would inevitably become “data”, I wanted to ensure that I listened to, interpreted, analyzed, and (re)told them in a way that was both self-reflexive and attentive to power differentials.

In this chapter I outline the methodological practice that guided my own research process. First, I locate myself within the field, an important element of reflexive practice. Second, I address the issue of sampling, focusing in particular on questions of diversity. Third, I consider some of the ethical and theoretical questions raised by the interviews themselves, including the role of power imbalances in interview practice. Fourth, I introduce my narrators

²⁵⁴ Judith Stacey, “Can There be a Feminist Ethnography?” in Sherna Berger Gluck & Daphne Patai, *Women’s Words: The Feminist Practice of Oral History* (New York: Routledge, 1991) 111 at 117.

²⁵⁵ *Ibid.* at 113.

²⁵⁶ For example, as discussed in Chapter 2, comparative psychological research has been used extensively by litigants and judges in the various lesbian parental recognition cases in Canada to “prove” the health and wellbeing of the children of lesbian parents. The fact that the children of lesbian parents experience roughly the same psychological outcomes as children raised by heterosexual parents is introduced as evidence of the legitimacy of lesbian families. See, eg, *Re K*, *supra* note 73.

and provide a brief description of their family characteristics. Finally, I discuss the issue of data analysis.

3.2 Locating myself

Over the past few decades a serious challenge has been mounted by feminist scholars to positivist research methods and interviewing practices. In particular, they have called for greater self-reflexivity through close attention to issues of power and positionality. Feminist researchers thus reject positivist notions of “value-free objectivity”, and instead ask questions about how particular assumptions about being and knowing permeate the conduct and writing of research. Reflexivity, or the process of critical reflection on the self as the research instrument, has thus become an essential element of the qualitative inquiry. The researcher herself must become an object of scrutiny.²⁵⁷ As Stanley explains:

The use of [the autobiographical] “I” recognizes that knowledge is contextual, situational and specific, and that it will differ systematically according to the social location (as a gendered, raced, classed, sexualized person) of the particular knowledge-producer.²⁵⁸

Thus, by locating myself within the field my role in *constructing* rather than merely discovering the story/knowledge is made clear.²⁵⁹ In my case, explaining *why* I chose to research the topic of lesbian motherhood is particularly helpful in explaining both the intellectual and emotional content of my relationship to the field.

²⁵⁷ Gayle Letherby, *Feminist Research in Theory and Practice* (Buckingham, Open University Press, 2003) at 123.

²⁵⁸ Liz Stanley & Sue Wise, *Breaking Out Again: Feminist Ontology and Epistemology* (London: Routledge, 1993) at 49-50.

²⁵⁹ Letherby, *supra* note 257 at 141.

My interest in the topic of lesbian motherhood and its treatment by the law was first sparked by my involvement in the Family Court of Australia case of *Re Patrick*, heard in Melbourne in January 2002.²⁶⁰ The case, a dispute between two lesbian mothers and their gay sperm donor, revolved around the issue of legal parenthood.²⁶¹ At the time, I was employed by the Family Court as a judicial clerk and, after being assigned to the case, I played a significant role in researching the issues and drafting the judgment. In my capacity as a clerk I also spent many hours with Guest J., who presided over the trial, discussing the issues it raised. Watching the trial was both upsetting and bemusing. The judge had no experience with the issues raised by the case and the law offered him little assistance. Ultimately, he re-inscribed quite traditional norms, declaring the child to have a mother, a father, and a co-parent.

Working on the case was very difficult for me, not least because I was not “out” to my employer. I felt that my ability to be perceived as “objective” would be lost if information about my sexuality was disclosed. At the same time, I felt that I was one of the few people within the Court who had any real understanding of the issues the case raised. The experience was also made difficult by the endless barrage of jokes and unpleasantries that emanated from the mouths of court staff and journalists about the “crazy lesbians” in Court 4H. After breaking down in tears after work for several days in a row, it finally occurred to me that I was being publicly vilified on a daily basis, but in order to protect my own sexual identity and “credibility” I had been forced to remain silent. This was an unusual position for me as I was, in all other areas of my life, completely open and often quite vocal about my sexuality.

²⁶⁰ *Re Patrick*, *supra* note 241.

²⁶¹ For a discussion of the case see Fiona Kelly, “Redefining Parenthood: Gay and Lesbian Families in the Family Court – The Case of *Re Patrick*” (2002) 16 Austl. J. Fam. L. 204 [Kelly, “Redefining Parenthood”].

Over time, this silence bore heavily on my psyche and more than once I wished I had never been assigned to the case. Ultimately, however, my experience during the trial faded in comparison to its tragic conclusion. Several months after Guest J.'s decision in favour of the donor, the biological mother suffocated the child and killed herself.

My personal connection to the case of *Re Patrick* left me extremely reluctant to engage with the issues it raised. While I had not supported all of the findings Guest J. reached, I had been heavily involved in writing the decision. It became very difficult for me to not feel somehow implicated in the deaths. It was also very challenging for me to witness the enormous divisiveness and anger the tragedy caused amongst lesbian and gay parenting networks in Australia. I felt the decision and the parties were often wildly misrepresented by those with only a passing acquaintance with the case. When I was first informed by the Court counsellor of the deaths I had already begun writing a case comment about the decision. The news led me to pause and reflect on how quickly and easily other people's lives become "research data". My case comment was eventually published,²⁶² but I did not return to the topic until two years later in the context of my Ph.D.

My experience with the *Re Patrick* case produced in me a strong belief that the legal aspects of lesbian parenthood demanded scholarly attention. Having witnessed perhaps the worst effects of legal failure, I felt that the need for law reform was immense. Thus, at least part of my role in the research process was as a law reform activist. However, I also found that there was a significant gap in the academic literature that influenced the approach I took to law reform. Given that most of the early battles around lesbian motherhood revolved around a

²⁶² *Ibid.*

lesbian woman's capacity and entitlement to parent, the majority of academic commentary focused on proving that lesbian mothers were identical to heterosexual parents.²⁶³ As a result, few legal researchers approached law reform from a more substantive position. For example, legal commentators rarely suggested that the law should extend its existing boundaries to incorporate a variety of family configurations. To do so would be to admit that lesbian families might be different. As a result, researchers have tended to focus, often for political expediency, on how the lesbian nuclear family might be incorporated within the pre-existing legal framework. Thus, the second goal of my project was to offer an alternative to the normalizing tendencies of much of the existing parenting literature.

Soon after I began my research, the same-sex marriage debate took off in Canada, culminating in July 2005 with the passage of federal legislation legalizing same-sex marriage across the country.²⁶⁴ Within the space of a couple of years, lesbian and gay families moved from relative obscurity to national attention. While discussions about parenting were not common in the public marriage debates, several of the female litigants in the provincial cases were parents or intended to become parents. In their affidavits a number of the women suggested that allowing them to marry would provide their children with a greater sense of

²⁶³ See, eg, Fiona Tasker & Susan Golombok, *Growing Up in a Lesbian Family* (New York: Guilford Press, 1997); Raymond Chan, Barbara Raboy & Charlotte Patterson, "Psychosocial Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers" (1998) 69(2) *Child Development* 443. The comparative nature of the social science research inevitably influenced the legal environment.

²⁶⁴ *Civil Marriage Act*, *supra* note 146. By the time the *Civil Marriage Act* was passed, courts in Ontario (June 2003), British Columbia (July 2003), Quebec (March 2004), Yukon (July 2004), Manitoba (September 2004), Nova Scotia (September 2004), Saskatchewan (November 2004), Newfoundland (December 2004) and New Brunswick (June 2005) had already declared same-sex marriage to be legal. The passage of the *Civil Marriage Act* made Canada the fourth country, following Belgium, the Netherlands, and Spain, to recognize the right of same-sex couples to marry. In November 2006, South Africa became the first country in Africa and the fifth in the world to legalize same-sex marriage.

security and normalcy.²⁶⁵ The eventual success of the marriage campaign was generally understood by the lesbian and gay communities as a positive step towards legal and social equality. There was a feeling, supported by national surveys, that the majority of Canadians supported lesbians and gay men in the quest for “equal marriage”.²⁶⁶ However, the same-sex marriage debate also produced enormous moral outrage amongst certain portions of the Canadian community and opposing views, often quite unpleasant, were frequently found within the mainstream press.²⁶⁷ As one of my narrators noted, experiencing the same-sex marriage debate meant enduring personal attacks every time she turned on the television or read a newspaper. A number of the public figures who opposed same-sex marriage focused directly on the issue of children.²⁶⁸

Given the daily public attacks on lesbians and gay men that accompanied the same-sex marriage debate, I suspected that many of the mothers who received my email request for an interview might have been wary of my motives.²⁶⁹ I therefore felt that it was important for me to disclose my own identity as a lesbian woman. I was able to do this through the study website (to which potential narrators were directed in the email advertisement), as well as

²⁶⁵ See, eg, the comments made by litigants in the B.C. marriage case: “We want to have children and, to us, being married is very important. I want our children be born and raised in a married environment.” Affidavit of Tanya Chambers, *EGALE v British Columbia* in the Supreme Court of British Columbia, July 2001. Similar statements were made in the affidavit of the Ontario marriage litigants. See, eg, “I want to marry Michelle because I would never bring a child into this world without the safety net that a legally recognized marriage creates.” *Halpern* factum, *supra* note 148 at para 32.

²⁶⁶ In October of 2004, an Ipsos-Reid/CTV/Globe&Mail poll found 54 per cent of Canadians agreed with same-sex marriages, while forty-three per cent disagreed. (Press Release, Ipsos-Reid, “Slim Majority (54%) Support Same-sex Marriage”, 13 June 2003. Online: <ipsos-reid.com>). These same figures were replicated in an Environics/CBC poll conducted in January 2005. See Press Release, Environics, 13 January 2005. Online: <http://erg.environics.net/media_room/default.asp?aID=570>.

²⁶⁷ Perhaps the most offensive of the advertisements were those published on behalf of Focus on the Family. These full page advertisements, estimated to have cost Focus on the Family \$1.5 million, were published in both the national and local press. The advertisements can be viewed online: <<http://www.equal-marriage.ca/>>.

²⁶⁸ See, eg, Somerville, “Gay Rights”, *supra* note 252.

²⁶⁹ The details of my recruitment process will be discussed below.

verbally. In fact, a number of narrators asked me about my sexuality during the phone or email conversations that preceded the interview. There is little doubt that access to narrators was facilitated by my willingness to reveal my “insider” status as an out lesbian. In fact, a number of researchers have noted that lesbian and gay research participants are often motivated to participate when they know the researcher shares their sexuality, often because they assume a degree of common ground.²⁷⁰ Once the mothers had confirmed I was a lesbian, there were few enquiries about my views on lesbian and gay parenting. The assumption was that I had no moral objection to their choices. It was also assumed that we shared common experiences of discrimination. During a number of interviews narrators told stories about incidents of discrimination or misunderstanding that they attributed to their sexuality, concluding with comments like, “You know what it’s like.” The assumption of shared experience made it easy to build a rapport with the mothers, and in many instances I felt that I did “know what it was like”. However, there were instances where our experiences of our sexuality differed, and I wondered when those instances arose whether the presumption of common ground masked what we did not share.

Being an insider or an outsider is not a fixed or static position.²⁷¹ Thus, at the same time that I was an “insider” with regard to sexuality, I was simultaneously an “outsider” when it came to motherhood. Whether or not I was a mother was often a topic of conversation before the interview began and the fact that I did not share this identity with my narrators created a significant distance between them and myself. Furthermore, because large parts of the pre

²⁷⁰ Gillian Dunne, *Lesbian Lifestyles: Women's Work and the Politics of Sexuality* (London: MacMillan, 1997) [Dunne, "Lesbian Lifestyles"]; Arlene Stein, *Sex and Sensibility: Stories of a Lesbian Generation* (Berkeley: University of California Press, 1997); Weeks, Heaphy & Donovan, *supra* note 250; Lewin, *supra* note 13.

²⁷¹ Nancy Naples, *Feminism and Method: Ethnography, Discourse Analysis, and Activist Research* (New York: Routledge, 2003) at 49.

and post-interview periods, as well as significant portions of the interview itself, were spent discussing the narrators' children, my outsider status was often profoundly felt. At the same time, because I was five to ten years younger than most of my narrators (and often assumed based on my appearance to be even younger than that), most of them were as interested in whether I *wanted* to be a mother as whether I was a mother at the time. The fact that I could provide a positive answer to the question of future intention seemed to rebuild some common ground. There is no doubt, however, that some of my narrators were disappointed that I did not share with them the experience of being a lesbian mother.

While most of my narrators were well educated and worked in professional occupations,²⁷² I had not predicted the power they would attach to legal knowledge and therefore to me. It was during our discussions about law that I was made fully aware of the power dynamics inherent in the qualitative research process, even in circumstances where researchers share many of the “insider” qualities of their narrators. Many of my narrators asked me about my qualifications as a lawyer, as well as how many years of education I had completed. Most appeared a little overwhelmed by my answers and I sometimes struggled to convince them that they were as justified as I was in having opinions about how the law might best respond to lesbian parenthood. On more than one occasion I found myself ascribed the status of “expert”. For example, mothers would sometimes pause mid-interview to ask me a legal question. I was happy to answer their questions, and on more than one occasion I was able to alleviate their concerns. The process, however, reinforced the inequality between us. Providing legal information also temporarily shifted the nature of the interview itself, as my identity fluctuated between “researcher” and “lawyer”. I also found that during the sections

²⁷² Three narrators had legal qualifications, though only one practiced law at the time of the interview.

of the interview that dealt directly with law, many of the mothers became increasingly deferential to me, sometimes checking the veracity of their answers with me before fully committing to them. During these parts of the interview it became very important for me to reassure the mothers that they could ask me questions and that there were no “right” answers. I was able to assist some of them to overcome their uncertainty by providing them with a general overview of what issues were included within “family law”. In fact, those narrators who sought and received clarifying information subsequently exhibited much higher levels of confidence. Despite my efforts to minimize the power my legal knowledge gave me, the legal vulnerability and uncertainty that characterized my narrators’ lives made someone like myself very valuable. I was not only familiar with the law, I also understood and approved of their families. The power associated with my status as a “legal expert” was thus inescapable.

While my status as both insider and outsider, expert and activist, created a complex dynamic throughout the interview process, I also experienced an enormous sense of shared community with my narrators. While I acknowledge Dunne’s argument that the closeness that can be created in interviews is often created falsely by the sensitivity of the issues being discussed, I felt quite strongly that a sense of shared purpose drew the narrators and myself together.²⁷³ The stories they told of their daily lives as lesbian women, many of which I could identify with even in the absence of children, suggested to me that they were tired of “proving” themselves and welcomed the opportunity to talk about their differences. In most cases I left the interview emotionally drained, but incredibly inspired by what I had heard. My narrators, even those who lived relatively comfortable middle class lives, openly defied some of

²⁷³ Dunne, “Lesbian Lifestyles”, *supra* note 270 at 32.

society's most resilient traditions. Their willingness to do so produced in me an enormous amount of respect.

3.3 Method

3.3.1 Sampling

The difficulties inherent in obtaining representative samples of marginalized groups such as lesbian women have been well documented.²⁷⁴ The stigmatization and relative secrecy that continue to characterize lesbian existence makes it very difficult to select participants through any kind of random modeling. As Donovan has noted:

Students of homosexuality concede that identification is practically impossible due to the hidden nature of the homosexual population. Instead of drawing samples randomly from a complete universe, we are obliged to take them from the most accessible sources.²⁷⁵

Because of the difficulties associated with identifying narrators, most research with lesbian women relies on "convenience sampling" whereby participants are found through advertising in written materials directed at lesbian readers, or in physical locations frequented by lesbian women. Some of the most common options are the local lesbian and gay press (if one exists), women's bookstores and cafes, and social, political and sporting organizations that count lesbians amongst their members. In more recent years, advertising on email list-serves where lesbian women with a shared interest "meet" has also become a common method of locating

²⁷⁴ Stacey & Biblarz, *supra* note 208; Raymond Lee, *Doing Research on Sensitive Topics* (Sage: London, 1993); Kenneth Plummer, *Documents of Life* (London: Allen & Unwin, 1981) at 214.

²⁷⁵ J. Donovan, "Homosexual, Gay and Lesbian: Defining the Words and Sampling the Populations" in Henry Minton, ed., *Gay and Lesbian Studies* (New York: Haworth Press, 1992) at 28.

narrators. In fact, the internet, and email list-serves in particular, have emerged as an important site of information gathering and community building within the queer community.

While convenience sampling is often the only method by which to build a sizeable group of narrators, particularly when narrators are drawn from a marginalized community, it can often produce highly self-selected samples of friends or networks within the particular community in question.²⁷⁶ These individuals are likely to share similar outlooks as well as backgrounds, skewing the results of the research in a particular direction. Convenience sampling might also result in disproportionate responses from individuals with strong opinions about the topic. For example, in my own research, it was possible that the women who responded to my advertisement, which noted the study's legal focus, were particularly dissatisfied with the current legal framework or had specific knowledge of the law.

Like most researchers working with the lesbian and gay community I relied on convenience sampling despite its deficiencies. However, in an effort to overcome some of these deficiencies I attempted to gather narrators from as diverse a range of backgrounds and experiences as possible. Foremost, I sought to maximize the range of family configurations represented. Diversity of family configuration was important for three reasons. First, I was concerned by the fact that the vast majority of studies on planned lesbian parenthood have deliberately focused on lesbian nuclear families,²⁷⁷ usually for the purposes of comparison with heterosexual families. Such a starting point inevitably prioritizes the nuclear family, and

²⁷⁶ Robert Burgess, *In the Field: An Introduction to Field Research* (London: Allen & Unwin, 1984) at 57-58.

²⁷⁷ The lesbian "nuclear family" refers to an intact two mother family. The mothers in these families may have conceived using the sperm of a known donor but he is not included within their family structure.

implies that families that take some other form are somehow inadequate or illegitimate.²⁷⁸ By deliberately seeking lesbian mothers who parented outside of the nuclear model I sought to displace the nuclear family as the reference point from which all discussion flows. Second, I hoped that by including narrators who parented within a diverse array of family configurations I might draw attention to new and innovative approaches to parenthood that are easily overlooked or even elided in more narrow studies. Revealing these alternative approaches might highlight the constructed nature of existing legal and social norms. Finally, I made deliberate efforts to include mothers who parented within diverse family configurations because of their remarkable absence from the mainstream legal debate over parental and family recognition. I was concerned that the singular focus on the lesbian nuclear family in recent Canadian litigation overlooked alternative approaches to parenthood emergent within the lesbian community, or deliberately omitted them on the basis that they did not fit easily into a formal equality framework.²⁷⁹ As Elisha, a Vancouver mother who parented her daughter with three co-parents noted:

It's hard that, that the stories we hear are the, the ones that are just like, [pause] just like the heterosexual model. And it doesn't really represent the, the scope of what we see. I think we really need more of the other stories.

²⁷⁸ Stacey & Biblarz, *supra* note 208.

²⁷⁹ See, eg, *M.D.R.*, *supra* note 74. In *M.D.R.*, which permitted two mothers to appear on a child's birth certificate from birth, a formal equality argument was made that involved comparing heterosexual couples who conceived via anonymous donor insemination with lesbian couples who conceived via anonymous donor insemination. The use of such a narrow comparator group left little room for family diversity and almost definitely excluded from decision those women who conceive using known donor sperm.

Given that one of the questions underlying the study was how the law should respond to lesbian motherhood, I felt that it was imperative that *all* kinds of lesbian families were represented, not just those with the loudest voices or most intelligible structures.

In order to achieve the greatest diversity possible I created a list of the various family configurations that might exist amongst planned lesbian families created through assisted conception. My final list included: two mother families with anonymous donors, two mother families with known donors, multiple parent families, single mother families by choice, separated families, reconstituted families (both nuclear and non-nuclear), couples in which only one parent identified as a mother, non-conjugal same-sex co-parents, and non-conjugal opposite sex co-parents (where the mother identified as a lesbian). Given that one of my research questions focused on the particular meaning attributed to biological and social relationships within the lesbian family, I also wanted to speak to both biological and non-biological mothers within each family configuration. I took the view that location within a particular configuration could have a significant bearing on the experiences, definitions of, and beliefs about, both family and parenthood. Thus, saturation point in my sampling was reached only after concerted effort had been made to attract narrators from across the full spectrum of configurations. Not surprisingly, some configurations were better represented than others, though I suspect the frequency with which they appear might be an accurate reflection of their actual numbers within society. Ensuring that I had all of the various family configurations represented required some questioning of mothers prior to their agreeing to be interviewed. In the initial stages of interviewing this was brief, but as certain categories

became well represented and others remained only marginally represented, more concerted questioning was necessary.

As my list of possible family configurations suggests, I did place a significant limitation on my sample: I only spoke to narrators who had conceived at least one of their children via either donor insemination or in vitro fertilization. In other words, my focus was on planned lesbian families created through some form of alternative conception method and that therefore included at least one biological parent. While taking this approach meant that I ran the risk of reproducing the discourse of biologism, my decision to focus on women who became parents in this particular context – and not on those who became parents through adoption, fostering or a heterosexual relationship – was for a number of reasons. First, there is a strong suggestion that lesbian families created through alternative conception methods represent the fastest growing group of lesbian parents.²⁸⁰ Yet there is no Canadian empirical research addressing their legal needs. Second, while most provinces offer some form of legal recognition for planned lesbian families, it is both incomplete and inconsistent. Significant questions, such as the legal status of known donors, remain unclear. Furthermore, unlike lesbian women who adopt, foster or conceive in the context of a heterosexual relationship, there is no established legal framework to fall back on. Legal recognition has thus become a matter of urgency for this particular group of lesbian mothers (though the appropriate model of recognition remains unclear). Finally, because planned lesbian families challenge so many of the traditional signifiers of legal parenthood, perhaps more than any other family form, they provide an unprecedented opportunity to unpack the various assumptions upon which

²⁸⁰ It is difficult to be conclusive about this assertion, but the combined effect of access to sperm banks, increased acceptance of lesbian-headed families, and the younger age at which lesbians now "come out" is likely to result in an increase in the number of women who conceive within a lesbian relationship.

the current law is based. Such a discussion is likely to make a significant contribution to the more general debate that has emerged in recent years around defining legal parenthood in the twenty-first century.

Also omitted from my sample are gay fathers and donors. While I had initially intended to include these men as narrators, I was unable to recruit a sufficient number of them to justify their inclusion. This was very disappointing given that they are significant stakeholders in the debate about the legal recognition of lesbian parents. Because many lesbians conceive using anonymous donor sperm, I had not expected to locate as many gay donors and fathers as lesbian mothers, but I felt that finding a small group of them was a plausible goal. In recruiting the men, I used all of the same techniques I had used with the mothers. In fact, my initial advertisement requested both lesbian mothers and gay donors/fathers. I also contacted two support groups for gay fathers, but both informed me that their members were men who had become parents in the context of a heterosexual relationship. From all of my advertising I received only two responses, one from a father who co-parented with a lesbian couple and the other from a donor who had some involvement in his child's life. Given the poor response, I reluctantly began asking some of my narrators who had used known donors if they could forward my email advertisement to these men. Most of the mothers agreed to this, but it produced only one additional narrator. I eventually interviewed all three men, but given the size of the sample I did not feel I could draw any conclusions from what was said.

It is difficult to know exactly why the response rate from fathers and donors was so low. They are certainly not a large population, but that alone cannot explain the numbers. It is

possible that because some donors do not see themselves as “parents” they were poorly represented on the various *parenting* list-serves I used to recruit narrators. However, given that I advertised well beyond these lists to the gay community more generally, it is hard to blame the lack of response entirely on this particular method of sampling. I also speculated that donors may not have been sufficiently invested in parenting to feel that the study was relevant to them. Many of them were “occasional parents” at best, and may not have felt that their stories were particularly important. Finally, I wondered whether gay donors and fathers were in fact satisfied with their existing parenting arrangements and therefore had no concerns about reforming the current legal framework.

While finding narrators who parented within a diverse range of family configurations was the central focus of my sampling strategy, I also sought narrators from a variety of backgrounds. Like any community, the lesbian community comprises a diverse range of women of different races, social circumstances, and religious and cultural affiliations. I felt that it was quite possible that the different social, racial and cultural positions women occupy might inform their experiences of and attitudes towards both parenting and the law. In an effort to find narrators from different backgrounds I sent my email advertisement to a number of social groups directed towards racialized lesbians, as well lesbians who are members of religious minority groups. I also contacted several lesbian and gay social and community groups which were located, and presumably drew their members from, lower income areas of the cities in which I interviewed. In many instances, my initial contact with these groups resulted in the forwarding of my email advertisement to their members.

The final decision with regards to sampling was to determine from which geographical regions narrators would be drawn. Ultimately, I chose to interview narrators who lived within a 200km radius of Vancouver, Calgary or Edmonton. Initially, my focus was on Vancouver due to my own location within the city and my personal connections and familiarity with the local lesbian community. Furthermore, like most large urban centres Vancouver (with a population of approximately 2 million people in the greater Vancouver area),²⁸¹ has a thriving and visible lesbian and gay community. I also had reasonably strong anecdotal evidence that the city was experiencing a lesbian “babyboom”. After securing additional funding that allowed me to extend the study to a second province I decided to continue my research in Calgary and Edmonton. These locations were chosen for a number of reasons. First, they varied in size both from each other and from Vancouver. Calgary is a rapidly expanding city of approximately 1 million people, while Edmonton’s population is closer to 800,000.²⁸² Their lesbian and gay communities were thus much smaller and far less visible than Vancouver’s. In fact, because of the lack of a “gay ghetto” in either city, narrators were not clustered in one or two areas as they were in Vancouver. The second reason Calgary and Edmonton were chosen was because of their location within Alberta, a socially conservative province, often perceived as being more hostile to lesbians and gay men than British Columbia. I felt that gathering narrators from such communities might increase the range of constructions and understandings of family represented within the study. Finally, Calgary and Edmonton were chosen because they proved to be feasible options. I received several positive responses to my initial attempts to find narrators and it quickly became apparent that

²⁸¹ Online: <<http://www.city.vancouver.bc.ca/aboutvan.htm>>.

²⁸² Statistics Canada, *Population and Dwelling Counts for Canada, Provinces and Territories, and Urban Areas, 2006 and 2001 Censuses* (Catalogue no: 97-550-XWE2006002). Online: <<http://www12.statcan.ca/english/census06/data/popdwelling/Table.cfm?T=802&PR=48&S=0&O=A&RPP=25>>.

I could gather enough narrators to support the research.²⁸³ While I had hoped to compare the experiences of lesbian mothers between the two provinces, few distinct trends emerged.

3.3.2 Locating narrators

For my initial search for narrators in the Vancouver area in October 2004, advertisements for the study were posted in a variety of venues, including cafes, restaurants, bookstores, and community and family centres in the “gay ghettos” of the West End and East Vancouver. An advertisement was also placed in the community notices section of *Xtra West*, Vancouver’s lesbian and gay fortnightly newspaper, as well as in the Eastside edition of the *Vancouver Courier*. All of this advertising produced only a single response. When I mentioned my lack of success with these methods to some of my narrators several of them commented that they rarely had time to read the queer press (which they also perceived to be male focused), or to relax long enough in any one place to notice what was posted on the bulletin boards.

Given the failure of these traditional methods of gathering participants I turned in December 2004 to the modern technology of email. Email proved to be a highly successful method of recruitment, especially when used in conjunction with a website I developed for the study, which provided detailed information about the research and myself.²⁸⁴ The enormous number of online communities and list-serves through which lesbian women “meet” made it possible to access large numbers of women who did not necessarily come from the same social

²⁸³ At the same time that I contacted relevant individuals and groups in Calgary and Edmonton I also attempted to make some contacts in Winnipeg. As a medium sized city in a prairie province, the lesbian parenting community in Winnipeg might arguably also differ from that of Vancouver. However, my initial attempts at making contact produced few results and Winnipeg was abandoned as an option.

²⁸⁴ The website address was included in all recruitment materials and provided information about the project goals, who could participate, why participation was important, the interview process, and information about myself as a researcher and member of the lesbian community. The website can be found at: <http://fjkellybc.tripod.com/>

networks or live in urban areas. Email was also able to overcome many of the problems associated with the more traditional methods of recruitment. Because email is delivered to the recipient and can be accessed, read and responded to in multiple physical locations and during all times of the day, it was well suited to the mothers' busy schedules. Email was also a fruitful sampling method because my advertisement was often forwarded through networks that extended far beyond my initial entry point. In fact, in several instances emails were forwarded to other online community groups that included members that were unknown to the initial recipient of my email, breaking the friendship and community links that so frequently characterize convenience sampling.

Given the ongoing vulnerability of lesbian and gay parents, accessing email list-serves was not always straightforward and usually required some form of "introduction" from an existing member.²⁸⁵ In Vancouver, an acquaintance gave me the contact details of the list convener of a lesbian and gay parenting email group that boasted "over 200 families from Pt Grey to Abbotsford".²⁸⁶ The convener subsequently agreed to regularly post my advertisement to the list from January to May 2005. Many members of this list responded to my advertisement. I attributed their keen response to the fact that the list was a widely used forum for parents who were motivated to improve the legal treatment of their families. Requests to have my advertisement posted to various other email groups that served the lesbian and gay communities were also made. These lists included several hosted by EGALÉ, including its now defunct "*familia*" list serve that had a national membership, one

²⁸⁵ In fact, in only one situation was I given direct access to the email list.

²⁸⁶ Pt Grey is an extremely wealthy area located on the most western tip of the city of Vancouver, next to the University of British Columbia, while Abbotsford is situated approximately seventy-five kilometres further east in the semi-rural, mixed income, and generally religiously conservative Fraser Valley region.

hosted by The Centre (Vancouver's GLBT resource centre), and various faculty, student and resource group list-serves at the University of British Columbia. As noted earlier, email advertisements were also forwarded to lesbian and gay groups that formed around social or sporting interests, as well as ethnic, cultural or religious affiliation. As the interviews progressed I also found narrators through word-of-mouth as well as my own personal networks. I did, however, try to keep interviews with narrators I knew or was acquainted with to a minimum, and ultimately interviewed only one woman who was a friend.

Gathering narrators in Alberta proved more difficult because of my lack of familiarity with or connection to the province's lesbian and gay communities. I also found that the lesbian and gay communities were far less visible or cohesive than they were in Vancouver. For example, neither city really has a well defined "gay neighbourhood". Furthermore, because I was not physically located in the province during the recruitment period my methods of contact were limited. By the time I was looking for narrators in Alberta in May 2005 I had already determined that email was by far the most effective means of gathering narrators. After making contact with a Calgary woman who hosted a website focused on lesbian parenting, I managed to have my advertisement forwarded to a number of informal lesbian parenting and social groups within the Calgary area. The majority of my narrators came from this initial inquiry as well as through word-of-mouth. One of the women who responded to my Calgary advertisement (though she lived in a small town approximately 130 kilometres from the city) had previously lived in Edmonton and was able to connect me with a newly formed lesbian and gay parenting group that was meeting at the Pride Centre of Edmonton. I was able to

access this group through the Centre and it was from this source that the majority of my Edmonton narrators were drawn.

3.4 The interviews

Between February and October 2005, I conducted thirty-six interviews with forty-nine lesbian mothers; twenty-four in the Vancouver area, seven in the Calgary area, and five in the Edmonton area. Thirty-six families were represented in total. Twenty-two of the interviews were conducted with one mother alone (though most were members of a couple), while fourteen were conducted with both mothers together. The shortest interview lasted approximately forty minutes and the longest for over four hours. Most interviews averaged approximately ninety minutes in length. The vast majority of the interviews were conducted in narrators' homes. Other venues included workplaces, an office at the University of British Columbia, an office in my home, and a café. Approximately one third of the interviews were conducted with children present. Interviews held in narrators' homes were by far the most successful in establishing rapport. This may have been because the home environment was most conducive to maintaining household and children's routines. Many home based interviews involved lengthy pre and post-interview conversations and some included sharing a meal or snack, often with the children.

Before the interview began, I provided narrators with a brief written statement about the project as well as the consent form. In accordance with ethics requirements,²⁸⁷ I provided an oral overview of the statement and then repeated orally each clause of the consent form,

²⁸⁷ The project was given approval by the UBC Ethics Committee on 14 February 2005 (Certificate No: B05-0039).

highlighting in particular those that assured their anonymity as well as their right to pause or end the interview at any time. Narrators were also told that I had a list of accessible and lesbian-friendly services that they might utilize in the event that the interview raised difficult issues for them. With the consent of narrators, the interviews were recorded on a digital recorder and subsequently downloaded to my computer. The recordings were then transcribed by a professional transcriber who was required to sign a confidentiality agreement. The interviews were transcribed verbatim, and included pauses, stuttering, laughter and, where appropriate, voice inflection.²⁸⁸ Once the transcripts were returned to me all identifying information, including names, addresses, workplaces, occupations, and schools, were removed.

The interview schedule took the form of a semi-structured series of questions that were designed to guide narrators through four topics. The first topic, family arrangements, included questions about planning, negotiating, and becoming a parent. It also dealt with how parenthood was enacted within the narrator's family. The second topic, family definitions, addressed the narrators' understandings and definitions of key familial terms, as well as whether they felt that their definitions were accepted beyond the confines of their own home. The third section, legal arrangements, addressed any legal arrangements (eg, donor contracts, second parent adoptions, wills) the narrators had made that were designed to protect their children. The final section, law reform, required narrators to respond to a series of law reform models and offer their own law reform suggestions. It also dealt briefly with the relationship between law reform and social change.

²⁸⁸ For example, voice inflections that suggested affirmation of what had just been said or uncertainty on the part of the speaker were noted.

While the interview schedule was relatively well defined, I used it more as an “*aide memoire*”²⁸⁹ in an effort to achieve what feminist researchers have described as a “dialogical” mode of interaction.²⁹⁰ Dialogical interviews are designed to look less like question/answer sessions and more like fluid “conversations with a purpose”. The value of adopting such a model is that it has the potential to assist in overcoming the hierarchical nature of subject/object interactions that are inherent in interview practice. In my own interviews, I felt that the dialogical model did help to diminish the power of the researcher/subject relationship. In fact, on a number of occasions, especially when the direction of questioning was reversed and narrators asked for my opinion, the line between interviewer and narrator was blurred. Limiting my own interventions also made it less likely that narrators would be led in a particular direction or towards the “right answer”. Finally, the fluid interview structure allowed narrators to tell their stories in a manner that suited their own sense of sequence.

The fluid nature of the interview was established with the first question of the interview: “Can you tell me the story of how you came to be a mother?” The answers to this question often extended to twenty to thirty minutes of narration as mothers pieced together the various elements of their family history. Answers often went well beyond the basic details to include very personal and often emotionally charged stories about failed relationships, unsuccessful negotiations with donors, fertility problems, miscarriages, infant death, and post-partum depression. I was often surprised by the ease with which narrators talked to me, as well as

²⁸⁹ Burgess, *supra* note 276 at 108; Plummer, *supra* note 274 (2001); Dunne, “Lesbian Lifestyles”, *supra* note 270.

²⁹⁰ Dunne, “Lesbian Lifestyles”, *supra* note 270 at 29.

their willingness to share stories outside of study's parameters. Ultimately, I attributed their openness to both the dialogical model as well as my own commitment to active listening and a non-judgmental approach.

3.5 The narrators: a summary

Years of research about lesbian and gay parents has shown that they are far from a homogenous group.²⁹¹ The thirty-six families who participated in my study were no different. Together, the forty-nine women I interviewed were the parents of forty-six children – twenty-six girls and twenty boys – ranging in age from four months to twenty-eight years old. Eighteen of the mothers I interviewed were birth mothers, five were non-biological mothers, and in thirteen instances I interviewed both the birth and non-birth mothers together.²⁹² Seventeen of the Vancouver families lived in East Vancouver. The clustering of my narrators in East Vancouver, specifically around Commercial Drive, is not surprising. The lesbian community has its historical roots in the area, primarily because of the availability of affordable (including co-operative) housing.²⁹³ While East Vancouver is being rapidly gentrified, and is thus less affordable than it was a decade ago, it remains the centre of lesbian activity in the city.²⁹⁴ The remaining seven families lived in Vancouver's West End, outlying suburbs, and the semi-rural Fraser Valley. Most of the Calgary families were scattered around the city's suburbs, though two families lived in small towns outside of

²⁹¹ Millbank, "Meet the Parents", *supra* note 4.

²⁹² In one family the birth mother was not the child's genetic mother. The child was conceived using an embryo created using anonymous donor sperm and the non-birth mother's egg.

²⁹³ Anne-Marie Bouthillette, "Queer and Gendered Housing: A Tale of Two Neighbourhoods in Vancouver" in Gordon Brent Ingram, Anne-Marie Bouthillette & Yolanda Retter, *Queers in Space: Communities, Public Spaces, Sites of Resistance* (Seattle: Bay Press, 1997).

²⁹⁴ The affordability of the area stems from its history as a working class immigrant neighbourhood. While its earliest immigrant populations hailed from Italy and Portugal, it has more recently experienced an influx of Asian immigration. East Vancouver is also home to a large First Nations population.

Calgary with populations of less than ten thousand people. The Edmonton families were split evenly between the inner-city and the suburbs.

In accordance with my sampling goals, I managed to recruit narrators who parented in a number of different family configurations. The complexity of these configurations makes it difficult to categorize them, and in several cases the categories overlap. Short summaries of the characteristics of each family can be found in Appendix 1. The most common family configuration, with 18 of the 36 families falling within it, was the two parent nuclear model with an anonymous donor. The prevalence of this model within the sample, despite my best efforts to de-centre the nuclear family, suggests that it may be the most common parenting model within the lesbian community. One of the few noticeable provincial differences was that all of the mothers living in Alberta had conceived using anonymous donor sperm. In contrast, the B.C. families were evenly split between anonymous and known donors. Given the size of the sample, it is difficult to know what conclusions, if any, can be drawn from this finding. It is also difficult to know how to interpret the finding, as it can be understood through multiple lenses. For example, conceiving a child using the sperm of an anonymous donor, and thus creating a two mother family absent a knowable “father” or “father figure”, could be seen as a progressive statement about the ability of women to parent autonomously from men. On the other hand, using anonymous donor sperm allows lesbians to create a family structure that most closely resembles the traditional nuclear family. Using anonymous donor sperm can thus be understood as conservative choice, designed to mimic existing norms. Without having asked the mothers more detailed questions about their choices, it is impossible to know which (if either) interpretive lens to employ.

While the two mother family with an anonymous donor was by far the most common family model, my sample included a variety of other family configurations. Twelve families included known donors, most of whom had regular contact with the child and played some role in family life. In two instances, the donors and their partners were considered to be “parents”. In seven families, three of which included known donors, the mothers were separated from the child’s other parent. In four of these families the mother I interviewed had re-partnered, while three mothers remained single. In total, seven of the women were unpartnered at the time of the interview. In three families, the biological mother had planned at least one of their children as a single parent. In one of these cases, the mother had a partner at the time of conception but did not consider her to be a parent because of the newness of the relationship. The partner did, however, “grow into” the role of parent but only after she had shown a commitment to the “job”. Finally, in one family the biological mother parented with a non-conjugal female co-parent, an arrangement that had been planned prior to conception.

As suggested above, the role played by donors was also diverse across the sample. Twenty-four of the families had used anonymous donors, while the remaining twelve used known donors. Two of the families who used anonymous donors had conceived at a time when lesbian access to fertility clinics was prohibited. These women, whose children were considerably older than the average, had accessed sperm through a third party intermediary, in both cases a feminist-identified friend. The twelve families with known donors tended to

fall within one of three categories.²⁹⁵ In seven of the families the donor was understood as a significant male figure in the child's life who exercised regular contact, but was not considered a parent. Some of these men were referred to as the child's "father", while others were known by their first names. In two of the families donors played the role of "symbolic fathers".²⁹⁶ These men were not involved in the child's life but were known to the child and could be pointed to in the event that the child needed to identify someone as "dad". Finally, in two families the donors (and their male partners) were active, practicing parents with all of the rights and responsibilities implied by that status, though without legal custody. In these families, the mothers considered their children to have four parents. In all but one of the families, the donor identified as gay.

Despite my attempts to recruit mothers from a diverse array of racial, ethnic and social backgrounds, the sample remained resolutely middle class, urban, able-bodied, and Anglo-Canadian. Over eighty percent of narrators were of Anglo-European descent. Of those who were not, three identified as French Canadian, two claimed a Jewish ethnic heritage (one of these women was Israeli), one hailed from South Africa, and one identified as Aboriginal. The vast majority of the women were also well educated and middle class. Most had professional qualifications and many worked in senior positions. However, because they were clustered in the "caring industries"—teaching, nursing, and social work—they were not necessarily high earners. Approximately 70 percent of the families owned their own homes, though this was far more common amongst the Alberta mothers than those who lived in B.C. The lower rates of home ownership in B.C. no doubt reflect the extraordinarily high cost of

²⁹⁵ As will be discussed in Chapter 4, the three donor categories mirror those identified by Maureen Sullivan in her study of lesbian mothers living in San Francisco. Sullivan, *supra* note 20 at 49-50.

²⁹⁶ *Ibid.* at 50.

housing in the Lower Mainland, and Vancouver in particular. A large number of the Vancouver mothers who were not home owners lived in co-operative housing. Despite their middle class status, in only six households did a parent stay at home full-time.²⁹⁷ In five of those households the child was under the age of two. A number of the mothers noted that they would have liked to have a stay-at-home parent while their children were young but their financial position and the high cost of living made it impossible. As a partial solution, several of the women who parented in couples had rearranged their employment after the birth of their child so that both mothers worked part-time.

A high representation of white, middle class, well educated mothers is a general feature of most studies of planned lesbian parenthood.²⁹⁸ For example, in a recent Australian study of 270 prospective and current lesbian parents, over 40 per cent of the women had post-graduate qualifications compared with only 8 per cent of the general population.²⁹⁹ Similarly, studies in the United States that have compared the caregiving practices of lesbian and heterosexual parents who conceive via donor insemination found far more working-class heterosexual parents than working class lesbians.³⁰⁰ Finally, in a recent study of lesbian families living in the San Francisco Bay Area, a racially diverse part of the United States, fewer than 20 per cent of narrators were women of colour.³⁰¹ There is no doubt that at least part of the

²⁹⁷ The extraordinarily high cost of living in Vancouver undoubtedly limited mothers' options in this regard.

²⁹⁸ See, eg, Dunne, "Lesbian Lifestyles", *supra* note 270; Sullivan, *supra* note 20; Renate Reimann, 'Does Biology Matter? Lesbian Couples' Transition to Parenthood and their Division of Labour' (1997) 20 Qualitative Sociology 153; Ruth McNair, Deb Dempsey & Sarah Wise, "Lesbian Parenting: Issues, Strengths and Challenges" (2002) 63 Family Matters 40; A Brewaeys, P Devroey, F Helmerhorst, E Vanhall & I Pontjaert, "Lesbian Mothers who Conceived After Donor Insemination – A Follow-Up Study" (1995) 10(10) Human Reproduction 2731.

²⁹⁹ McNair et al., *ibid.*

³⁰⁰ Tasker & Golombok, *supra* note 263.

³⁰¹ Sullivan, *supra* note 20 at 240.

explanation for this lack of diversity lies in the use of convenience sampling.³⁰² Some researchers have suggested, however, that the over-representation in research studies about lesbian motherhood of race and class-privileged mothers may reflect the actual racial and economic composition of planned lesbian families.³⁰³ For example, Stacey and Biblarz have suggested that there may be more white and middle class lesbian mothers because socially privileged lesbians are more likely than the less privileged to possess the required sense of entitlement to have children in the face of considerable moral judgment and disapproval of their actions.³⁰⁴

Beyond the question of entitlement, there are a number of other explanations for why white, middle class families are so well represented within my sample. The most obvious relates to the costs associated with becoming a lesbian mother, particularly if the services of a fertility clinic are utilized.³⁰⁵ The cost of buying and storing sperm, as well as insemination and other consulting services, means that lesbian women who conceive using anonymous donor sperm face preconception costs of between \$1000 to \$15,000, depending on the number of attempts necessary to become pregnant and the difficulties experienced along the way. Even the

³⁰² *Ibid.* at 240-41. While the experiences of poor and racialized queer families are not well represented within academic studies, they can be found elsewhere. For example, Vancouver-based film-maker Karin Lee is currently making a documentary about queer families of colour living in British Columbia, including families with adopted children. The experiences of American queer families of colour – particularly Hispanic and African-American families – have frequently featured in the US-based *Gay Parent* magazine. See, eg, “Family Values in an Old-Fashioned (but Non-Traditional) Family Camp”, *Gay Parent Magazine*, 8:46 (2006) (featuring the Quinones-Delgado family); “The Namaste Family”, *Gay Parent Magazine*, 8:48 (2006) (featuring the Namaste family, whose two children are named Justice Audre and Mandela Peace in honour of leaders of colour). Finally, poor queer families, queer families of colour and queer parents who are religious minorities are represented within a number of anthologies to which lesbian and gay parents have contributed. See, eg, Audre Lorde, “Man Child: A Black Lesbian-Feminist's Response” in Sandra Pollack & Jeanne Vaughn, eds., *Politics of the Heart: A Lesbian Parenting Anthology* (Ithaca: Firebrand Books, 1987) 220; Teya Schaffer, “L'Havdol” in Pollack and Vaughn, *ibid.* at 194; Helen, “Coming Out Poor” in Pollack & Vaughn, *ibid.* at 287.

³⁰³ Sullivan, *supra* note 20; Reimann, *supra* note 298.

³⁰⁴ Stacey & Biblarz, *supra* note 208 at 166.

³⁰⁵ *Ibid.*

easiest pregnancies are expensive. For example, a single insemination attempt (including the purchase of sperm) at any of the five clinics my narrators used cost between \$500 and \$800. A single IVF cycle, including super-ovulation drugs, could cost up to \$7000.³⁰⁶ It is thus possible that lower-income women are less likely to conceive using donor insemination. Conception using known donor sperm obviously reduces the costs and some researchers have suggested that lower-income lesbians might be more likely to choose this option.³⁰⁷ In my own study, however, I could not discern any connection between income level and donor choices.

The prevalence of middle class narrators in my study may also be explained by the fact that I drew my sample from three of the wealthiest areas of Canada. The average median incomes in Vancouver, Calgary and Edmonton are above both the Canadian average and the average for other regions within the two provinces.³⁰⁸ In fact, according to the 2001 Census, Calgary and Edmonton are among the ten metropolitan areas with the highest median family incomes in the country.³⁰⁹ It is therefore not entirely surprising that many of my narrators were comfortably middle class. It is also possible that the study's focus on law may not have been particularly appealing to working class lesbians. While the middle classes often perceive law to be a tool of social justice and progressive change, the working classes are more likely to experience law as a tool of oppression. For example, many working class women will have experienced some form of state surveillance, perhaps in the context of welfare law or child

³⁰⁶ One couple who conceived through IVF admitted to spending almost \$20,000 on fertility services.

³⁰⁷ Sullivan, *supra* note 20 at 242.

³⁰⁸ Statistics Canada, *Income of Individuals, Families and Households: Highlight Tables, 2001 Census*, 2001 Census, (Catalogue no: 97F0024XIE2001014). Online: <http://www12.statcan.ca/english/census01/products/highlight/Income/Index.cfm?Lang=E>.

³⁰⁹ *Ibid.* The other eight cities are all in Ontario.

protection law, and are thus less likely to perceive legal mechanisms as positive or capable of assisting them in any way. It is also possible that some working class women may have been uncomfortable with the use in my advertisement of the arguably middle-class term “lesbian”, and might have been more likely to respond had I used “gay”.

Finally, the lack of racial diversity in my sample may be a product of my own whiteness. It is possible that had I been able to work alongside a researcher of colour, I may have attracted a more ethnically diverse sample.³¹⁰ While I did advertise my study on list-serves that catered to ethnically diverse communities, members of those communities may have been more likely to respond to someone who shared their ethnic and racial background.

3.6 Data analysis

The data analysis process is perhaps the most under-discussed aspect of qualitative research, yet it is arguably one of the most important. It is through the analysis process that researchers confront the question of “how to keep the [narrators’] voices and perspectives alive, while at the same time recognizing the researcher’s role in shaping the research process and product.”³¹¹ In other words, researchers must, in the absence of their narrators, consider how they will balance the expectations and interests of those being studied with their own intellectual, theoretical and political interests in a way that is respectful to everyone involved. The considerable volume of material generated in the course of transcribing interviews, collating interview notes, and drawing up case summaries, also raises questions about what

³¹⁰ As a Ph.D. student, I was not permitted to hire anyone to assist me with my research. In future projects, however, it would be important to build a diverse research team.

³¹¹ Natasha Mauthner & Andrea Doucet, “Reflections on a Voice-centred Relational Method: Analysing Maternal and Domestic Voices” in Jane Ribbens & Rosalind Edwards, eds., *Feminist Dilemmas in Qualitative Research: Public Knowledge and Private Lives* (London: SAGE Publications, 1998) 119 at 119.

should be included and what can be left out. To acknowledge these complexities is not to undermine the possibility of investigating a social phenomenon through qualitative methods. Rather, it is to maintain a healthy degree of skepticism about achieving a singular “truth”. The end product is thus best understood as a contribution to what is an ongoing conversation, rather than a definitive statement about “the way things are”.

In my own study the data analysis process began as soon as each transcript was received. The transcripts were initially read to check for errors as well as to monitor my own interview technique. During this reading, I also looked for new insights, thematic developments, and theoretical avenues that might be worthy of exploration. These thoughts were recorded in a notebook that I returned to frequently throughout the analysis process. Once all of the interviews had been transcribed and pseudonyms allocated the larger process of analysis began. This was undertaken in three stages.

First, interviews were listened to and transcripts were read for the purpose of creating case summaries. Each case summary was approximately two to three pages and included a short biography of each narrator, their family details, and a general description of the ideas and themes that characterized their interview. The summaries also included significant words and phrases that I felt captured “epiphanic moments” in a narrator’s story.³¹² After all the case summaries were completed an annotated list of themes was developed. This list was updated and re-worked on numerous occasions, but it provided a starting point for a second reading of the transcripts. The second stage involved re-reading ten randomly selected transcripts to look for additional themes. I felt this second reading was important because the focus of my

³¹² Norman Denzin, *Symbolic Interaction and Cultural Studies* (Massachusetts: Blackwell, 1992).

reading would be different. Rather than focusing on the individual story of the narrator as I had when reading for the purpose of creating the case studies, the second stage was designed to elicit connections *between* the narrators. At the conclusion of the second stage, the list of themes was re-worked as clearer patterns emerged. This new list of themes became my guide for the third and most detailed reading of the transcripts. The third and final stage involved a close reading of all of the transcripts and a subsequent re-working of their thematic content. After the third stage was completed, all transcripts had been read twice and ten had been read three times. The transcripts were then coded, relying on the descriptive themes, using the qualitative computer package N-vivo. This involved a final, unstructured reading of the transcript. My use of N-Vivo was primarily as a data management tool. It created indexed Word documents of direct quotes for each of the “nodes” (themes) I had identified. While relying on N-vivo even as a data management tool did put some distance between myself and the interviews, I was so immersed in the material by that stage that I felt confident using the technology.

The data analysis process obviously concludes with the presentation of the data in written form. Researchers working with biographical material have historically perceived themselves as merely documenting the lives of others or “giving voice” to their participants’ experiences. In fact, empiricists have often argued that they simply “tell it like it is”. I have approached the issue of data presentation from a different perspective. Rather than presenting my narrators’ words as objective evidence of an existing reality, I understand the data presented in this dissertation as my own (re)telling of other people’s (partial) truths. The various dynamics that characterize the sampling, interviewing, and writing processes that I have

discussed in this chapter make any other assertion problematic. However, I do not wish to give up all ground to subjectivity. Rather, I have adopted the view that while my narrators' stories may not represent "objective reality", their perceptions and experiences, as they have made sense of them and expressed them to me, constitute a "reality that is significant and palpable *for them*".³¹³

3.7 The reciprocity of research: giving back to my narrators

The research process does not end once the researcher has gained everything she needs from her narrators. Rather, self-reflexive research practice requires that the researcher/narrator relationship is both reciprocal and collaborative.³¹⁴ Researchers should encourage the ongoing involvement of narrators in the research process and, ultimately, "give back" to their narrators. "Giving back" can take many forms from providing narrators with the final results of the study, to the researcher using her privilege as an "expert" to tell her narrators' stories to a wider audience. In my own research I have been conscious of building relationships of reciprocity with my narrators and I believe I have been successful in a number of regards.

Perhaps more than anything else, it was important to me that I represented my narrators' voices accurately. Thus, all narrators were sent copies of their interview transcripts and were invited to add to, subtract from or clarify what had been said. While few of the women amended any part of their transcript, at least some responded to confirm that they were happy

³¹³ Sullivan, *supra* note 20 at 246 [emphasis added].

³¹⁴ Roberta Splater-Roth & Heidi Hartmann, "Small Happiness: The Feminist Struggle to Integrate Social Research with Social Activism" in Sharlene Hesse-Biber, Christina Gilmartin & Robin Lydenberg, *Feminist Approaches to Theory and Methodology: An Interdisciplinary Reader* (New York: Oxford University Press, 1999) 333.

with the final version. Each of the narrators will also receive a copy of the completed dissertation and many have expressed interest in the ultimate findings.

I have also sought to give back to my narrators by using my position as an "expert" to disseminate both their stories and their reform agenda in the public domain. Because of my qualifications and experience, I have far greater access than most of my narrators to both the media and government. My background also lends a degree of authority and credibility to what I say. I have thus sought to use my privileged position to further the objectives of my narrators and their children. Over the past two years I have been interviewed for several radio programs, newspaper articles and television documentaries that have addressed the issue of lesbian and gay parenting. On each of these occasions I have promoted the legal recognition of lesbian motherhood in a manner that reflected my narrators' concerns. Whenever I have participated in a media or government event, narrators have been told in advance so that they could tune in and follow the progress of the study. Several mothers have contacted me following media activities to comment on what was said and to thank me for "getting the issue out into the public". By disseminating the findings of my study through the media, the mothers have also had access to my research in a form that is practical, meaningful and accessible to them.

I have also managed to disseminate my research findings at a government level. In 2006, I was invited to appear before a Senate Human Rights Committee investigating Canada's compliance with the United Nations *Convention on the Rights of the Child*.³¹⁵ Focusing once

³¹⁵ *Convention on the Rights of the Child*, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2 September 1990.

again on legal recognition, I was able to raise before the Committee the very specific issues that children born to lesbian mothers face. The final report of the Committee ultimately endorsed my assertion that Canadian law fails the children of lesbian mothers.³¹⁶ Similarly, I hope to further the law reform goals of my narrators by submitting to the Committee currently reforming British Columbia's *Family Relations Act*³¹⁷ the reform proposals developed for this dissertation. The Committee, through its public consultations, will specifically address the question of legal parentage, and I hope that my submission will encourage the Committee to include lesbian-headed families within their discussions. I have also encouraged my narrators to make submissions to the Committee, and have provided them with some assistance in their preparation.

The final way in which I have given back to my narrators has been through a series of informal contributions that I could not have planned. Through the process of conducting my research I have become an accessible (and free!) resource for the lesbian community with regard to parenting issues. Over the past two years I have been contacted by a number of lesbian mothers who have been referred to me by my narrators. Most of these women have had legal questions to which they could not find an answer. Others have simply been unable to afford the services of a lawyer. In most instances, the women have been told that I "know about legal issues" and that I can probably help. In a similar vein, in September 2007 I conducted a well-attended legal information session as part of an annual four part "queer

³¹⁶ Senate, *Children: The Silenced Citizens – Effective Implementation of Canada's International Obligations with Respect to the Rights of Children*, Final Report on the Standing Senate Committee on Human Rights, April 2007 at 113. Online:

<http://www.canadiancsrc.com/PDFs/Canadian_Senate_Report_Children_Silenced_Citizens_10APR07-e.pdf>.

³¹⁷ *Family Relations Act*, *supra* note 235.

parenting" program presented by an East Vancouver midwifery practice.³¹⁸ The practice, which estimates that approximately thirty per cent of its clients are lesbian women, found that they were increasingly being asked legal questions to which they did not know the answer. The midwives in the practice, most of whom identify as queer, knew of my research as well as my connections to Vancouver's queer community. By providing prospective mothers with legal information,³¹⁹ as well as details of my own efforts to change the law, I hope to add to the knowledge and confidence of the community to which my narrators belong.

The relationship of reciprocity between researcher and narrator that self-reflexive research requires arguably never ends. In fact, part of my own commitment to my narrators is to ensure that for as long as governments and courts debate the issues raised by lesbian motherhood, I will use my narrators' stories to contribute to positive change. In the next chapter, I begin the process of telling those stories, focusing on two main issues. First, I consider how the mothers defined key familial concepts, such as "family" and "parent", and how they sought to exert their definitions in opposition to societal norms. Second, I explore how the mothers' definitions shaped their understanding of where the boundaries of "family" should be drawn. Then in Chapter 5, I will consider how the mothers' definitions and understandings might be transformed into a law reform context.

³¹⁸ "Twats N' Tots", Queer Conceptions Lecture Series, Pomegranate Community Midwives. Online: <<http://www.pomegranate-midwives.com/index.html>>.

³¹⁹ It is necessary to clarify, both with the mothers and for the purposes of this dissertation, that I am not providing legal *advice* to these women. As I have not been called to the Bar of British Columbia, I am not actually able to do so. Rather, I am providing them with legal information. I always recommend that they speak to a practicing lawyer if they are able to do so.

4 DEFINING QUEER KINSHIP: HOW DO LESBIAN MOTHERS UNDERSTAND THEIR FAMILIAL RELATIONSHIPS?

4.1 Introduction

To be a lesbian mother is to constantly engage in definitional acts. With little direct guidance (though substantial influence) from either law or society, the lesbian family must self-define. Rights and responsibilities, as well as nomenclature, must be distributed by the mothers amongst the various individuals through which connection, whether biological, social or semiotic, is dispersed. This can often lead to creative reinterpretations of family that differ markedly from traditional norms. While it might be tempting to do otherwise, I agree with Corinne Hayden that we should, however, resist the urge to argue that lesbian mothers are engaged in a process of developing *wholly novel* conceptualizations of kinship.³²⁰ Rather, a more accurate understanding might be reached by showing how old ideas and symbols are being “pressed into new service” by the mothers, often resulting in a destabilizing of traditional meanings and a creative (re)formulating of family.³²¹ For example, kinship connections created *between* lesbian families because of the genetic connection shared by children born via the same anonymous donor,³²² or the reformulating of a biological connection between a child and his or her known donor into a mere semiotic relationship, give biology a very different symbolic meaning than is usually employed. However, in

³²⁰ Corinne Hayden, “Gender, Genetics and Generation: Reformulating Biology in Lesbian Kinship” (1995) 10(1) *Cultural Anthropology* 41 at 42. Hayden’s position draws from Marilyn Strathern’s argument that reproductive technologies also do not produce wholly new forms of kinship, but rather make “new ideas out of old ideas”. Marilyn Strathern, *Reproducing the Future: Anthropology, Kinship, and the New Reproductive Technologies* (New York: Routledge, 1992) at 15.

³²¹ Strathern, *ibid.*

³²² Amy Harmon, “Hello, You’re My Sister. Our Father is Donor 150” *New York Times* (20 November 2005) 1, 20. Harmon’s article discusses the connections made between families, often involving regular visits and spending holidays together, whose children have been born using the sperm of the same donor. Harmon notes that “while many donor-conceived children prefer to call their genetic father “donor”, to differentiate the biological function of fatherhood from the social one, they often feel no need to distance themselves, linguistically or emotionally, from their siblings.”

neither instance does biology – one of the most important signifiers of family in its traditional form – become meaningless. Rather, it is reconfigured in the lesbian family context to mean something *different*. The treatment of biology within lesbian families highlights why an either/or approach to reform will always be problematic. Lesbians neither fully embrace traditional attitudes toward biology, nor completely reject them. Rather, they adopt a middle ground, perhaps best captured by a substantive equality strategy.

In this chapter, I analyze how my narrators understood and defined key familial concepts. Their definitions will be discussed in the context of wider debates about the meaning of kinship in contemporary Western society. I begin by considering how the mothers defined “family”. Given the dramatic legal changes that have occurred with regard to lesbian and gay families in recent years, I was particularly interested to see whether the mothers would continue to employ Kath Weston’s notion of “chosen family”.³²³ Second, I explore how the mothers understood their parenting relationships, both vis-à-vis each other and in relation to their donors. Rounding out this discussion I address whether the mothers believed that the law should be capable of recognizing more than two legal parents. Finally, I consider whether the mothers drew any positive connection between legal marriage and parenting.

4.2 Families of choice? The lesbian family in the twenty-first century

“Family” is a powerful and pervasive word, embracing a variety of social, cultural, economic and symbolic meanings. In more recent times it has also become a hotly contested term, the subject of numerous polemics, anxiety and political concern about the “crisis of the

³²³ Weston, *supra* note 3.

family”.³²⁴ As noted in Chapter 2, “the family” has also been a controversial topic for gays and lesbians. While the early gay liberationists and many lesbian feminists deliberately situated themselves “outside” the family, in more recent times lesbians and gay men have sought recognition of gay families as a legitimate form of kinship. The first tentative steps towards gay family came in the form of what Kath Weston labelled “families of choice”.³²⁵ “Families of choice” were understood by lesbians and gay men as a distinctive and alternative form of kinship that decentered legal and biological definitions in favour of a more practical model grounded in choice and love. Thus, lesbian and gay families of choice were defined not so much by analogy as by contrast, whereby gay kinship was seen as one *type* of multiple kinship possibilities.

In the 1980s, at the time that the concept of “families of choice” first emerged, there was very little legal, institutional, or social recognition of lesbian and gay families.³²⁶ In other words, attempting to exist within the traditional kinship framework was not really an option. Lesbians and gay men were denied the legal mechanisms and social support that would have given recognition to their sexual and parental relationships, let alone their extended families of choice. Obviously a great deal has changed since the 1980s. At the most basic level there appears to have been a shift in lesbian and gay attitudes towards the family, at least amongst a certain very vocal portion of the lesbian and gay community. Rather than rejecting family, or asserting gay and lesbian “families of choice” as a distinctive form of family, many

³²⁴ See, eg, the literature of conservative Canadian organizations such as Focus on the Family, the Institute of Marriage and Family Canada, REAL Women of Canada, the National House of Prayer, and the Institute for Canadian Values. For a discussion of the significant and growing role of these organizations in Canadian politics see McDonald, *supra* note 41. For a discussion of the “crisis of the family” literature see Stacey, “In the Name of the Family”, *supra* note 27.

³²⁵ Weston, *supra* note 3.

³²⁶ Particularly in the United States, where Kath Weston conducted her research.

lesbian and gay activists now rely on the notion of formal equality to argue that gay and lesbian and heterosexual families are essentially the same. In addition to this ideological repositioning, there has also been an enormous shift in the legal treatment of lesbian and gay families, often as a result of litigation mounted on the basis of formal equality arguments. For example, gays and lesbians in Canada can now legally marry, adopt their non-biological children, and access many of the government benefits traditionally reserved for heterosexual conjugal partners. Each of these changes has allowed gays and lesbians to move closer and closer to traditional, nuclear models of kinship. In contrast, little attention has been given by the lesbian and gay community to seeking legal recognition of the extended networks of chosen family, such as the long term non-conjugal relationships of care that were so frequently discussed by the narrators in Weston's study.³²⁷ Given this enormous shift in recent years in the ideological and legal positioning of gays and lesbians, it was perfectly plausible that my narrators might have abandoned chosen family in favour of a more traditional definition. When a lesbian couple can legally marry and have both of their names on their child's birth certificate from birth, might a more respectable lesbian nuclear family be the new family of choice? This was, in many ways, the question I pondered when I started speaking to the mothers.

Given the enormous changes that have occurred since Weston's study, I was somewhat surprised to find that the vast majority of the forty-nine mothers I spoke to continued to

³²⁷ Though one Canadian province gives legal recognition (for some purposes) to non-conjugal, non-biological, long term caregiving relationships, this legislation was not the product of any lobbying from the gay and lesbian community. *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5.

define family, sometimes quite self-consciously, through the concept of “chosen family”.³²⁸

While many of them had also entered into certain legal arrangements that gave them the outward appearance of a more nuclear unit, they continued to include chosen family in the daily lives of themselves and their children. For example, Yael, the biological mother of an adult son and the non-biological mother of an adult daughter, defined her family as the people she had “collected” over her lifetime, none of whom were blood relatives. As she explained:

It’s interesting ‘cause my family’s so large. Most of it is family I’ve collected over time, like friends that I’ve had for forty years plus. So it’s probably a core of about [counting] probably a core of about six, seven people. It’s whoever you make your family. And that can, I guess, that can change through time, but I found that it doesn’t really.

While Yael was one of the older narrators in my sample, and thus closer to the generation that first adopted the concept of “chosen family”, a number of younger narrators asserted a similar position. For example, Michaela, the biological mother of an infant son, noted that while chosen family might be a cliché in the lesbian and gay community, it remained the lens through which she understood family:

³²⁸ Many of my narrators actually used this term without any prompting on my part. The expansive definition of “family” that many of my narrators adopted distinguishes them from the mothers in several other recent studies on lesbian parenthood. This may be because other studies have tended to focus on two-mother nuclear families. For example, American sociologist Maureen Sullivan *required* that the mothers in her study parented within a nuclear model, largely because she was interested in the relationship between gender and labour distribution within same-sex families with children. While Sullivan’s narrators could still have defined “family” broadly, the construction of their own families arguably makes it less likely. In contrast, because my sampling strategy involved seeking as diverse an array of family configurations as possible, my narrators were more likely to voice a cross-section of opinions with regards to family definitions. Sullivan, *supra* note 20 at 234.

I think family, being gay I mean it's the cliché, but it is true to a certain degree that you make your own family. Because, you know I have my aunts that are lovely, but I've lots of other family members that are not that lovely about [me] being gay. Like I've had no interest in seeing them and hanging out, so. [sigh] Um, what is the definition of family? It is, it's a combination of those that you're biologically related to and those that, [pause] you're not. Like I think you can meet people in your life and include them [in your] family. Or consider them to be family. And they're people that you rely on. The people that you have a deep connection with. That, um, [pause] you know, I mean I always like to think that they are there, are gonna be there during the tough times and the good times. Like really there, more than a friendship.

For Janet, the biological mother of two children aged seven and three, chosen family included a combination of her nuclear household and other people she had “brought in”. In Janet's family, these additional people served as aunts to her two children:

[Family is] your immediate household and then it's all of the people that you bring in [pause] as your family. Like, I have two friends that are the kid's aunts that aren't related to me, but they have been friends for, you know, over twenty years. So they, they are our family.

As Janet's comments suggests, kinship ties were often created between the mothers' chosen family and their children, with many of the adults serving as god-parents or aunts and uncles. These relationships often became very important to the children who, like their mothers, incorporated these individuals into their understanding of family. For example, Paula's two year old daughter who was very close to a male friend that her mothers consider “part of the family”, would list the important people in her life as, “My Mamma, my Mommy, and my Daniel.” Daniel was not the child's sperm donor, nor did he live with the family, but Paula

considered him to be closer to her daughter than most of her extended family. This was not the only instance where biological family was treated as secondary to chosen family. In five of the families, chosen family, often the children's lesbian "aunts" or gay "uncles", were named in wills as the legal guardians of the children in the event of both mothers dying. This designation created an enormous amount of conflict amongst the women's families of origin who could not understand how a "non-family member" could be chosen for this role. For example, Sally and her partner's decision to name a gay male couple who they considered family to be the guardians of their son, greatly angered Sally's parents because the mothers' decision involved going "outside the family".³²⁹ Conflict was often exacerbated in these cases when the mothers explained to their families of origin that their decision was based on a belief that the guardians they had chosen would raise their child in a manner that respected the child's own sense of family. Thus, while few of the mother's biological families were excluded from the category of family, members were not, even in instances where relations were good, automatically awarded priority over chosen family. As Julia put it, "The emotional connection supersedes any biological connections."

Given that I was interviewing a group of mothers, one might expect that they would make links between having a child and being a family. After all, procreation has traditionally being linked to "becoming a family". What I discovered, however, was that most of the mothers resisted the idea that one needs to have children in order to be a family. In fact, all of the mothers saw themselves as a family prior to the birth of their children, though several felt that having children "solidified" their family. The views of Maureen and Gillian were representative of many of the mothers:

³²⁹ Neither of the men were the child's sperm donor.

MAUREEN: We considered ourselves a family before [our son] came. Which I know is unusual, you know, not always the case.

INTERVIEWER: Yeah, I actually tend to ask about that, you know, does the child make it a family or?

MAUREEN: No.

GILLIAN: We made it very clear that we were adding to our family, not making a family when we were trying to conceive.

MAUREEN: Yes. I don't like the term "starting a family". You know. "We're gonna start a family". No, we've been a family for, for years.

That a group of parents would sever the link between being a family and having children is perhaps unusual. Procreation is often treated as the *purpose* of marriage and family life, and the inability of same-sex couples to procreate without assistance continues to be used to treat them as not only outside of, but dangerous to, the family.³³⁰ Given that their exclusion from family rests in part on their inability to procreate, it is interesting that now that they are parents themselves these mothers have not appropriated procreation as a signifier of "family". Rather, the mothers understood their families in opposition to this norm, viewing themselves as family long before their children were born. This ongoing commitment to a definition of family that eschews traditional norms, even in the face of biological procreation,

³³⁰ See, eg, Margaret Somerville, *The Ethical Imagination: Journeys of the Human Spirit* (Toronto: House of Anansi Press, 2006) [Somerville, "Ethical Imagination"].

is perhaps testament to the ongoing power of the concept of chosen family within the lesbian and gay community.

In only two interviews did mothers endorse a definition of family that deviated from the notion of chosen family. Interestingly, however, both of these mothers explained their definition of family *with reference to* chosen family. That is, they acknowledged the commonly invoked lesbian and gay construction first, and then explained that it did not match their own definition. Thus, the mothers treated chosen family as a legitimate and valuable type of kinship arrangement that just happened to not apply to them. As Mary Jane, a biological mother from Edmonton, explained:

I'm not one of those people who thinks my best friends are my family. And I know lots of lesbians do because they have no connection to their actual family. Or very limited connection. And they've done that family of choice, that stuff. Which I think is very important but I just don't think of it that way.

For me, family means the people who we're related to.

It is clear from Mary Jane's comments that she understood chosen family as an important concept for the lesbian community, though she herself did not think about family in that way. Fortunately, Mary Jane and her partner Shannon had the support of their extended families, making reliance on non-biological family far less important. Interestingly, Shannon and Mary Jane also commented that they did not have much of a connection with the lesbian and gay community and had few lesbian friends, making it possible that they did not have people around them who were willing to engage in chosen family relationships.

At the same time that almost all of the mothers provided broad definitions of family, it was clear that at least some of them struggled to assert their own definitions in the face of the hegemony of traditional norms. The following excerpt from Diane's interview epitomizes this struggle. In defining what family meant to her, Diane listed a series of factors that are commonly attributed to the traditional family. However, she followed each factor with a self-questioning of whether she actually agreed with what she had just said. The passage reads as multi-layered dialogue with herself. She actually speaks with two voices as she moves back and forward between mainstream society and her own internal sense on what family means to *her*. Her obvious reluctance to engage with traditional familial ideology, but her inability to just let it go, perhaps epitomizes the struggle many lesbian mothers have in asserting their difference:

[Family is] a place of care. A place of sort of committed connection to people. Um, you know. Support [pause] common home, it's true that there's that too. Um, [pause] I mean, *I don't know that that's my definition of a family*, but that's the definition we're living by. You know I would allow for a lot larger definitions than that, depending on other people's arrangements. Um, [pause] common finances I guess is also true. [pause] *Again, is that part of my definition? I don't know.* But that's sort of a feature of it I guess, at least. Legal connection. I mean we've had to [sigh] you know, you do have to assert it at times, in connection with medical care, whatever. There is, I guess, a sense in which we also define ourselves in some kind of legal terms as a family. You know insisting on a sense of inclusion or right, or whatever. [emphasis added]

The hegemony of dominant traditions made asserting an oppositional position a very difficult task for mothers like Diane. This dilemma was perhaps further compounded by the fact that lesbian and gay families are increasingly being accepted by mainstream Canadians,

particularly when their outward appearance resonates with heterosexual norms. While the dominant societal perception for centuries was that lesbians and gay men were exiles from family, in twenty-first century Canada at least some Canadians are willing to incorporate lesbians and gay men into the family fold. If they have children, acceptance as “family” is all the more likely. For mothers like Diane, this particular kind of acceptance can pose significant political problems. Put simply, some lesbian mothers do not want to be incorporated within the traditional family. In the following section I will discuss in greater detail the experiences of two families who sought to deviate quite dramatically from traditional norms. While each took a very different approach, neither found it particularly easy to assert an oppositional family life.

For Vancouver couple Tracey and Helen the growing acceptance of lesbian and gay families within wider society posed for them a significant political dilemma. Both women were extremely resistant to the traditional family, yet realized that as a well educated, middle-class, home-owning couple, who largely parented their infant son in a dyadic structure (his donor and his donor’s male partner lived overseas), they were necessarily read as a traditional nuclear family. Their outward appearance belied their actual beliefs, but they could do little to change the perception. This was particularly difficult for Tracey, the non-biological mother, who had initially been ambivalent about having a child for exactly this reason.³³¹

³³¹ Tracey’s resistance to having children is reminiscent of that expressed by lesbian feminists in the 1980s, who argued that lesbian motherhood would result in lesbians being absorbed into the mainstream.

In explaining what “family” meant to her Helen began by stating that, “A family doesn’t have to be this dyad and a child kind of thing. It can be many things and it can be defined and redefined over time.” Helen had, in fact, co-parented a child in a communal setting a number of years earlier, and both mothers made it clear throughout the interview that they accepted families that included three or more parents, as well as those that involved open relationships where multiple sexual partners might live in the same household. However, they felt that it was extremely difficult to assert alternative family forms within the current legal and social framework. The models they might want to adopt were completely absent from the public realm. As Helen explained:

I mean the idea of, when people think of multiple marriages all they can think of is Bountiful.³³² And um there aren’t any models that are positive for more complex kinds of family relationships. Either, you know, intimate or sexual or whatever. Um, and, so I think we feel like we’re trying to work within labels and within structures that don’t really fit what it is we’re trying to do.

While Helen and Tracey saw themselves “as something other than a small nuclear family where [they] just happen to be lesbians”, because they parented at a day-to-day level in a largely nuclear structure they were usually understood through a very traditional lens. As Helen explained:

It’s funny because, um, I was reading an article recently about the way people define family. And the presence of children is almost invariably what makes a “family” for people. I guess in that sense, um, even though we have ideas about family that uh run counter to the ones that get perpetuated in

³³² Bountiful is a polygamous Mormon community in southeastern British Columbia near the town of Creston.

mainstream culture and so on, I think I still have to remind myself that we, that people look at us and that we constitute something that looks more like a family than we used to.

In fact, when Helen and Tracey attempted to assert their own definitions of family they were resisted by those around them who did not seem to understand why they might not want to take advantage of being allowed to assimilate into heterosexual norms. For example, when Helen told their lawyer that they wanted to complete a second parent adoption but did not necessarily want to replace the biological father name's with Tracey's name on their son's birth certificate, the lawyer was surprised and confused. He could not understand why they would not want to make their son's birth certificate reflect his two mother nuclear family. What Tracey and Helen actually wanted was to extend the boundaries of their family by providing their son with recognition of both his biogenetic family (recorded on his birth certificate) and chosen family (secured through his adoption). This mingling of biogenetic and chosen family seemed incongruous to the lawyer, as well as to the legal system which is able to recognize both biogenetic and social parenting, but only two legal parents.³³³

Helen and Tracey suggested that the difficulty of asserting alternative ideas about family was at least in part the product of active "mainstreaming" by the lesbian and gay community itself. Tracey felt that the argument that lesbian mothers are "just like everyone else" inevitably marginalizes those mothers who seek to express their difference.

You know there are things to be critical [of] about the "lesbian baby boom". There are people for whom this is about mainstreaming and um being just like everybody else and all that. Um and there is

³³³ The recent decision of *A.A. v B.B.* suggests that, in certain circumstances, this may no longer be the case (at least in Ontario). *A.A. v B.B.*, *supra* note 76.

the sense that, you know, we're cops and lawyers and bankers and um. But let's look at the parts of the queer community that are getting marginalized. Um and I think for those people who, you know, see themselves as radical queer activists and on the left, there are good reasons to be critical of some of this kind of shift. Um and that's one of the reasons that I think it took me a while to be comfortable with the idea that we were going to do this [have a child]. I mean this does feel like, I mean, all we need to do is go to our new house in East Van and paint the picket fence white. [pause] We do have a picket fence it's just grey that's all [chuckle]. Um but, so, I'm uncomfortable in some ways about what the implications of all of that are.

At the same time that Tracey rejected the mainstreaming of some lesbian mothers, she also expressed a degree of uncomfortableness about her own decision to parent. While she wanted to make it clear to me that she and Helen took a progressive approach to parenting, she also recognized the creeping of the "white picket fence" into her life. She did conclude, however, by noting that she hoped her more radical views about family might change the perception of some lesbians and gay men who were automatically suspicious of lesbians who chose to parent.

While they clearly sought to assert their family's difference, Tracey and Helen recognized that being open about their views might put their family at risk. Their family's acceptance within mainstream society was predicated on the extent to which they "masqueraded" as "more traditional". As Helen explained:

So it's only by not being open about those things [her acceptance of open sexual relationships] in certain circles that we get that sense of acceptance. Um and I think that's, that's true not just in the context of our family but in all kinds of contexts in our lives. Um, our families and um sort of even our

neighbours who, many of whom are, you know, many of the little old Catholic ladies, are quite caring and accepting of us. But [they] would be quite shocked if we said that we don't see any reason why a family of three or four adults couldn't be sexually intimate um or that people could have open relationships or, you know, any number of things.

Not surprisingly, Tracey feared that her real views about family would result in backlash from those she perceived as hostile – religious fundamentalists, Albertans (her home province), and “rednecks” – who were “just as likely to dress up in white sheets at night as say their prayers”. Even amongst more open minded Canadians, however, she felt that there was a limit to what would be accepted. She felt that as soon as her family moved away from “a sort of narrow triad of two parents a child”, acceptance amongst average Canadians would “drop pretty rapidly”. As a result, and because they saw their young son as vulnerable, Tracey and Helen chose to be “careful” about how they lived their family life. They felt that they had to “pull back from the edge at a certain level” and could not be the “radical social experimentalists” they had been prior to their son's birth. Tracey noted that this fact was exactly why some more radical lesbian and gay activists argued that having children was not the “right thing” to do.

Tracey and Helen in many ways epitomized the dilemma that Tracey had highlighted: does having a child necessarily have a conservatizing effect on lesbian and gay family? In Tracey and Helen's case the answer appears to be a tentative “yes”. While they wanted to be “doing family” differently, they felt their options were limited. This reasoning was in part because their son had been born premature and had spent his first few months in hospital. This experience had not surprisingly focused their priorities inwards, towards the challenges of

their new family life. However, their need to “pull back from the edge” meant that they now lived their lives as quite a traditional nuclear family. At one point Tracey noted, when comparing herself to a working class lesbian friend who was raising her son as a single mother in a communal setting, that she and Helen also had “a lot to lose” by embracing an alternative family form. Their comfortable, middle class, home-owning lifestyle would probably change if they were to embrace a non-nuclear family structure. It is thus not surprising that Helen and Tracey were often read as a traditional family by others. While their personal views belied their outward appearance, those views cannot be seen as capable of erasing their actual practice.

Elisha, a biological mother from Vancouver, shared many of the same views about family as Tracey and Helen, but took a very different practical approach. Choosing to parent her daughter with three co-parents, none of whom were her conjugal partner, as well as various chosen family, Elisha simply refused to “pull back from the edge”. Along with her eleven year old daughter, Akeela, she very much lived her radical politics. Elisha’s commitment to alternative family began while planning Akeela’s birth. She was working at a women’s shelter and had been talking with a workmate for several months about her desire to have a child. She was not in a relationship at the time and, while she did not expect to be with one partner for life, she was reluctant to have a child without additional support. Her workmate, Cassandra, eventually told Elisha that if she still wanted to have a child Cassandra would be happy to co-parent. Cassandra did not want to be a full time parent, but she was willing to commit to long term involvement and financial support. Eleven years later, Cassandra’s commitment remains the same. She is a fundamental part of Akeela’s life and has overnight

contact with her one night a week. Cassandra and Elisha have never been in a conjugal relationship, but both consider themselves Akeela's co-parents.

Once Elisha had arranged Cassandra's support, the two women went in search of a sperm donor. Elisha wanted a known donor who was willing to be part of the child's life. Through various friends she and Cassandra found Kyle and his partner Nick. The four adults met and after several months of talking they drafted a donor agreement. Interestingly, Elisha felt protected by the fact that Kyle, who she did not otherwise know, was heavily involved with the lesbian and gay community. She felt that this would produce "more accountability" or a kind of "wider accountability".³³⁴ As she explained, "It just felt like there was a bigger community supporting us." Elisha returned to this feeling later in the interview when she explained why none of Akeela's parents had sought any kind of legal recognition of their relationships. In Elisha's mind, protection came from the lesbian and gay community and its own internal rules of accountability, rather than the law. She speculated that this might be a naïve view, but one that she clung to nonetheless.

During the months of inseminating that followed, Elisha began a relationship with Rosemary who eventually moved in with her. Soon after, Elisha became pregnant. Elisha and Rosemary remained together until Akeela was almost one. After they separated, Rosemary continued to be involved in Akeela's life and is seen by Akeela as a very close friend. Kyle and Nick are also parents to Akeela. Soon after her birth they began spending time with her together,

³³⁴ Similar views were expressed by the lesbian mothers in Dunne's U.K. study. Dunne found that most of her narrators chose gay donors and all of the donors who were involved as co-parents were gay. While several reasons for choosing gay donors were cited, one of the most common was a view that gay men were "less likely to renege on agreements" because of their connection to the gay community and its particular lifestyle. Dunne, "Opting Into Motherhood", *supra* note 20 at 16-17.

though they were no longer partners. Their contact with Akeela increased over the years so that at the time I interviewed Elisha, they were coming together to co-parent Akeela in the same home two days a week. Akeela saw both of them as her “dads”. Akeela and Elisha live also with a friend – part of Elisha’s chosen family – who had lived with them since Akeela was two. While this woman was not considered a parent, she took on a significant caregiving role in Akeela’s life. Finally, Elisha had a significant family relationship outside of her immediate family. For the past few years she had been engaged in a co-parenting arrangement with a heterosexual couple who saw her as a third parent to their young daughter. She was present at the child’s birth, did regular caregiving but, most importantly to Elisha, she had “also helped think about [the child] in a bigger way.” Akeela also had a relationship with the little girl which Elisha saw as very important to Akeela’s own developing sense of kinship. Elisha recognized the unusualness of her relationship with the child and her primary parents and tried to explain why it might have been so successful:

I think the whole thing about possessiveness of children stops other people outside of, you know, the nuclear family (whether they be heterosexual or gay or lesbian) that, once you get two people having a baby they get all protective and it’s hard for people to break in. You know, for people without children to feel like they have a right to other people’s children, and it’s hard for other people to feel like [they can] give the right to other people. But what’s been really remarkable in my relationship with this couple, who are heterosexual, is that they’ve been very, you know, [they] let me interact with her as a parent would. It hasn’t been that, “oh, she’s upset. We have to take her back.” You know. So I get to listen to her when she cries just like they do. And for me that’s, I think, more about what being a parent is. That you’re not just this accessory who doesn’t really, really dig in there and, you know, wash the dishes or change the diapers, that kind of thing.

When asked whether she felt that she was a parent to this child, Elisha responded, “Yeah, yeah, I mean it’s growing.” She felt that her friends had been very open to her taking a parental role and, rather than having the attitude that “we’re the unit and you’re outside”, the couple talked about Elisha as the baby’s “third parent after the two of them”. Because of the closeness of this relationship Elisha had incorporated the parents and child into her own family.

Interestingly, Elisha and her various co-parents had refused to seek any legal recognition of their family relationships. Speaking for herself, Elisha stated that she did not want to live her life “depending on law”, and preferred to rely on the accountability she perceived to exist within the queer community. She also felt that the “distance [law] would have to travel to get to [her] family reality [was] so far” that it seemed pointless to engage. However, rather than seeing her family’s exclusion from law as a hindrance, Elisha saw strength in it existing outside of the legal framework. She felt that being outside law, and at least to some extent the ideological framework it imposes, gave her and her family more freedom to develop its own “systems and behaviours”. The expansive network of chosen and biological family within Elisha’s family illustrates exactly how freeing this could be.

Elisha noted that having such an oppositional family life was rarely easy. Sharing the parenting of her daughter with three other parents outside any kind of conjugal relationships meant that her family was rarely fully recognized. Unlike Helen and Tracey, who felt trapped by dyadic norms, Elisha’s family was so incomprehensible to outsiders that it was never labelled “family”. The non-conjugal nature of the parental relationships seemed to make it

particularly hard for outsiders to view her as anything but a single parent. Ironically, this could not have been further from the truth. However, as Elisha put it, “You don’t get to call people ‘family’ that you’re not having sex with.” In many ways the unintelligibility of Elisha’s family stemmed from the lack of comparable images within public discourse. Elisha lamented the fact that there were so few stories about alternative forms of kinship, and she felt that they were urgently needed by both the queer and heterosexual communities.

It’s hard that, that the stories we hear are the, the ones that are just like, [pause] just like the heterosexual model. And it doesn’t really represent the, the scope of what we see. I think we really need more of the other stories. And, I think we need to hear more of the other stories from heterosexuals too that are raising kids with other people involved. There’s still this illusion of the nuclear family that doesn’t, isn’t true, but somehow people don’t see that.

Elisha was especially worried that the stories of queer families that were told by the lesbian and gay community (usually to outsiders) were rarely about people who were expanding the category of family. Rather, they were as she put it about lesbians who had been together for fifteen years, decided to have a child, and now lived in the suburbs. While Elisha did not see this model as an inherently “bad thing”, she did think it was a “narrow thing”.

It is clear from the narratives that emerged from my interviews that, despite the enormous changes that have taken place with regard to the legal and social recognition of lesbian and gay kinship in recent years, chosen family and other non-normative family practices remain a significant part of kinship for many lesbian mothers. Almost all of the mothers I spoke to defined “family” through the concept of chosen family, and chosen family members were

almost always incorporated into the lives of their children. There is no doubt that if I had interviewed 49 heterosexual mothers I may also have unearthed approaches to family that deviated from traditional norms. As the heterosexual family that invited Elisha to co-parent with them illustrates, the concept of “chosen family” is not unique to the lesbian and gay community. However, reflecting Judith Stacey’s assertion that lesbian motherhood is “the pioneer outpost of the post-modern family, confronting most directly its features of improvisation, ambiguity, diversity, contradiction and flux”, several of the mothers suggested that lesbians might be *uniquely positioned* when it comes to understanding the family outside of the traditional paradigm.³³⁵ As Naomi explained:

Being in a same sex relationship we are luckier than most. We can define family as what we would like it to be. So we don’t have the same stereotypes, the roles.

Similarly, Toni attributed her broad concept of family directly to her identity as a lesbian. She argued that the process of coming out creates a dissonance between the individual and her family of origin that forces her to go in search of new forms of family – lesbian and gay family – and to rethink the uniqueness of biological family. As she explained:

It’s interesting cause um, our sense of family is a bit different, because I think when you’re gay, growing up, you’re, [pause] you don’t know really what a sense of family is, because you have your immediate sense of family, but you know you’re outside of this family. And until you sort of meet other gays and lesbians, you know, you don’t know really who you are within your family. And then, you know, your friends really become your family. And I think that there’s often, I find sometimes

³³⁵ Stacey, “In the Name of the Family”, *supra* note 27 at 142.

now, that there's that conflict between [pause] your immediate family and what you see as family. Because I see family as bigger and they see it a bit more insular, you know?"

In these comments Toni captures the unique process many lesbians and gay men go through as they realize their difference in the context of their families of origin. The resulting search for lesbian and gay family, for people who share their outsider experience, often produces a much more expansive sense of family than their families of origin are willing to absorb.

While the mothers clearly had an expansive sense of family, because lesbian and gay families are now more widely accepted than they have been in the past, their own definitions of family were often silenced by the assumptions of those around them. That is, there seemed to be a presumption that if a lesbian family takes a certain form – for example, a conjugal couple with children – that its members necessarily embrace the values traditionally associated with that form. This view is no doubt encouraged by the rhetoric of groups such as EGALE who have sought legal recognition largely through the assertion of the same-sex nuclear family.³³⁶ It thus appears that with social acceptance comes a certain degree of mainstreaming, whether the individuals like it or not. Helen and Tracey perhaps epitomized this dilemma. Their nuclear family appearance essentially erased their political beliefs, making it almost impossible for them to assert an alternative family model. What is interesting, however, is that when it came to discussing law reform issues, most of the mothers advocated for a legal model that resembled chosen family, independent of how their own family was arranged. It might therefore be expected that if the law were to embrace

³³⁶ For a discussion of EGALE's approach to lesbian and gay advocacy see Chapter 2, above.

more fluid forms of family, more mothers might feel safe enough to follow Elisha's example and adopt an alternative model.

4.3 Defining parenthood

Not surprisingly given the expansive nature of their definitions of family, most of the mothers felt that the term "parent" should also be defined broadly so as to give the concept the flexibility needed to capture the vast array of possible configurations. This usually involved expanding the definition beyond any strictly biological or legal framework.

Ultimately, the mothers favoured a definition of "parent" grounded in both joint intention and practice. In other words, parents were the people who intended to parent a child and, once the child was born, performed that intention through caregiving.³³⁷ Thus, parenting was

understood, as Edwards has argued in the reproductive technology context, more through relationship – socially realized caregiving ties – and less through relatedness, the abstract connections between people who are thought of as kin because of a biological connection.³³⁸

While the initial conversations I had with the mothers about parental definitions focused on defining parenthood in the social context, when we turned to the question of how to define *legal* parenthood, they maintained their views. What I found however, was that while the first element of the mothers' definition – intention – translated easily into the legal context where it could be used to establish presumptive parenthood, the second element – caregiving – was more difficult to capture in laws dealing with legal parentage because it could only be demonstrated over time.

³³⁷ This definition obviously does not limit the status of "parent" to two individuals. This aspect of the definition will be discussed at page 164, below.

³³⁸ Jeanette Edwards, "Explicit Connections: Ethnographic Enquiry in North-West England" in Jeanette Edwards, Sarah Franklin, Eric Hirsch, Frances Price & Marilyn Strathern, *Technologies of Procreation: Kinship in the Age of Assisted Conception* (Manchester: Manchester University Press, 1993) 42 at 45.

Despite the mothers' clear belief that biological connection did not make one a parent without an additional relationship of care, the symbolism of biological relatedness was always present even as it was displaced. The biological asymmetry of lesbian families meant that the meaning afforded to biology needed to be determined within each familial unit. First, mothers had to decide how they would understand the role of biology vis-à-vis each other. If they chose to co-parent, how would they "tie in" the non-biological mother so that she felt secure in her role in the face of norms to the contrary? Second, what meaning, if any, would be given to the genetic tie of the donor? Would the donor's contribution be understood as purely biological or, in the case of a known donor, would his biological relatedness be used as the foundation for a social relationship? As noted above, while the discussions initially focused on defining parenthood in a social context, the mothers' views did not change when the conversation turned to defining legal parenthood.

4.3.1 Understanding parenthood within the lesbian couple

While biological mothers were assumed to be mothers in all of the families (though this was not always as straightforward as it seemed),³³⁹ the status of the non-biological mother was something that needed to be negotiated. For the vast majority of the couples the negotiations were brief. It was their intention to be co-parents and, recognizing the "unfair" advantage the biological mother would necessarily have, they set about making sure that she was somehow "tied in" to the role of parent.³⁴⁰ The various mechanisms used to "tie in" non-biological

³³⁹ This issue will be discussed at 149-50, below.

³⁴⁰ The notion of "tying in" the non-biological mother comes from Maureen Sullivan's study of lesbian mothers in San Francisco. The mechanisms that some of the mothers used to "tie in" the non-biological mother were giving the child the non-biological mother's surname, securing a second-parent adoption, putting both mother's

mothers were both legal (completing a second parent adoption) and social (non-biological mothers playing the role of equal caregivers). Thus, becoming a parent was understood by the mothers as “a social process, or rather, the result of social practice.”³⁴¹ In coming to this conclusion, the mothers did as much to expose the legally and socially constructed nature of biological parenting as they did to validate social parenting. Because parents were understood to be the people who intended to parent and did the actual work of parenting, both non-biological *and* biological mothers were awarded parental status on the basis of their active involvement in the daily care of their children. As Sylvie, the non-biological mother of two daughters conceived with a known donor, explained:

I like to use a term here which, I call myself the front line parent. A parent is a front line parent, is the parent who commits, who is available from the get-go [pause] to provide everything that is needed in the healthy raising of a child. And whatever sacrifice that that entails...I’m the front line parent. That means that I’m the parent who’s there 24 hours. I’m there for the emergencies. I’m there for the heartache and the emotional, whatever. You know, to, to bear it all. I’m the one who has committed to doing that work and that has little to do with biology. Really little.

Sylvie clearly understood her parental connection to her daughters as stemming from the practice of “front line” parenting, a practice that had little connection to whether she was biologically related to the children or not.

Some of the mothers drew on their own childhood experiences to further explain why they were so comfortable understanding parenting through a combination of intention and

names on the birth certificate, and providing for the total and equal involvement of non-biological mothers from the very beginning. Sullivan, *supra* note 20 at 59-61.

³⁴¹ *Ibid.* at 59.

caregiving practice, rather than biology. Callie and Sam, a Vancouver couple who had each given birth to a child, were both raised by their mothers and a non-biological father with whom each enjoyed a close relationship.³⁴² Neither woman had a relationship with her biological father. Callie could not even remember how to spell her biological father's name. In both instances, the women considered their non-biological fathers to be their fathers because they were the ones who had cared for them. As Callie explained, "Put in the work you get the label. That's about it." Michaela, the biological mother of an infant son, also drew on her childhood abandonment by her father to explain why she understood the title "parent" as something that needed to be earned through "work":

My biological father took off, so it's like, you know, when he came back into our lives we were much older. And we're like well, you know you're like biological Bob. Like you're not really, you got a lot of work to do before you're gonna be called Dad.

Like Callie and Sam, Michaela felt that her father's biological relationship was meaningless unless it was accompanied by the work of parenting.

In the same way that the "non-biological mother" was constructed through the social practice of caregiving, some of the mothers felt, or were surprised to find, that parenting by the biological mother was similarly constructed. Mary Jane and Shannon came to this conclusion only after Mary Jane, the biological mother, discovered that efforts to "tie in" non-biological

³⁴² In their study of step-families in the United Kingdom, Edwards, Gillies and McCarthy found that legal policies that emphasize biological ties often overlook the significant relationships children develop with step-parents. Rosalind Edwards, Val Gillies & Jane Ribbens McCarthy, "Biological Parents and Social Families: Legal Discourses and Everyday Understandings of the Position of Step-parents" (1999) 13 *Int'l J. L. Pol'y & Fam.* 78 at 80.

mother Shannon had been so successful that Mary Jane did not feel like a mother herself. When their daughter was born, Mary Jane and Shannon were so conscious of ensuring that Shannon built a relationship with the child that Shannon was assigned almost all of the daily tasks of parenting. At one point Mary Jane was doing little beyond breast feeding. This situation left Mary Jane feeling that her “obvious” biological tie to her daughter lost its meaning when it was no longer accompanied by a caregiving relationship. As she explained:

It never occurred to me that I would feel insecure about my own mothering relationship to the baby. It never occurred to me that would happen and it did. Which was a total shock to me. You know, because I, I do, I guess sometimes in my head think, well, I have this biological connection to her, that's so [pause] obvious.

For Veronique, the biological mother of a ten year old boy, the constructed nature of biological parenting was something she had recognized from the outset. Although she was a biological mother, she understood her status as a parent entirely through the activity of care. As she conceived it, the biological relationship she had with her son was only given meaning because she also had a social relationship with him. As she explained:

Like, for me, the biological tie between Nathan and I is obviously important. But, um, that said, I mean I really do think parenting is, is social. So, I mean there is a significance that I am Nathan's social parent as well. But I think those two things have to come together.

Thus, while the tie between biological mothers and their children was seen by the mothers as conferring privilege, and was almost always understood that way outside the family, the relationship was not completely straightforward. Failure to activate an existing biological tie

– that is, the failure to participate in at least some of the tasks of a “front line parent” – may result in the individual losing or failing to acquire the title of parent.

Because the mothers equated “being a parent” with caregiving, their equal involvement in caregiving was understood as transforming them into equal parents. Thus, in thirty-three of the thirty-six families I interviewed, parenting was described as an equal endeavour. Rather than assuming that the biological mother would be the primary caregiver, the women engaged in what Sullivan labelled “shared primary mothering or caregiving”.³⁴³ This did not always mean that caregiving was divided exactly equally, or that one mother did not sometimes stay at home while the other mother worked outside the home.³⁴⁴ What it did mean was that tasks were shared as evenly as possible between the mothers, and that those that might be associated solely with the female parent in a heterosexual family, such as feeding the child at night, were deliberately turned into joint endeavours. For example, Callie and Sam who had each given birth to a child, talked about how parenting tasks were interchangeable between them, with little emphasis on who the child’s biological mother was:

CALLIE: We both work full-time so the children [aged two and four] are in day care during the day. Um, but in the evenings in terms of who bathes the children, who cooks, who does [pause] its interchangeable.

SAM: Yeah, I’m just thinking about that now from the children’s point of view. It’s a toss up which mom you’re gonna get. [laugh]

³⁴³ Sullivan, *supra* note 20 at 67.

³⁴⁴ Though stay at home parents were extremely rare. Most families, particularly those living in Vancouver, simply could not afford to have a parent out of the workforce for any length of time.

CALLIE: We didn't break into very traditional stereotypical roles. More like it was, "Okay you're home, you take them."

SAM: It's been very balanced.

Many of the mothers described scenarios like Sam and Callie's. Shared primary caregiving was clearly something they were committed to, both politically and as a way of diminishing the power of the biological link. While none of the mothers referred explicitly to feminism when describing the division of labour within their households, their views were clearly influenced by feminist arguments about the significance of dividing household labour evenly. Thus, while legal mechanisms such as second parent adoptions were what ultimately secured the status of non-biological mothers as "parents", psychically it was shared primary caregiving that made them *feel* like parents. It was also what made biological mothers see their non-biological counterparts as parents.

This latter point is illustrated by the views of the three mothers who *did* draw a distinction between biological and non-biological parenting. Each of these mothers had become their child's sole primary caregiver following the termination of their intimate relationship with the non-biological mother.³⁴⁵ In one of these cases the separation had occurred prior to the child's birth, and in the other two it was during the first five years of the child's life. In these cases, the biological mothers saw themselves as the "real" mothers because they had been

³⁴⁵ These were not the only mothers in the sample who had separated from their child's other mother. However, they were the only cases in which either of the separated mothers suggested that there was some difference between biological and non-biological motherhood.

left, at least initially, to do the bulk of the caregiving work.³⁴⁶ In other words, they continued to understand parenting through caregiving; a “real” parent was the one who did the work. However, each of these mothers speculated that they may have ended up being the primary caregivers because they were also the biological mothers. They suggested that some non-biological mothers may see themselves as having more freedom to limit their relationships with children that they have planned with their partners, particularly when they had not yet established emotional bonds with them. These examples are not necessarily representative, as other separated biological and non-biological mothers I spoke to had not had the same experience.³⁴⁷ However, they do suggest that the traditional symbolic meaning attributed to biology will not always shift in the lesbian context.

Interestingly, given the belief by these three biological mothers that the non-biological mothers had less of a commitment to the child, in the two cases where the children had a relationship with their other mother the biological mother felt committed to maintaining it.³⁴⁸ This was the case even though neither of the non-biological mothers had any legal relationship with the children. In these two cases, the biological mother’s decision stemmed from both a political commitment to the lesbian community and a commitment to the best interests of the child. Mischa explained the political component of her decision to maintain contact:

³⁴⁶ In one of these families, contact between the child and her non-biological mother was sporadic in the years immediately after separation, but they now have a mutually agreed upon 50/50 parenting arrangement in place.

³⁴⁷ In fact, several of the separated non-biological mothers I spoke to had joint physical custody arrangements with their former partners.

³⁴⁸ In the remaining case, the non-biological mother showed little interest in being part of the child’s life. Interestingly, the non-biological mother was the biological mother of the couple’s first child and *was* committed to maintaining a relationship between this child and the child’s non-biological mother.

Interviewer: You said that politically, you thought it was the right thing to do.

M: Yeah. Well politically because my allegiance to my beliefs is that, when you have a child within a lesbian relationship we have no other means of saying that what we're doing is two people having a child. And this is the only way we can do it. So, I have to honour that and say if we break up, the fact that you didn't get to have your biology in this mix doesn't mean I can walk away. Shouldn't mean I can walk away.

Mischa's statement reflects Elisha's earlier comments about seeing the lesbian and gay community as the source of accountability for her parenting. For Mischa, being a lesbian mother meant committing to a model of parenting that protected non-biological mothers in the face of their legal and social vulnerability. Interestingly, Mischa's maintenance of the relationship between her daughter and her non-biological mother has now led to a fairly amicable 50/50 caregiving arrangement. Yvonne, the biological mother of a 15 year old, took a similar approach to Mischa, though she articulated it through her commitment to her daughter. Her daughter clearly saw her non-biological mother as a "mother" and this was how she had been raised prior to her parents' separation. Yvonne therefore refused to take advantage of her superior legal position, which would have been particularly easy in this case as the non-biological mother had a number of mental health issues. While these examples may not be "representative" of all lesbian mothers, they do point to the enormous commitment amongst at least some mothers to maintaining the integrity of their community's understanding of family.

The only other crack in the mothers' narrative about the equal value of non-biological motherhood came in the interview with Laurie and Simone, a Calgary couple whose two

daughters (aged 5 and 10 months) were birthed by Simone, but conceived using Laurie's eggs. In other words, both mothers had a connection to their children that they described as "biological".³⁴⁹ The way in which Laurie and Simone had their children was the result of various medical complications and should therefore not be understood as a deliberate attempt to create biological links between both women and their children. The outcome, however, was that both women had a biological connection to the children that made them feel like they were both mothers in a way that other lesbian mothers were not. Their views were largely based on the fact that they felt they could see a difference between biological and non-biological mothers in other lesbian families, with the biological mother perceived to have "more of a connection" and "influence" with the children. In contrast, they felt that this distinction did not exist in their own family. They also noted that in some families the child called the non-biological mother by her first name. Laurie commented that it was perhaps a little judgmental of them to critique the parenting practices of other mothers, but they felt strongly that in some lesbian families the non-biological mother had a less significant parenting role than the biological mother. When I delved a little deeper, however, it became apparent that at least some of their apprehension about these families was associated with family practices that had little to do with parenting. For example, they commented that some lesbian mothers did not share a bank account or were not otherwise economically intertwined, practices they viewed as a sign of "total commitment". It is therefore hard to know exactly what was at the heart of Laurie and Simone's belief that they were "*really* both the mothers". It does suggest, however, that the increased use of reproductive technologies that create biogenetic connections between children and *both* of their mothers may shift how

³⁴⁹ In fact, Simone had a biological tie with the children as the gestational mother, while Laurie had a genetic tie to them through her contribution of the eggs.

biology is understood within the lesbian and gay community. In particular, it could signal a return to more traditional (and arguably heterosexual) understandings about who is a “real” parent than those currently espoused within the lesbian community.

4.3.2 Sperm donors and parental status

The meaning to be attributed to the donor relationship in the context of the lesbian family is perhaps the most difficult issues lesbian mothers face, not least because there is such a wide array of possibilities. When lesbian women decide to have a child, a decision must first be made about whether they will choose an anonymous donor, an anonymous donor with identity release (if available),³⁵⁰ or a known donor. In many ways this decision reveals how they will understand the donor relationship. If a known donor is chosen, the mothers must also determine what meaning he will have in the context of their child’s life. Will he be a symbolic father, an uncle-like figure, or “Dad”? How donors are understood also presents a number of legal conundrums for lesbian mothers. Mothers must decide whether they will make a legal “contract” with the donor, whether any provision for access will be included within it, whether the donor’s name will appear on the child’s birth certificate, and whether the donor will consent to a second parent adoption by the non-biological mother. Each of these decisions is made according to how the mothers and the donor understand his identity and role in their family.

³⁵⁰ Identity release donors are not widely available in Canada. None of the mothers living in Alberta were able to access this option within their province, while the mothers in BC had limited access (ie, the group of donors who had agreed to identity release was very small). One couple used a U.S. sperm bank for the express reason of being able to access a larger number of identity release donors.

While the mothers obviously play a significant role in determining the meaning attributed to the donor relationship within their family, the donor's role must also be understood in the context of the current (and widespread) moral panic about the prospect of "fatherless families". In fact, as suggested in Chapter 1, debates about lesbian use of donor insemination are part of a much larger debate about the meaning of fatherhood in contemporary society. Father absence has, in recent years, been constructed as unacceptable because of the perceived unique contributions fathers make to children's lives as gendered caregivers, disciplinarians, and economic providers. Drawing a connection between these "unique" contributions and outcomes for children, the lack of a father figure has been linked to lax discipline, criminal behaviour, teenage pregnancy, delinquency, youth suicide, poverty, and unemployment.³⁵¹ The response of politicians and the courts to this "crisis" has more often than not been to reinforce the heterosexual nuclear family and biological fatherhood by favouring liberal access arrangements, joint custody, and ongoing child support liability. In some cases, fathers are imposed on a family independent of whether the man actually has a healthy relationship, or any relationship at all, with the child.³⁵² Unfortunately, lesbian families have not been immune to these trends.³⁵³

³⁵¹ Blankenhorn, *supra* note 59; Maggie Gallagher, "Fatherless Boys Grow Up Into Dangerous Men" *Wall Street Journal*, (1 December 1998); Jean Beth Elshtain, "Family Matters: The Plight of America's Children" (July 1993) *The Christian Century* 14-21.

³⁵² See, eg, Dawn Bourque's review of reported Canadian custody and access cases from 1990 to 1993 in which she found that, "Paternal access is viewed by judges as paramount in the "best interests of the child" test, eclipsing virtually all other factors. A child's supposed "need" for or "right" to a father, irrespective of the quality or quantity of his parenting, has superseded virtually all other considerations." Research also suggests that the presence of factors that diminish the benefits of access between biological fathers and their children, such as spousal abuse, has little effect on this pro-access position. Bourque, *supra* note 231; Neilson, "Partner Abuse", *supra* note 63.

³⁵³ See, eg, *Re Patrick*, *supra* note 241 at 88,891; *Thomas S*, *supra* note 214. For a discussion of these cases see: Kelly, "Nuclear Norms", *supra* note 80; Arnup & Boyd, "Familial Disputes", *supra* note 117.

Not surprisingly, given the current political discourse around fatherhood, the mothers felt quite vulnerable to the unplanned participation in their families of known donors. It was rarely because they rejected the idea of a “father” – whether active, symbolic, or semiotic – altogether. Rather, it was their sense that the symbolic weight attached to fatherhood would always prevail over their own conceptions of what it meant to be a parent. In particular, they suggested that neither legal decision-makers nor wider society were likely to agree with them that parental status was something that should be conferred only in the context of a caregiving relationship.

4.3.2.1 The anonymous donor

Twenty-four of the thirty-six families I spoke to had conceived their children using anonymous donor sperm. However, about half of this group stated that they had initially wanted to use a known donor and only after careful deliberation had they decided it was not the right choice. What made them change their minds, and what might it say about how they conceptualize the “known donor”?

The most common reason cited by the mothers for choosing an anonymous donor over a known donor was that while they would have liked a man to label “dad” they did not want to share parenting with a third individual. That is, they wanted a father “in name” only – a symbolic father – who served little more than a semiotic function. Lisa and Sarah, who had unsuccessfully tried to find a man willing to fulfil such a role, actually used the term “dead-beat dad” to refer to the kind of donor they were looking for. While a couple of the mothers who used known donors did in fact have a symbolic father arrangement, the mothers who

wanted this arrangement but who eventually chose anonymous donors had trouble finding men willing to take on this secondary role. In most instances the men they spoke to wanted to be “fathers” and this was not the relationship the women envisaged. As Maureen and Gillian explained:

MAUREEN: Yeah, we spoke to a couple of men. They were somebody that we knew fairly well. And he considered it. Um, we, we sort of had the uncle analogy in our mind. And as he sort of started thinking more about it he had questions like well what if I, what if I wanted to, um, have a say in what preschool the child went to? Or what if I wanted to stop...

GILLIAN: In on my way home from work? And...

MAUREEN: And so it was clear that he wanted more of a parent role.

GILLIAN: And he did. He would love to have been a parent.

MAUREEN: Yeah.

GILLIAN: And so in fairness to him, um, because that wasn't what we envisioned, we said no.

Sam and Callie, who had also spoken to prospective donors and described themselves as being “very close to picking someone”, had similar concerns. They saw known donors as having the ability to wield a great deal of power and control, and the scenarios they described had a slightly more fearful edge to them than those mentioned by Maureen and Gillian.

CALLIE: We were the ones who were gonna be doing the parenting. And we didn't want to risk someone in the future coming and saying, “Hey, you can't move because, you know, I won't be able to see my child.” Or, uh, no I don't want my child to go to a school like that”. Or whatever. To influence any kind of parenting. We just wanted it to be simple and uncomplicated.

Going one step further than Callie, a number of the mothers expressed a very real fear that the donor might ignore the parties' original intentions and demand custody of or access to the child. Recognizing that donor agreements were “not worth the paper they were written on”, these mothers felt that choosing a known donor was simply too big a risk to take. As Delia, a Vancouver mother who also happened to be a lawyer, explained:

We talked very briefly about the donor being somebody we knew and quickly realized that we didn't really like that plan...It doesn't matter what people say. You know when they're signing a contract and they're agreeing to something. Then they get a little baby in their hands. Hearts melt and people change their minds. And that's just something we didn't want to deal with.

Janet, the biological mother of two children born using anonymous donor sperm, had experienced exactly the situation Delia described. Fifteen years earlier she and her partner had a son with a known donor who was to be a symbolic father only. The little boy was born with significant medical problems, however, and was hospitalized for much of his short life. While the child was in hospital the donor became very involved and asserted his right as a father to take part in the boy's medical care. With no legal protection available to them, Janet and her partner had little ability to assert their understanding of the donor relationship. As a result, the hospital staff treated the donor as the boy's parent. When it came to having her other children Janet stated that while “idealistically” she wanted a known donor, given her earlier experience she felt it was just “too risky”.

It is obvious from the comments made by these mothers that the law, coupled with the social power biological fathers were clearly understood to possess, were significant factors in their decisions to choose an anonymous donor. Given the various legal disputes that have emerged over the years between lesbian mothers and their donors, it is not surprising that they doubted their familial definitions would be upheld.³⁵⁴ What is interesting is that the presence of laws in their favour did not necessarily allay their fears. Even in B.C. where the array of post-birth legal protections available is numerous (though certainly not complete), many of the women still felt that choosing a known donor made them too legally vulnerable. They simply did not trust the legal system to protect the interests of themselves or their children over those of the donor. As Rochelle, a Vancouver mother who chose an identity-release anonymous donor³⁵⁵ stated:

We thought about having a known donor, but um, we just don't think that the laws in Canada worked to protect the children. And that's the biggest reason why we decided not to have a known donor.

Mary Jane and Shannon, an Edmonton couple with an anonymous donor, expressed a similar sentiment:

MARY JANE: Yeah, we were both really, well I shouldn't speak for you, but I was really uncomfortable with the idea of a known donor. Um, just because of worries about claiming paternity at some point.

³⁵⁴ The majority of the legal cases the mothers referred to they had learned about through the press. The mothers often came across news stories about these disputes, most of which were located in the United States, when researching lesbian motherhood in books or on the internet.

³⁵⁵ An "identity-release" donor is a donor who has consented to his updated profile and contact information being released to his biological progeny in the event that they request such information and are eighteen years of age or older. There are fewer "identity-release" donors available, than donors who wish to remain anonymous.

SHANNON: Yeah, that was our biggest thing. Losing the baby in a legal battle was actually our biggest concern.

Alluding to the influence of the fathers' rights movement within family law, Rosie and Toni saw the law as pro-father, making them even more vulnerable to the claims of a known donor. The decision as to whether to choose an anonymous or known donor had been very hard for them as Rosie had really wanted a man who could be a caring, gentle, and loving male figure in their child's life. In the end, however, their fear of the law and particularly what they perceived as its bias towards fathers, made them change their minds. As Rosie explained:

ROSIE: I think that the legal system doesn't allow for it [having a known donor]. I mean you can just see a judge sort of going, [banging her hand on the table] "The father has rights!" What, because he donated sperm? I don't think so. You know, like, I don't. You know all of a sudden like these people come back into their lives and say, "Well I'm his dad!" Well, no you're not a dad!

TONI: Uh huh. [affirmative]

ROSIE: Because being a father and a dad has a lot more responsibility than just claiming that that's what you are.

The known donor emerged from these conversations as a slightly sinister figure with the law on his side. The mothers' perceptions of the existing law meant that they did not feel safe choosing a known donor, even though at least half of them favoured known donors as the option they otherwise felt most comfortable with. Their main reason for shying away from known donors derived from a fear that their definitions of "parent" would not be accepted by

the legal system or society at large. Thus, in choosing an anonymous donor they traded “their knowledge of biological connection for protection from...potential kinship claims and from the very basis of such claims: paternity.”³⁵⁶ In doing so, they exposed the ongoing legal vulnerability felt by many lesbian mothers even as the law expands to include them. Rosie and Toni’s comments are perhaps the most salient on this issue. As they understood it, being included within law was little protection when the law itself operated within a heterosexist and patriarchal framework.

4.3.2.2 Known donors

By essentially removing the donor from the family context, the twenty-four families who used anonymous donors were able to avoid many of the more difficult questions around parental definitions. In contrast, the twelve families with known donors were constantly confronted with the question “what makes a parent?” Breaking this question down into smaller pieces, many of them grappled with whether their sperm donor could be a donor but not a father, or a father but not a parent. Approaches to these issues were not necessarily consistent across the group.

As they had when defining “family”, the mothers also emphasized in the context of their parental definitions the importance of the freedom to self-define within each family unit. However, mirroring the categories developed in Sullivan’s study of lesbian families in the San Francisco Bay Area, the mothers tended to see their donors in one of three ways.³⁵⁷ First, seven of the families saw their donor as a “flexibly defined male figure” with whom their

³⁵⁶ Sullivan, *supra* note 20 at 53.

³⁵⁷ *Ibid.* at 49-50.

child(ren) had a relationship, but to whom no parental status was imputed. While some of these men were referred to as the child's "father", others were known by their first name. In this first category, the men were regular visitors in the child's life, though some were far more involved than others. The second category was made up of two families who saw their donors as "symbolic fathers". A symbolic father is "someone the family can hang the label "dad" on – an embodied human referent that the child may identify as his or her progenitor."³⁵⁸ In other words, it is as Sullivan notes "a purely sign-driven, semiotic arrangement".³⁵⁹ Though their identities were known to their biological children, donors who fell into this category had almost no relationship with their progeny. The final category was made up of two families whose donors were active, practicing parents with all of the rights and responsibilities implied by that status, though without legal custody.³⁶⁰ However, in both of these families the mothers were still considered to be the primary parents.

The two families with donors who were considered active "parents" understood the men in this way because of the significant caregiving roles they played in the lives of their children. The men provided overnight care for the children on a weekly basis and also took part in at least some of the day to day caregiving. In both instances, the children viewed the men as fathers. This had not necessarily been the plan when the women first considered having a child with a known donor. For example, biological mother Rhona had initially wanted only herself and her partner to be her children's parents and did not want the donor to be "too involved". However, soon after her first son's birth, the donor, Ian, began visiting on a

³⁵⁸ *Ibid.* at 50.

³⁵⁹ *Ibid.*

³⁶⁰ In both of these families, however, no legal arrangements had been made either between the mothers and donor or between the mothers themselves, leaving the donor's ability to claim custody unrestricted.

weekly basis. Within months Ian was spending time alone with his son and by the time the boy was three years old Ian had him for overnight visits with him and his same-sex partner, Rick. Rhona and her partner separated when her first son was an infant, and she decided to have a second child without a partner. Ian was unable to act as a donor by that time because of health reasons, but his partner Rick agreed to take on the task. Rhona was comfortable with this idea because Rick was already a significant part of her first son's life. When her second son was born the two men remained heavily involved with the children, though their own intimate relationship eventually ended. Because of limited space and financial difficulties, for a period of three years Rhona, Rick and the two boys shared a house. During that time, Rick played a pivotal caregiving role. Rhona described both men as the "boys' dads" and considered Ian also to be a "parent" to both of them. Rick, on the other hand, was understood by Rhona to be a parent only to his biological son on the basis that he did not make "the same effort" with regard to caregiving for his non-biological son. Despite their parental role in the boy's lives, Rhona stated that she and her partner of seven years were the boys' "primary parents". However, Ian and Rick continued to see the boys, who were now aged 13 and eight, for overnight visits every weekend. In addition, they alternated spending one evening a week with them. Rhona described the arrangement:

One night a week one or the other of them picks the kids up from school, brings them here. Like tonight, Rick took them to his place. Um, Ian would pick them up and bring them here. Do dinner for them. Get homework done. Put them to bed kind of thing. And then Liz [her partner] and I get that one night out a week.

There is no doubt that in the case of Rick and Ian, the semiotic, biological and social elements of parenting were brought together in each of the men in relation to his own biological child. In Ian's case, these three elements were also fused in relation to his non-biological son. The crucial element that made these men "parents" was the fact that they provided regular care for their children. The only aspect of parenting missing was legal custody. That remained the sole domain of the mothers.

The remaining families – those who saw their donors as "symbolic fathers" or significant male figures in their children's lives – were faced with a very different set of issues, primarily because there was such a variety of degrees of donor involvement available. Those who saw their donors as "symbolic fathers" had perhaps the easiest decision-making process. These mothers never intended their donors to be anything more than peripheral figures in their children's lives, available for consultation only in the event that a child asked. It is thus not surprising that these men were referred to as the child's "donor" and had little to no involvement in the child's life. Mothers who saw their donors as significant figures in their children's lives had a more complex set of issues to address. The most common concern of the mothers in this group was whether they would choose a "donor", "father" or "uncle-like" identity for their donor and how this might work in practice. This was far more complex than it might sound, particularly given what the mothers often described as the "utter failure" of language to capture the identities created.

The one thing that all of these mothers were clear on was that a biological connection did not make a donor a parent. Thus, no donor could simply by virtue of his genetic contribution claim the identity “parent”. Such a title required an additional caregiving relationship. This was explained succinctly by a number of the mothers. For example, Rochelle noted that, “Genetics is genetics and parenting is parenting. They’re different. Genetics does not make one a parent.” Michaela argued in a similar fashion that “an eighth of a teaspoon of biological matter is not a parent.” While none of the donors in this category were understood as parents, many of them were given the title “father”. In fact, one of the concepts the mothers took great pains to explain to me was that a donor could be a father without being a parent. Antonia, whose donor lived with his male partner and visited his two sons once or twice a year from another province, was understood to be a father (as was his partner), but neither man did enough caregiving to be considered a parent. As Antonia explained:

I think you can be a dad but not a parent. I think that’s maybe kind of the area where it’s a bit grey. I mean one of their [her sons’] dads came out for spring break and he and I and the kids went skiing together. And the whole time he was there he was a dad and a parent, but that was a week out of the whole year. You know he’s not there at three in the morning when they’re sick and I think it brings up that whole question of, you know, who’s really doing the parenting? Can you parent one week a year? Or two weeks a year?”

Tracey explained how her son’s donor, who was a very close friend but lived overseas, was also a father but not a parent:

Um, he’s a father but he’s not a parent. Um, so he fathered the child in a biological sense, but he’s, he’s not a parent. And I think that, that [her son] will refer to John as “John”. But we want to be clear

that John is his father. So we're working so that, what we really want to do is not have secrets. Not have things that can't be said.

In these two families, the men were clearly understood to be fathers but lacked the depth of relationship necessary to acquire parental status. The children knew they had "a dad", but they did not relate to him through a parental paradigm.

In a slightly different category were those mothers who acknowledged the biological tie between donor and child, but did not consider their donors to be either fathers or parents. In trying to describe their identities, they sometimes referred to them as "like uncles" or "somewhere between a donor and a father". Without the language to truly describe the relationships these men had to the children some of the mothers fell back on the term "father". The terminology they chose was, however, seen to have important ramifications particularly outside of the home, causing many of the mothers to switch terms depending on the situation. Carey, for example, struggled with what to call her donor, who saw his son once a fortnight, as none of "donor", "father" or "parent" really captured his role. She also wanted to avoid people outside of the family thinking that he had more caregiving responsibility than he actually had. Ultimately, she chose her terminology on the basis of the situation she was in, though it is clear from the pauses and stuttering in the following discussion that she found this a difficult issue to resolve. As she explained:

CAREY: It [the term she uses] depends on who I'm talking to. [sigh] I always define Nora and I as [his] parents and sometimes um, I will include Roger [donor], depending on who I'm talking to. [pause] But, I don't consider, he's not a hundred percent parent. He's very much a part-time parent.

And I don't think he even completely gets what it is like to be a full time parent. [pause] So a lot of times, I don't consider him to be a parent.

INTERVIEWER: [pause] You said that in some circumstances you would refer to him as a "parent". Which people would you be talking to when you make that distinction?

CAREY: Um, [pause] I guess people who are kind of already familiar with the situation. I'll talk about [my son's] "dad". Whereas other times I'll say [my son's] "donor". Just, [pause] it's, [pause] it is, [pause] 'cause neither is completely accurate. He's really in between.

INTERVIEWER: When you said you would use "donor" when you're speaking to people who maybe don't understand the situation, is that out of a fear that Nora will somehow be negated?

CAREY: No, no, no. Not at all. Uh, because I don't [pause] I don't want them to think that [my son] has three full-time caregivers when really it's Nora and I, we're really doing it. To professionals Nora and I are the parents. I don't, I don't bring his dad into it at all. Because I don't want people to start thinking that he has responsibilities that he doesn't have.

Carey's reference to the inability of language to fully capture the nature of the donor's relationship to the child was a common concern. In many instances the mothers complained that language simply could not grasp the complexity of the relationship between donor and child. Paternal terminology was often perceived by the mothers as carrying a great deal of "social power", especially in light of the rise of the fathers' rights movement and the ongoing legal vulnerability of non-biological mothers. For example, in describing the role of her donor in the life of her seven year old son, Jasmine noted how difficult it was to assert their

lesbian family in the face of the enormous symbolic meaning that attached to the designation “father”. As she explained:

JASMINE: Chris [her son] and [his donor] do see each other and Chris knows him as his father. Um, but we don’t define him as part of our family. Chris is starting to think maybe he might be sort of part of the family, but in a distant sort of uncle-like way or something. But not immediate family. We’ll see, we maintain to both of them that whatever relationship they develop we’ll support. Um, it hasn’t been easy.

INTERVIEWER: What’s been difficult?

JASMINE: Um, [pause] the words are wrong. Like to call him “father”, and yet he hasn’t been there at all, in any way. And he can show up and take Chris out to McDonalds and be a wonderful hero once every few weeks. Uh, I guess it is sort of the plight of a lot of single moms. That’s been difficult, especially in the beginning where Bianca doesn’t have the biology and it was really important to make sure that she’s the one acknowledged and not him. We had, we were really cautious to not include him... Today there’s no more issues around who’s the parents, but [pause] you know it’s more in public. As far as Chris goes I mean he knows that Bianca and I are his parents. But if Neil [the donor] comes to something like one of his performances or something and he introduces him as “father”, um, they will defer to him. And that kind of stuff. ‘Cause we don’t have the right words for it. Yes, he’s the biological father and yes he may be important in Chris’ life, but [sigh] don’t defer to him.

In this discussion, Jasmine captures the difficulties of negotiating donor identity in the public sphere. Despite it being clear to Jasmine’s son who his parents are, in public situations the mere presence of her son’s “father” results in outsiders deferring to him. This says as much about the patriarchal role fathers continue to play within the heterosexual family structure as it does about society’s inability to acknowledge alternative families. Working within a

heterosexual paradigm in which the contribution of sperm equals “father” and being a father means having authority, outsiders defer to Jasmine’s donor without thought. This dilemma points to something mentioned by a number of the mothers: the ease with which men are awarded the title “father” in the heterosexual domain. Trying to work through this issue for herself, Helen commented that, “for many heterosexual fathers [sperm donation] is the largest part of their contribution. Um, they’ve never had to think about whether that means they’re really fathers or not.” Helen seems to be suggesting that because the semiotic and biological aspects of fatherhood are fused (and the social aspect largely ignored) in the heterosexual context, there is a profound lack of thought about what makes a man a “father” beyond the contribution of sperm. This is perhaps at the heart of the problem lesbian mothers have in asserting their own definitions. Because they *do* think about what makes a man a father or a parent – and they have largely come to the conclusion that the single most important feature is participation in caregiving – they do not necessarily extend fatherhood to men who might traditionally be understood as fathers in the heterosexual context.

4.3.2.3 Should parenting be limited to two people?

Not surprisingly given their generally broad familial definitions, only a small number of mothers felt that parenting should be limited to two individuals. This was the case even when their own families may have resembled the nuclear model.³⁶¹ In fact, over three quarters of the mothers supported the idea of a child having three or more parents if that was what the various parties had agreed to. In most instances, they envisaged the recognition of a known donor (and perhaps his partner), provided that the men were taking on a caregiving role and

³⁶¹ A significant number of narrators who parented within a nuclear model noted that nuclearity had not actually been their first choice. They had wanted to parent with an involved known donor, but had been unable to find a man who met their needs and was willing to take on the role.

that that was what the parties had arranged. These two provisos – caregiving and the mothers’ consent – were extremely important to the mothers, particularly in the context of legal recognition, and will be discussed in greater detail in Chapter 5. The mothers’ reasons for favouring a non-dyadic parenting model varied, but most of them agreed that the child could only benefit from the love and attention of additional adults. As Elisha, who saw communal parenting as the optimal model, explained:

It’s not healthy for Akeela [her daughter] or for me, for me to be the only person that she can go to. You know the world is big and you need more than one person with their little rigidities and strengths. You need different strengths and they kind of help you be more well balanced if you can get different things from different people, and have different struggles with different people too. That you don’t think that, you know, this is the only way to act.

Sylvie also endorsed a flexible parenting model, emphasizing the isolating effects of nuclear parenting:

You know, I really do believe what I said when you first came in. The more parents the better. You know. And that’s where we need to go legally, is to be in a position where we can prove [pause] that that is a benefit. That the old saying of “it takes a village to raise a child” really is true. That forcing people by legislation to be isolated in their parenting is a recipe for disaster. It really is! To open that up would be most beneficial I think for all involved. And for society as a whole.

Sylvie, who had a largely uninvolved known donor, went on to express some frustration with not being able to invite her donor to play a more significant parenting role. Had the law been open to a three parent configuration that is what she and her partner would have chosen.

However, Sylvie's legal vulnerability as a non-biological mother, coupled with the legal power she and her partner felt the donor had as the biological father, had forced them to be exclusionary in their parenting. As she explained:

We've organized ourselves in this way mostly because the way the law currently is and because we feel that we have to do this to protect ourselves and our children. To be exclusionary. Otherwise we would be quite open to, to the idea of having the sperm donor thought of as a "parent". It's just not wise legally for us. It's a *big* mistake to ever use that word.

Sylvie's comments help explain the apparent contradiction between many of the mothers' reluctance to share parenting with a third parent and their overwhelming support for multiple parent families. Sylvie seems to suggest that if the law gave them more security, lesbian mothers might be more open to donor involvement.

A final reason for extending parentage beyond the dyadic model came from Lisa, who suggested that recognizing multiple parents might be beneficial because it would make "more visible the invisible work of parenting". Lisa argued that if more than two parents could be recognized it would challenge the assumption that two parents should be able to provide everything that is necessary to raise a child. It might also highlight how many parents actually find it difficult to achieve this "norm" and how isolating it can be. By recognizing that a three or four parent family might offer a more balanced family life, multiple parent recognition would make "visible the real work of raising a child". Lisa also suggested that the recognition of multiple parents might shift what she saw as the patriarchal nature of the nuclear family. As she explained:

It seems to me that recognizing that third person could just shift the, the patriarchal duality of it. Like there's one head and one not, a subordinate. So that might work in a kind of subversive way. And I think it would be good for the kids as well, just teaching them about different possibilities. And then that's a valid option and it just kind of expands what's possible. Takes us out of a kind of stereotypical expectation.

While not all of the mothers had such a nuanced political stance towards non-dyadic parenting as Sylvie and Lisa, the vast majority of them believed that the two parent model lacked sufficient flexibility. As a result, they favoured the possibility of multiple parents, provided that their own role as mothers was legally protected. They did acknowledge that the legal recognition of multiple parents might increase the complexity of disputes between parents, but that this was not sufficient reason to deny recognition altogether.

4.4 Severing the link between marriage and parenting

A final definitional theme to emerge, and one that was somewhat unexpected given the availability of same-sex marriage in both British Columbia and Alberta at the time the interviews were conducted, was that few of the mothers made any link between marriage and parenting. In fact, in many cases the mothers expressed deep concern about the legal recognition of their parenting relationships, but dismissed legal marriage as something they were “not interested in”. This severing of the traditionally positive link between becoming a parent and being married was unexpected given the frequency with which proponents of

same-sex marriage had used the fact that lesbians and gay men are now parenting to support their legal claims.³⁶²

Despite the fact that most of the women represented in the study had been in a relationship with their same-sex partner for over a decade, in only nine of the thirty-six families were the mothers married, and in only two others did the mothers have any intention of getting married. Of those who were married, in only three cases did they make a link between their desire to marry and a sense of it being important for their children and parenting relationships. In one of those families, the mothers married prior to the birth of their daughter because, although they felt it was a “weird conservative thing” to do, they thought it would be best for the baby to be born to a married couple. In the other two cases, the mothers thought it would “solidify” their families and make their children feel more “secure” because they would be “just like everyone else”. The remaining seven couples married for purely practical reasons and were often quite insistent in their need to get across that their decision to marry was not because they believed that parenting was best performed within a legal marriage. For example, Emily and Lesley married because their donor approached them about whether he could tell his parents about his son. The fear this created for Emily and Lesley was what eventually “drove” them to get married. They felt that being married would give them greater legal protection against claims from their donor’s extended family. Their attitude to the marriage itself was quite revealing and certainly did not reflect any reverence for it as a “fundamental” element of Canadian society. As Emily recounted, “I guess it means I’m sticking around for a while! I mean, it was a joke. It had no bearing on anything.” While few mothers were quite this flippant about their marriage, most of them cited reasons for

³⁶² See discussion at 87, above.

marrying that reflected those of Emily and Lesley. Some of the mothers who were married also had a critique of the institution that sat uncomfortably alongside their decision to marry. Veronique for example, who had married her partner outside of Canada, noted that she was “very skeptical” about the assumption that having married parents is “good for kids”. However, she did feel that her marriage made her relationship with her partner, which had begun when her son was six, “very real” to him.

A large number of the mothers who were not married expressed strong resistance towards the institution, and saw no positive connection between being legally married and parenting. While I did not question them explicitly about their reasons for rejecting marriage, it was clear that at least some of their views derived from feminist critiques of marriage as a patriarchal institution. Those who expressed resistance to marriage rarely mentioned it in connection with parenting, suggesting that the two issues were separated in their minds. Instead, talk of marriage elicited heated responses about how the same-sex marriage campaign had not represented their interests. Sylvie, for example, saw same-sex marriage as harmful to women and wanted nothing to do with it. As she explained:

We’re not impressed. What can I say? [laugh] Um, I never wanted marital rights. I don’t believe the institution of marriage has served women well. I do not believe in it and I do not want to participate in it.

Tracey and Helen, who had grappled with the idea of getting married but eventually rejected it in favour of an informal “un-wedding”, expressed similar concerns about what same-sex marriage meant for queers and women with more radical politics. In telling the story of how

they came to reject marriage, Tracey and Helen explained how they shifted from seeing the “potentially radical implications of marriage” to feeling that it was “more productive” to seek change “from outside” the institution. This shift stemmed in large part from their developing belief that legal marriage would inevitably conservatize the lesbian and gay community and “mark as illegitimate” those who refused to participate. At least some of their fears arose out of what they perceived as the growing pressure on lesbian parents to marry.

When the same-sex marriage debate emerged in Canada, Helen and Tracey’s “first impulse” was that “something that makes George Bush that angry [had] to be good.” However, they quickly began to resent the fact that “the advocates of gay marriage” were treating marriage as somehow capable of making their relationship “more real”. As Tracey explained:

We didn’t want to allow the state to sanction us and for that to change what our relationship was. We had already been as committed as two people can be for nine years and, um, we resented any implication that this was changing our relationship or, um, making it more real. So we, we had a lot of ambivalence about it.

Their distrust of the marriage campaign grew when they realized the “very conservative stand point” the main advocates were arguing from. They had hoped that gay marriage might “blow up the family” and that lesbian and gay participation in the institution could provide some “radical political valence”. As Helen noted, EGALE wanted to argue for marriage on the basis that “we are just like everyone else” and she wanted to argue “from the point of, no, we’re not just like everyone else.” Ultimately, Tracey and Helen rejected the capacity of marriage to be a progressive institution. Instead, they sought to destabilise the notion of what

marriage means, and one of the ways in which they could do that was to reject the idea that children are best raised by married parents.

Continuing in a similar vein to Tracey and Helen, Kinwa and her partner Ruth suggested that the marriage campaign may actually have been damaging to the interests of lesbian mothers. As a working class Aboriginal woman living in Edmonton, Kinwa perceived the marriage campaign as dominated by the interests of elite gay men who ignored what she saw as the more critical needs of lesbians with children. As she explained:

You know, marriage wasn't an issue for the lesbians. And we kept standing up at the [EGALE] meeting [in Edmonton] and saying, "That's not our issue." And the rich gay men stood up and said, "We want to be able to marry each other." So legal recognition of parenthood? Yes. Legal recognition in terms of marriage? I don't think so. That wasn't the hill I was prepared to die on.

There is nothing at all in Kinwa's comments that might suggest that she sees any positive connection between gaining marriage rights and parenting. This severing of the traditionally positive link between parenting and being married marks these lesbian families as remarkably distinct from mainstream ideology. Furthermore, it suggests that any law reform related to lesbian parenting should not be centered around the marriage relationship.

4.5 Conclusion

It is clear from the definitions provided by many of the mothers that their ideas about, and practice of, family do not conform to traditional legal or social norms. While none of them completely abandoned all elements of the traditional family they had, as Strathern suggests,

“pressed old ideas into new service.”³⁶³ This often involved redefining family in a way that incorporated chosen family and recognized the “choice” about whether to treat biological relatives as “kin”. While the mothers spoke confidently about the ways in which they had put their expansive and relatively non-traditional familial definitions into practice within their own immediate families, they returned frequently to the fact that their views were not reflected within wider society or the law. There was a strong sense amongst the mothers that non-nuclear, non-conjugal, and non-biological families were not ones for which the law was currently able to cater. As Christy noted, “[The laws] are very oriented towards nuclear families. They don’t seem to take into account the complexities of the families that are coming up today.” While the mothers did not unquestioningly endorse pursuing law reform, there was a relatively uniform consensus that law was an important component of their bid for change. In the next chapter, I will explore the possibility of legislative reform, giving specific attention to the issue of whether the diversity that is clearly present amongst the lesbian parenting community is able to be captured within a legal framework.

³⁶³ Strathern, *supra* note 320 at 15.

5 (RE)FORMING LAW'S FAMILY

5.1 Introduction

One of the most significant challenges posed by planned lesbian parenting is how such a heterogeneous array of parental and family arrangements can be contemplated by a single legal regime. The diversity of parenting practices within the lesbian community suggests the need for a flexible legislative framework, capable of providing a variety of recognition mechanisms for a diverse array of family forms. On the other hand, the need for flexibility cannot be at the expense of lesbian family security, particularly with regard to donor involvement. As noted in Chapter One, a central goal of my research was to explore the mothers' attitudes towards law reform, and to determine what model of reform they favoured. Given the diversity of my sample, particularly with regard to family configuration, I aimed to develop recommendations for reform that would be inclusive of as many types of lesbian families as possible.

In this chapter, I explore the possibility of parenting law reform through the eyes of my narrators. The chapter begins by considering the mothers' attitudes towards law and legal engagement. While law reform was a goal of my research, I did not want to presume that the mothers shared my ambitions. The chapter goes on to consider how the mothers' parental definitions translated into a law reform context. In particular, I address their attitudes towards non-biological and multiple parent recognition, as well as the recognition of the role of involved known donors. The third section of the chapter considers how law reform might be structured so that it reflects the mothers' parental definitions. In this section, the mothers' responses to three law reform models are considered. While the law reform models were

drawn from existing legislative provisions as well law reform recommendations in other jurisdictions, the focus of the discussion is not on cataloguing what has already been proposed, but rather on what my own narrators favoured. Finally, based on the mothers' law reform preferences, the chapter concludes by proposing a new legislative framework for determining legal parentage.

5.2 Attitudes to Law

As noted above, while developing a law reform proposal was a goal of my project, I did not want to presume that the mothers wholeheartedly supported legal engagement. In fact, given the current tendency amongst many of Canada's most vocal lesbian and gay rights organizations to focus almost exclusively on achieving social change through legal mechanisms (primarily litigation), I felt it was important that the mothers had an opportunity to express their views about law. What I found was that the relationship between my narrators and the law was far more complicated than might often be presumed.

Law was very much a part of the mothers lives. In fact, all but two of the thirty-six families had engaged with law in one way or another,³⁶⁴ and almost all of them rated legal recognition of their parental relationships as a high or medium priority in their lives. Because of the significance of law as a social institution in western societies, legal recognition was understood by the mothers as capable of conferring legitimacy on their families, something

³⁶⁴ In most cases, the mothers' legal engagement involved entering into a second parent adoption. In a significant number of families, however, mothers had engaged further with law by entering into donor agreements, guardianship agreements, and separation agreements, or by completing wills or powers of attorney. Most of the mothers residing in BC who were able to access the gender neutral birth registration form had chosen to register both mothers as their child's legal parents. In nine of the thirty-six households the mothers had undergone a legal marriage.

that most of them desired. However, despite the legitimacy offered by law, few of the mothers understood law to be solely positive. For example, many of them were distrustful of the legal system and those who administered it. They therefore doubted whether legislative reform would necessarily lead to more favourable decision-making by judges. Others viewed existing law reform strategies – primarily those based on equality-seeking litigation – as assimilationist or incapable, on their own, of creating any real understanding or acceptance of their families within wider society. Thus the mothers’ concerns about law related primarily to what they perceived to go on in court. They had reservations about the process of legal decision-making, as well as the nature of courtroom strategies. The mothers were far less critical of legislative reform, though they still worried about judicial interpretation of any legislation that might be introduced. What was clear, however, was that the mothers’ concerns about law, broadly defined, were sufficient to make them reluctant to put all of their hope, time, and resources into law reform.

5.2.1 “Legitimacy” through legal recognition

Whether or not they saw it as entirely desirable, a significant number of the mothers understood the legal recognition of their parenting relationships as capable of conferring upon them a certain “legitimacy” or “normalcy”, particularly outside of the home. Because members of the public were assumed to be more supportive of familial relationships that were legally recognized, the legal recognition of lesbian parental relationships was expected to produce greater overall acceptance. As Antonia, a non-biological mother, explained:

I think that people tend to see the law as sort of God. Um, you know if you’re legally their parent. And I think people even use those terms. “Are you *legally* their parent?” You know, so I think that, that’s

why the same sex marriage thing I think will change attitudes. 'Cause I think if it's legal then people [pause] I don't know. I'm making an assumption but I think that there are people who kind of sit on the fence and if the law is such then they'll say, "Oh, okay then it must be okay." It's law. So I think the same thing with parenting. If there's legal things in place that say this is the definition of a family and these are legally parents then I think there might be some more acceptance [by] people who are kind of on that edge.

The social support that came with the legal recognition of their parental relationships was also seen by the mothers as important to their children. For example, the mothers felt that legal recognition might give their children an additional tool when confronted about their families in the playground or elsewhere in life. As Paula explained, the legal recognition of her son's two mothers would give him a "right to be" when "out there [in public]". Paula did not think that parental recognition would change the nature of their relationships within the home, but that it would make the family feel more secure in its dealings with outsiders.

Many of the mothers also saw the legal recognition of their parental relationships as capable of making those relationships more real to extended family members. This was particularly important for non-biological mothers, whose families often did not consider their daughter's non-biological children to be their grandchildren. As Paula, a biological mother, explained in reference to her partner's family:

I think [the second parent adoption] is important symbolically. Like, I think it helped Belinda's parents arrive at the fact that she actually was a parent. That she, it gave them something they could understand. If someone adopts a child then they have an official capacity, right?

Similarly Antonia, who had her children before legal recognition was available, stated that she thought her parents “would have been way more on board had there been some legal things in place.” Thus, there was something about the officialness of the law – the “law as God” approach – that gave extended family members permission to overlook biology and treat their daughter’s non-biological children as their grandchildren.

Legal recognition of their parental relationships, particularly if immediate and automatic, was also understood by the mothers to afford them a level of family security they did not feel they currently had. By far the biggest concern of the mothers, with almost all of them citing it as their most significant legal issue, was the precarious status of the non-biological mother.

While various forms of recognition were available to the non-biological mothers, they were not without problems. Second-parent adoptions involved delays, fees and legal representation, as well as the consent of the biological mother, while birth certificate registration for both mothers was not available in all provinces and its legal value was unknown. Presumptive legislative provisions that, given certain circumstances, automatically conferred legal status on the non-biological mother were expected by the mothers to offer them a level of family security that was, at present, beyond their reach.

5.2.2 Reservations about legal engagement and law reform

Despite the advantages legal recognition was seen to confer, the vast majority of the mothers expressed at least some reservation about the prospect of legal engagement. As noted above, their concerns focused primarily on the quality of judicial decision-making and the litigation

process. They expressed far fewer concerns about legislative reform, perhaps because it avoided what they saw as the highly discretionary nature of the courts. While almost all of the mothers had reservations about law, their concerns did not prevent them from supporting a law reform agenda. However, they approached the prospect of reform with caution and a healthy dose of cynicism. Significantly, the mothers refused to place all of their faith in law, preferring to see it as one part of a much larger strategy for change.

The most consistent reservation the mothers expressed about law related to their profound distrust of what they described as "the legal system". Their distrust centered largely on judges who were seen as unrepresentative, pro-father, and able to make decisions based on their personal biases.³⁶⁵ The concerns the mothers expressed about judges influenced their ability to see legal engagement, particularly litigation, in an entirely positive light. The following conversation with Emily and Lesley, a suburban Vancouver couple with a known donor, was a common interaction. It emerged in the context of Lesley, a social worker with a fair amount of courtroom experience, feeling very unsafe about the potential power of their known donor, despite the fact that they had several legal measures in place.

INTERVIEWER: So in a sense you don't trust the legal system.

LESLEY: Oh, I do not trust the legal system. Actually I can tell you that for sure. I do not trust it.

INTERVIEWER: Don't trust it for anything?

³⁶⁵ It was difficult to discern from where the mothers got their ideas about judges. Some had courtroom experience because of their work as lawyers or social workers, but most appeared to have absorbed their knowledge from the media.

LESLEY: No.

Lesley's distrust of the legal system, which was shared by her partner, was not overcome by having a donor contract, a legal marriage, and both of the mothers' names on their son's birth certificate. The driving force behind Lesley and Emily's distrust appeared to be what they saw as the bias of judges, coupled with the enormous amount of discretion they enjoyed. In Lesley and Emily's view, parental recognition achieved little if there was no simultaneous attention to the ideological biases of judges. As Emily explained:

It depends on who the judge is, in terms of their own biases. They are not unbiased. And they're usually in their sixties or seventies. [sigh] So right now I'm guessing...[they] have been in the legal system for their entire lives, quite sheltered frankly. So how can they actually have any sense of what society is actually like for the people they represent?

Lesley and Emily's views were shared by a number of the mothers, particularly those who felt vulnerable to the legal incursions of known donors. There was a strong perception amongst the mothers that sex, sexuality, class, age, and values separated judges from the lesbian experience of parenting, and that the chasm between a judge's experiences and their own may be too wide to cross. Elisha, for example, decided to avoid law altogether on the basis that the legal system was far less likely than the lesbian and gay community to hold the members of her large and diverse family accountable. As she explained, "It felt like if anyone is gonna be able to say [to the donor], 'What are you doing being an asshole?', you know, it was gonna be the gay and lesbian community. It wasn't gonna be anybody in the legal system." Mothers like Elisha therefore did not see the legal recognition of their parenting

relationships as any great panacea because they did not expect that once within the legal system their families would necessarily be understood or respected.

A second reason for the mothers' reluctance to engage with law seemed to stem from the fact that the dominant approach to law reform adopted by lesbian and gay rights organizations, involved arguing that lesbians and gay men were "the same as" heterosexuals. Thus, in the mothers' eyes, legal engagement often had the effect of forcing lesbian and gay families to submit to heterosexual norms. In Christy's mind this was unacceptable and would ultimately lead to exclusions:

It annoys me that there's all this, like heterosexual kind of rules that have developed over the years from heterosexual history. And it's just put on couples that are gay and lesbian. I think there's some people that are gonna slot in, but in the end gay and lesbian relationships do not slot into the heterosexual mould.

Christy resisted the notion that lesbian and gay relationships were "the same as" heterosexual relationships, and was uncomfortable with the existing law's "heterosexual rules" being applied to same-sex couples. Ultimately, she supported law reform only if it displaced the heterosexual framework. Thus, her concern was not with law per se, but rather with the litigation strategies adopted (whether by choice or necessity) by various gay rights advocates. Expressing a similar sentiment, Sylvie argued that she could only "believe in" law reform if it involved a complete rethinking of family law. Moulding the current framework to fit lesbian and gay needs – the strategy most commonly adopted – was insufficient to break

down what she saw as the ideological assumptions embedded within the system. As she explained:

The [current family law system] is archaic. It no longer applies. Hasn't for centuries. We need to scrap it already. We need to acknowledge the fact that, that our times have gone beyond what the law can handle and we need to actually reinvent a body of law that, that [reflects] reality, not delusion.

Sylvie went on to note that reform strategies that accepted the existing family law framework would only ever involve assimilation or, for those who could not or refused to assimilate, exclusion.

Finally, over half of the mothers refused to fully embrace law because they felt that parenting law reform – whether achieved via litigation or legislation – would not, *by itself*, produce significant or immediate progressive social change, which they defined as a change in attitudes towards lesbian mothers and their families. In other words, this group of mothers distinguished between being granted legal recognition and being accepted, supported, and understood by those around them. As Sam noted, even after laws are passed and legal recognition is granted, at a “face to face, individual, at the moment level” discrimination and a lack of acceptance may prevail. In fact, many of the mothers expected acceptance and understanding to take time and that for many members of the public it would not be until they had some direct contact with same-sex families that their attitudes might begin to change. As Julia noted, “I don't know that you can just change the laws and expect it [social change] to happen.” Some of these mothers speculated that social change might take several generations after a law is passed to emerge, though they were encouraged by the speed with

which attitudes towards same-sex relationships had improved in Canada following the legislative reform of recent years. There was also a general consensus amongst this group that law reform was only one part of a much larger process of social change that included ongoing political activism, public visibility, education, and public awareness campaigns. Thus, legal engagement was not understood by these mothers as a means to an end, but rather as a single tool within a much larger strategy. As Christy put it, “you gotta do political activism and legal work *together*.” Thus, while legal recognition was sometimes seen by this group of mothers as providing them with the foundation of legitimacy often necessary to carry out these additional political activities, legal recognition alone was rarely understood as enough.

Thus, while the mothers supported law reform in general, many of them did not regard it as capable, on its own, of solving all of their familial recognition concerns. Furthermore, they felt that if law reform was to be pursued, a complete rethinking of the current system was required. Simply mapping lesbian families on to the heterosexual norm was understood to be an inadequate solution. As Sylvie explained, “[law reform] cannot be built on what we have right now. What we have right now has to be dismantled first.”

5.3 Law reform: the mothers’ views

While the mothers tended to approach the law with caution, there was a sense that parenting law reform was both necessary and inevitable, and they welcomed the opportunity to discuss it. Their ongoing vulnerability and the realization that legislative recognition would go *at least some way* toward alleviating it, made legislative reform a generally attractive option.

While the law reform issues discussed by the mothers were obviously shaped by the questions I asked,³⁶⁶ two issues garnered the majority of their attention. First, the mothers debated whether parenting law should abandon the current two parent model in favour of a more fluid system capable of legally recognizing multiple parents as well as secondary non-parental figures in a child's life. Second, the mothers addressed the practicalities of reform by considering whether the legal recognition of lesbian parents should take the form of a series of parenting presumptions, an "opt-in" registration system, or some kind of combination of both. While the majority of the discussion of law reform focused on reforms related to parenting, a number of the proposals extended beyond the parental context to include chosen family relationships.

5.3.2 Expanding the legal family: multiple parents and non-parental recognition

As noted in Chapter 4, the vast majority of the mothers (twenty-nine of the thirty-six families) felt that parenting should not be limited to a two parent model. When asked to consider this argument in a legal context, the mothers maintained their convictions, though not without certain qualifications.³⁶⁷ The mothers' support for the legal recognition of multiple parents tended to derive from the fact that for some families this was the reality of their lives. Multiple parent recognition was therefore the only legal model "truly descriptive of [their] circumstances." In most instances the mothers were referring to families that included two mothers and an actively involved "donor dad" (and maybe his partner), though a number of them also mentioned blended families, Aboriginal families, and the extended family networks of certain immigrant groups within Canada.

³⁶⁶ While I asked several directed questions about law reform proposals, the mothers were also given an opportunity to suggest their own proposals.

³⁶⁷ These qualifications are discussed at 200-01, below.

Given that at least some Canadian families already included three or more parents, and the vulnerability of these families to having contrary legal understandings imposed upon them, the mothers felt that the law should be reformed so that it had the capacity to extend legal recognition to multiple parents if that was what the parties had agreed to. To do otherwise, especially in the face of actual parental responsibility being exercised, seemed “wrong”. As Paula explained:

I can think of one, one family that I know [that] has, um, made an impact on me, where it’s two mothers and a father who co-parent. I think just seeing their family and how, how that works, it just seems wrong to me that they can’t have that [legal recognition]. Um, and it totally seems plausible to me that other families would become formed that were similar to that. So I think, yeah that the law should recognize the parents who are active in taking responsibility.

In advocating for the multiple parent model, Sylvie also focused on the importance of giving legal recognition to all of the individuals who were “taking responsibility” for a child. Drawing on her earlier discussion of the concept of the “front-line parent”, Sylvie explained her commitment to multiple (as well as single) parent recognition:³⁶⁸

I think that again, if we come back to my definition of the front, who the front-line parent is. That could be one, two, three, it depends. There are circumstances where the front-line parents are a handful of people and that works very well for everybody. And in that context full legal rights should be accorded to each and every one of those people. The definition of the nuclear family right now does

³⁶⁸ The possibility of extending legal recognition to a single mother family as a *complete* family unit (that is, to the exclusion of a donor) will be addressed in the law reform section at 208, below.

not serve anyone and within that definition it is very well ingrained that it can only be two. Even one is considered quite outlandish. You know, so I think we need to scrap that altogether.

Mothers like Paula and Sylvie endorsed the multiple parent model even though their own families resembled the two parent structure. In fact, a number of the mothers who supported multiple parent recognition noted that their own parenting practices should not limit the options available to others. As Maureen explained:

Yeah, I mean certainly for us the two parent model would work but I don't think everybody should be limited to our model. [pause] I don't know a lot of three or four parent models that have...I mean I just don't have a lot of experience with that but I, I know there are some out there. And, I think they should have the right to have legal protection as well.

While the vast majority of the mothers supported the abandonment of the two parent model, there was some concern about how a more fluid model might work in the context of law. A number of the mothers, including the seven who expressed serious reservations about adopting a multiple parent model, regarded its legal application as “really complicated”. Most frequently they noted the increased potential for conflict once three or four adults were legally involved in a child’s life. As Delia, who preferred the two parent model, argued, “it’s hard enough to get two people to agree on parenting. You throw in a third person, oh!” Others noted the additional challenges of day-to-day decision making when multiple parties had a legal right to have their views taken into account. As Michaela put it, making sure everyone has an equal say in parenting decisions could “just get out of hand.” There was also some fear amongst mothers, including several who supported abandoning the two parent model, that permitting the legal recognition of multiple parents might result in donors being

given rights in circumstances where they were not actually parenting. Emily, for example, endorsed the application of the multiple parent model in situations where all of the adults were actively involved in parenting. However, she expressed considerable concern about the potential for donors who were not actually caring for a child to assert their right to be recognized as a legal parent on the basis of biology alone. She feared that if such a situation were to arise the donor would succeed in his claim. As she explained:

I think it should be flexible but if it came to the court system and [the donor] says, “Hey, I could be a parent. I’m here, why are you not letting me be?” That would set up a system where he’d, that would be a very good fight in court. Where in fact he’d win. He’d win, he’d get that guaranteed, hands down. So, yes I agree it should be flexible. Do I still worry about that? Absolutely. [chuckle] ‘Cause I could see that being the avenue for our justice system to allow for the donor to become a parent. A father. I have reservations about that.

Emily was not alone in worrying about how a multiple parent model might apply with regard to a known donor who had only limited involvement in the child’s life. As noted in Chapter 4, a known donor was understood by the mothers to be a parent only when he played a significant (and intended) caregiving role. Thus, while all of the mothers who supported multiple parent recognition saw it as the perfect way by which to recognize a three or four parent family in which the donor (and possibly his partner) were genuinely parenting, if such a model were to be implemented various safeguards would need to be included.

A possible solution to this dilemma was the creation of a secondary legal category, less than a parent, which recognized the non-parental relationships some known donors developed

with their children.³⁶⁹ Creating such a category would hopefully reduce the tendency to see these individuals as parents, and thus create more security for the lesbian family. Support for this concept was widespread amongst the mothers, many of whom treated the relationship an involved donor might develop with a child as non-parental but worthy of some kind of legal recognition. In fact, several of the mothers invoked the best interests of the child principle to explain their commitment to maintaining the relationships their children developed with their donors as well as with other significant adults. It was thus not surprising that in grappling with the issue of how the law might respond to an involved donor (while simultaneously protecting the lesbian family from unwarranted intrusions), thirty-one of the thirty-six families indicated that they would support the creation of a new legal category to capture the familial contributions of secondary figures who might have regular access with the child, but who were not parenting.³⁷⁰ The mothers struggled with how to refer to these individuals. Some utilized already existing language by calling them “guardians” or individuals with “extended family status”. Others simply called them “secondary” figures in the child’s life. Whatever language was used, the mothers who supported the concept agreed that these secondary figures should, in certain circumstances, be entitled to some legally recognized relationship to the child, but with fewer rights and responsibilities than a parent.

³⁶⁹ While these secondary figures could also be dealt with through existing access laws, a separate legal category has several advantages. First, existing access laws are designed for separating heterosexual parents and apply most frequently to heterosexual fathers. This is exactly the kind of framework lesbians mothers are trying to avoid. Secondly, because the “secondary figure” category would come with clearly defined rights and responsibilities attached, it would provide a clarity that access law cannot. Finally, as will be discussed below, unlike existing access laws, the secondary figure category can only be realized with the consent of the primary parents.

³⁷⁰ The remaining five families felt that parenting should be an “all or nothing” category and that those who did not fulfill the role of a parent should not be entitled to any legal recognition.

A number of the mothers grappled directly with how these “secondary figures” might be understood. Michaela, for example, saw them as occupying a “grey area” between donor and parent that warranted some kind of legal rights. As she explained:

Um, I wonder if there's some grey area in between where you can recognise [an involved donor relationship]. Especially, you know, if a lesbian couple chooses to have a guy in the family and call him Dad, right, then you know he should have some rights. And he wouldn't have any rights [in the current system]. And, I think that, that's kind of, unfortunate even though it makes me queasy thinking about it. [chuckle] Because what rights would he be getting, you know what I mean? But I still think that if he's being a good dad and, and, all's going well, so, yeah. So, I, I think that um, there should be like a grey area. And maybe that's just, just that he could be named as a guardian.

Similarly, Mischa supported both a multiple parent model and a secondary legal category for non-parental figures such as known donors. She noted that such a system would protect relationships between the child and non-parental figures in the event of unforeseen events, such as parental death. As she explained:

MISCHA: Well if I were going to design a program, I think I would say that that you should be able to opt for whatever you choose. So I don't think you should say there can only be two primary [parents], but maybe there could be categories. There could be primary care-givers, two or more, and there could be secondary or whatever you want to call them. Additional. And so for instance in our case maybe we could have two primary [parents], and then a secondary could be her biological father, who is in some form, a, a parental figure I guess. But he doesn't really have much [responsibility]. But if I were to die I would want him to continue to have a right to see her. I would be very upset if I died and this wouldn't happen. So that would be a lesser category. A right to access um, and maybe some minimal responsibility to contribute if she fell on hard times or something. I mean I don't know. Some, sort of, lesser...

INTERVIEWER: Lesser responsibility and lesser rights, but still recognition of some sort?

MISCHA: Uh huh. [affirmative]

The struggle that both Mischa and Michaela experienced in explaining the nature of the secondary, non-parental category occupied by involved donors indicated the challenge involved in transforming a theoretical concept into a legal principle. While they knew how these relationships worked in practice, it was difficult for them to imagine how the involved donor's identity might be captured in law and what restrictions would be necessary to ensure that the lesbian family remained secure. Attempts to resolve some of these more technical concerns were explored when the mothers moved to discussing more concrete law reform proposals.

5.3.3 Presumptions versus registration: recognizing parenthood

In an effort to move the theoretical discussion into a law reform framework, the mothers were invited to respond to three parental recognition models that, if introduced, would apply to both same-sex and heterosexual families who conceived using some form of alternative insemination.³⁷¹ I developed the three models, which will be described below, by drawing from various law reform discussion papers and reports, academic articles, and existing legislative frameworks in other jurisdictions.³⁷² Ultimately, the models reflected an array of approaches to parental recognition and responded to many of the desires and concerns

³⁷¹ That is, the favoured model would replace any existing legislation.

³⁷² The sources I consulted included legislation addressing parentage in Canada (particularly the *Civil Code of Quebec*), Australia and New Zealand, law reform discussion papers and reports from New Zealand and Victoria, Australia, as well as academic material from Canada, Australia, and the United States. These jurisdictions were the focus of my research because in each of them some recent effort had been made (whether by government or otherwise) to respond to the legal issues around lesbian motherhood.

already identified by the mothers.³⁷³ For example, two of the models allowed for the legal recognition of multiple parents as well as other significant non-parental figures. All three of the models responded to the mothers' need for legal security, especially vis-à-vis donors. Deliberate effort was made, however, to keep each of the models loosely defined so that mothers could shape them in ways that suited their own needs. For example, questions around consent and when legal rights and responsibilities might vest in an individual were left to the discretion of the mothers.

The first model presented to the mothers was labelled the "presumption model". The presumption model essentially extended the current legal framework – where the parties to an intimate heterosexual relationship are presumed to be the parents of a child born into the relationship or within nine months of the relationship ending – to the same-sex context. Thus, if one member of a lesbian couple gave birth to a child, both members of the couple would be deemed legal parents without any need on the part of the non-biological mother to adopt the child. In the case of a single mother who conceived through donor sperm, she alone would be the child's legal parent. Parental status would therefore continue to be limited to one or two individuals, and donors would immediately and permanently be denied the status of legal parent.³⁷⁴ The presumption model would also involve making certain assumptions about lesbian couple themselves. If they were in a conjugal relationship, the presumption would be that both parties to the relationship intended to parent the child. Like women who conceive in

³⁷³ In addition to the models proposed, mothers were also invited to make their own suggestions.

³⁷⁴ A donor may still be able to apply for access as a non-parent under provincial family law legislation in some provinces. See, eg, section 21 of Ontario's *Children's Law Reform Act*: "A parent of a child or any other person may apply to a court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child." *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 21.

a heterosexual context, the biological mother would, however, retain the ability to list the other parent as “unknown” or “unacknowledged”.³⁷⁵

The second model was described as the “opt-in” model and was based largely on intention. Rather than relying on biology or adult relationship status as the current system tends to do, the opt-in model would require adults who intended to parent a child to register as the child’s parents. The one exception would be the child’s birth mother who would be presumed to be the child’s parent.³⁷⁶ Being permitted to register as an additional parent would not require a biological connection to the child or a conjugal relationship with the child’s biological mother, and would not be limited to one other individual. In other words, several individuals could opt-in as parents, creating a three or four parent family. The opt-in model would also permit significant non-parental figures, such as an involved donor, to “opt-in” to the legal family. The status that might extend to such an individual was not defined in the scenario presented to the mothers, but it was made clear that it was something other than parental. In addition, the issue of when individuals might be allowed to opt-in and whose consent would be required was left to the mothers to decide.

The final model involved combining the presumption and opt-in models to produce a framework that granted automatic parental status to the conjugal couple (or a single mother), while also allowing for additional parents and non-parental figures to “opt-in” to the legal family. This model was designed to provide security for the couple or single mother, while

³⁷⁵ While the “unknown” and “unacknowledged” categories continue to be available on birth certificates, the decision in *Trociuk v British Columbia* suggests that mothers who use them may now attract closer scrutiny. *Trociuk*, *supra* note 232.

³⁷⁶ The birth mother’s ability to “opt out” of parenting would be limited to putting her child up for adoption.

also creating space for a degree of intentionality in family formation. Furthermore, by including a parental presumption in favour of the couple (or single mother) the combination model gave the non-biological mother a level of security that was absent in the opt-in model. The questions of when individuals might be allowed to opt-in and how consent might be dealt with were once again left to the discretion of the mothers.

The most popular model, with twenty-one of the thirty-six families preferring it, was the combination model.³⁷⁷ The entirely opt-in model was favoured by twelve families, and only three families endorsed the solely presumption based model. These responses suggest that the vast majority of the mothers want the security of a presumption-based model, but only if accompanied by an additional, more fluid framework, grounded in intention. The mothers' responses to the three models will be discussed in order of their preference, beginning with the highly favoured combination model.

5.3.3.1 The combination model

The twenty-one families who favoured the combination model viewed it as capable of achieving the best of both worlds. While it granted the parties to a conjugal relationship (or a single mother) automatic and full legal protection as parents,³⁷⁸ it also allowed additional parents or non-parental figures to be legally recognized. This latter point reflected the mothers' strong commitment to both multiple parent families and the limited legal recognition of significant non-parental figures in a child's life. It also demonstrates the extent

³⁷⁷ The narrators are categorized as "families" in this section (rather than individual mothers) because all of the mothers who were interviewed as couples preferred the same legislative model.

³⁷⁸ As opposed to second parent adoption which involves a delay of three to six months, significant paper work, a filing fee and, in most cases, legal representation and thus lawyers fees.

to which the mother rejected an either/or approach to parental recognition. Ultimately, their preference was for a reform proposal that appeared to capture the benefits of both formal and substantive equality. Paula's simple comments summed up the views of many of the mothers who favoured this model:

Um, [pause] I think, I think there is an importance of someone opting in and saying that they're committed [to] the process. But I think if you're conceiving a child in a relationship that there should be some kind of presumption as well.

Thus, there was a sense that the parties to the relationship were making an active choice to parent and that that should be respected by the law, but not to the exclusion of other individuals who were also committed to playing a role in the child's life.

For mothers whose families actually resembled the combination model – a conjugal couple with an involved known donor – it was particularly attractive. They could see their own families reflected in the model and realized how it would have benefited them if it had been in place when their children were born. For example, Antonia, a non-biological mother who had to negotiate a joint custody arrangement with her ex-partner as well as an access agreement with the donor and his partner, explained why she favoured the combination model:

Because I think for us it would have been nice to have just the automatic [presumption] when [the] kids [were] born. 'Cause we didn't even have that. I mean I, you know, here we were going to the hospital to have our kids that we had planned and had conceived together. You know, really, I mean it's interesting 'cause my partner says, or my ex-partner, that she and I really conceived the kids. We

just didn't do it biologically. Um, and so I would like when the kids are born that whoever conceives them in whatever way are the parents. And that didn't happen. So we had to actually get that in place. Then we moved on to, so now the dads are, we want them to have some status and they haven't had any. Other than, you know, [what] we've given them. But they haven't had any legal status at all.

Antonia's attraction to the combination model was based on the security it gave the couple (or a single mother), at the same time that it allowed the primary parent(s) to open up their family to other parental and non-parental figures. This arrangement was perfect for her family given the active, but only occasional involvement, of her sons' "dads" who lived in another province.

While the majority of the mothers supported the combination model, they were willing to do so only if a number of concerns were addressed. The most significant concern related to consent, that is, would consent be required before an additional party could opt-in, and who would have the power to exercise it. This concern obviously related to opt-in provisions in general and was voiced by mothers who favoured both the combination and opt-in models. All of the mothers who raised the issue of consent argued that a consent provision was necessary, and that whether an additional individual could opt-in should depend on the consent of the couple (or single mother) protected by the parental presumption. If it did not, the presumption would become meaningless. The mothers' need for a strong consent provision was based largely on their perceived vulnerability vis-à-vis donors. The following interaction with Jasmine, who ultimately favoured the combination model after the consent issue was resolved, captures the nature of the mothers' concerns around consent:

JASMINE: Okay, so in my case Bianca and I decide we're going to um, be the parents. Neil [the donor] wants some involvement. Um, [pause] he has a, he chooses to opt-in? Or we chose to opt-in? And those are the parts, like, so I wouldn't want to say. I wouldn't think of a blanket, yeah, like lets have opt-ins. And I wouldn't want to make it any more confusing in that now we have to get his permission to opt him out for instance. So, I would, I would, I would keep my final decision on that combination to see what the combination is.

INTERVIEWER: Okay, would you feel more comfortable if, in order to opt in, you had to get the consent of the "primary parents"?

JASMINE: Yeah, um, they're the ones that get to decide who else comes in. That makes me feel better.

Paula similarly noted the dangers of opting-in not being regulated by some form of consent. She argued that without a consent provision a donor who was not intended to be part of the family could opt-in at his own discretion. As she explained:

So the ability for other persons to opt-in...you'd need consent so that you don't have a sperm donor who's not, um, going to be acknowledged. Like if there's a "contract" that's developed you don't want someone in violation of that contract to just opt-in without the consent of the other parties.

Thus, building a consent provision into the combination model would permit those mothers who wanted to extend legal recognition to other parents or non-parental figures to do so, but would also protect those mothers who did not intend to make such a choice.

A number of other concerns related to the combination model were raised by individual mothers who wondered about its practical application. For example, some speculated about

when opting-in might take place (when planning the child? at conception? at birth?), and how the rights and responsibilities of those who opted in might be defined and recorded. Others wondered whether birth certificates would change to include the names of the additional parents or significant non-parental figures who had been invited to opt-in. Not enough of the mothers commented on these questions to gain any sense of what their shared perspective might have been, but they were clearly issues that would need to be resolved if the model were to be transformed into a legislative framework.

5.3.3.2 The opt-in model

The twelve mothers who favoured the entirely opt-in model were attracted not only to its flexibility, but also its direct link to intention. They emphasized the importance of parenting being a conscious act. As Sam noted, “By having to go through [pause] some sort of proactive action you’re making, you’re consciously making a commitment.” Some of the mothers speculated that adding a level of consciousness to the act of becoming a parent might benefit the institution of parenting itself. More forethought would inevitably be given to the enormous responsibility parenting entailed. The mothers who favoured the opt-in model were also attracted to its rejection of presumptions, particularly presumptions based on relationship status. As Gillian noted, an opt-in framework would allow the parties themselves to consciously shape their family, rather than having the law impose the framework from above. Gillian felt that this would be particularly helpful in times of conflict:

If people disagree later on and it does have to go to court, at least there is the, the stated intentions of all of the parties from, at the outset. And, and then, you know hopefully decisions really can be made

sort of in the best interest of the child at that point rather than, “Well, unfortunately the law says that these are the primary parents.”

The mothers who favoured the opt-in model were also attracted to the fact that by avoiding presumptions based on biology or relationship status, the opt-in model allowed partners to choose whether they both intended to be parents.³⁷⁹ This level of fluidity was particularly attractive to the mothers who did not necessarily make a link between a woman having a child and her partner being a parent. As Sally noted, the biological mother and her partner may have agreed that the partner would not actually be a parent. The opt-in model would allow for this intention to be given legal form. As Sally explained:

For example there’s a couple of women that I know that are in a relationship, and yet the child is not her, the partner’s child. She is an aunty and [partly] a care-giver, but [is] not considered a parent. And that’s certainly not within [the current law], but that’s how they decided to do it. And that’s fine. And so I think that you need to make [that a] serious consideration. Is that her child? Am I making that commitment?

³⁷⁹ Interestingly, this approach was recently rejected by the Alberta Court of Appeal in *Doe v. Alberta*, 2007 ABCA 50. The question for the court in *Doe* was whether a written agreement between a co-habiting couple, in which it was stated that the male party to the relationship (who was not the biological father of the child) had neither parental rights nor obligations to support the child, could be effective in law. Jane Doe decided she wanted to have a child but John Doe did not want to be a father. Neither party wanted to end their relationship with the other. Jane conceived via artificial insemination and together they agreed that any rights or obligations with respect to the child would be governed through an express written agreement. The agreement would stipulate that John Doe was not the father of the child and had neither parental rights nor any obligation to support the child. The Court of Appeal held that John Doe’s subjective intent not to assume a parental role would inevitably yield to the needs of the child. In particular, his “settled intention” to remain in a close, albeit unmarried, relationship with the child’s mother would inevitably “thrust John Doe, from a practical and realistic point of view, into the role of parent to this child” (at paras. 21-22). Jane and John Doe sought leave to appeal to the Supreme Court of Canada, but the application was refused.

In Elisha's family, this was exactly what had happened. Elisha had chosen to co-parent with a non-conjugal partner, while Elisha's conjugal partner, who she met while pregnant, was not considered a parent. As Elisha explained:

The opt-in one sounds more kind of appealing. I mean, especially like my situation of living with [my partner], like she was very clear that she didn't, you know, wasn't opting in...She was willing to be around and be supportive and be somewhat involved but she was like, totally, [pause] you know freaked out by the idea of commitment and financial responsibility. And all those things. She, she would not have opted in and would not have necessarily even been in the relationship if, if it was gonna be like a given that she would then have to take that on.

For Elisha, the opt-in model would have provided exactly the fluidity she needed to adequately parent her daughter. Because her family had been framed around the concept of intention, rather than biology or adult relationship status, the opt-in model was the only framework capable of capturing the nature of her family relationships.

Somewhat ironically, the opt-in model's complete rejection of presumptions was also understood to be its most significant weakness. Some of the mothers were worried that adults would avoid responsibility for children by not opting in. They were particularly concerned about this possibility in the heterosexual context, but noted that it could also occur within lesbian relationships. Their concern revolved around birth mothers being left to care for and financially support their children in the event of a partner refusing to opt in. As Veronique, who ultimately favoured the opt-in model explained:

The problem though with that, with that kind of a system [an opt-in system] would be where people have, um, committed to taking on a set of responsibilities around a child, um, and then decide that they no longer want to opt in. And so, so the person who, the other person who's involved in that arrangement, might be left um, having to do everything when they didn't expect that that would happen. So I mean, and obviously too, we have to be, cognizant of the fact that in, in terms of heterosexual relationships, that, that often happens to women.

Veronique went on to suggest that a possible solution to this dilemma would be to separate economic issues from parenting. If biological mothers were not fearful of the economic and lifestyle ramifications of partners failing to opt in – because state assistance was adequate and child care was affordable and available, for example – then they may have fewer concerns about the prospect.

Not surprisingly, the mothers who favoured the opt-in model also raised issues of consent and timing, and came to many of the same conclusions as those who favoured the combination model. Most of the mothers advocated for strong consent provisions that placed the power to give consent solely in the hands of the birth mother. This approach was understood to protect the birth mother's autonomy as a parent, while still allowing for the recognition of additional parental relationships. The few mothers who raised issues of timing tended to prefer that those who opted-in did so very early in a child's life.

5.3.3.3 The presumption model

Only three families favoured the presumption model, and in each family their commitment to it derived from a belief in formal equality. The presumption model was seen as extending to

lesbian couples the same parenting framework as heterosexual couples who conceived through donor insemination already enjoyed. In other words, these families felt that the presumption model would treat them identically to heterosexuals and this was what they wanted. As Rochelle, who favoured the presumption model, explained:

I think we should, I think we should be treated as heterosexuals. And equal. There's, there's no reason why Angie and I should not have been. I mean, we've been together a long time. You know, we were married. There's no reason why, um, we're not any different than [them].

Not surprisingly, these same mothers had already rejected earlier in their interviews the idea of multiple parent families, as well as the legal recognition of significant non-parental relationships. They therefore saw no need to extend the presumption model to cover other family structures.

While few mothers chose the presumption model, much can be learned from considering the reasoning of those mothers who rejected it. The most common reason for opposing the presumption model was that it did not capture the multiple parental and significant non-parental relationships that could be found within lesbian and gay families. Rather, it limited parenting to two people in a conjugal relationship. For many mothers such an approach seemed like a step backwards. It was not that they completely rejected formal equality. Rather, it was that formal equality was understood as insufficient. Their preference was for reform that *combined* equal treatment with additional provisions grounded in a more substantive vision of equality.

The presumption model was also understood to be inadequate because it limited the possibility of intention-based, self-conscious parenting. Mothers such as Veronique saw this as a problem for both heterosexual and lesbian and gay parents. As she explained:

I mean I just think we need to be more self conscious about what it means to raise a child. And, um, and so, the, the more self conscious we can be, the more conscious of what that means to everyone, the better. And so that's why I think the, the problem around you know, automatic presumptions, [pause] well I mean, in terms of you know, in terms of, lesbian couples, it, it really does, just simply mimic the, what happens in a heterosexual relationship. And maybe what needs to happen in heterosexual relationships is more consciousness about the negotiation of relationships.

The presumption model was thus rejected by the vast majority of the mothers on the basis that it mimicked an arguably inadequate status quo. It was seen to serve neither lesbian mothers nor heterosexual parents particularly well.

5.4 Law reform proposals to legislative models

The remainder of this chapter considers how the law reform proposal most favoured by the mothers – the combination model – might be transformed into a legislative framework. The proposed legislation is designed to respond to the parenting needs of the mothers as indicated in their law reform discussions, focusing on the dual goals of flexibility and security. As noted above, in drafting the legislation, I drew on law reform discussion papers and reports, scholarly texts, as well as existing legislation. The proposal is not intended to be a definitive model for reform, but is designed to capture the principles that would ideally underlie any future legislation.

5.4.1 Pre-existing models and the academic literature

Few Canadian jurisdictions have legislation granting *presumptive* recognition to same-sex parents who conceive through donor insemination.³⁸⁰ In fact, in those jurisdictions in which same-sex parents have access to some form of legal recognition, it almost always requires a positive act on the part of the parents. One of the few exceptions to this rule is the filiation laws of Quebec.³⁸¹ Introduced in 2002 as part of the province's civil union legislation, Quebec's new filiation laws determine legal parentage in situations in which a child is born to either an individual or spouses (either opposite or same-sex) through some form of "assisted procreation". At the heart of the Quebec legislation is the concept of a "parental project", which "exists from the moment a person alone decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project".³⁸² Where a "parental project" is found to exist, the parties to it are presumed to be the child's legal parents.³⁸³ At the same time, any parental rights of the donor of the genetic material, provided the donor is not a party to the "parental project", are extinguished.³⁸⁴ Read together, these provisions protect the intending parents from unwanted donor involvement, while also ensuring that donors avoid any unintended

³⁸⁰ *Civil Code of Quebec*, *supra* note 74 at arts. 538-42. Manitoba's *Vital Statistics Act* allows for a woman's common law female partner to be registered as a co-parent, but the provision is far less comprehensive than the Quebec statute. In particular, it does not specifically address the situation where a known donor is used. *Vital Statistics Act*, C.C.S.M. c. V60, s 3(6). Such presumptions do exist in a number of jurisdictions outside of Canada. For example, several Australian states and territories have included presumptive recognition for same-sex parents for a number of years. See, eg, *Artificial Conception Act 1985* (WA) s. 6A; *Status of Children Act 1979* (NT) s. 5DA; *Parentage Act 2004* (ACT) s. 11(4).

³⁸¹ *Civil Code of Quebec*, *supra* note 74 at arts. 538-542.

³⁸² *Ibid.*, art. 538.

³⁸³ *Ibid.*, art. 538.3.

³⁸⁴ *Ibid.*, art. 538.2.

obligations, such as child support liability.³⁸⁵ The Quebec model differs from most presumption based legislation addressing assisted conception by including the additional concept of a "parental project". In doing so, it places the focus on the joint intention of the parties to the project rather than simply the "consent" of the non-biological parent. It thus captures the importance of joint intention explicitly in a way that other models may not.

While the Quebec law is by far the most comprehensive and inclusive presumption-based parenting law available in Canada, it remains a limited model. While able to cater to the needs of both same-sex couples and single mothers, the Quebec law continues to limit parenting to two legal parents. For example, there is no possibility of a "parental project" between three or four individuals. It also does not envisage a known donor playing any legally recognized role in a child's life, except in circumstances where he or she is a party to the "parental project" and thus a legal parent. Finally, the Quebec provisions limit parenthood to individuals or spouses. Article 538 makes it clear that a "parental project" can only be undertaken by "spouses" or by a woman alone, preventing a birth mother and a non-conjugal partner from agreeing to parent together.³⁸⁶ While the draft legislation described below draws heavily from the Quebec model, it also attempts to address these concerns.

³⁸⁵ It should be noted, however, that in the reported decision dealing with these provisions the court found that the parental project was between the birth mother and the donor. This was despite the fact that the birth mother and non-biological mother had entered into a civil union prior to the birth of the child and had parented the child together from birth. The decision was an interim one and relied largely on the uncontested affidavit of the donor. However, it does suggest that the courts may be reluctant to apply the "parental project" provision in a manner that protects the lesbian family. *S.G. v. L.C.*, *supra* note 70.

³⁸⁶ *Civil Code of Quebec*, *supra* note 74 at arts. 538

While few jurisdictions grant presumptive legal recognition to same-sex parents, even fewer permit parental or some form of “known donor” recognition beyond the two parent model.³⁸⁷ Perhaps the most notable attempt to respond to the issue of donor recognition is New Zealand’s *Care of Children Act* 2004 (NZ) which permits a known donor, in a discrete set of circumstances, to opt in as a *non-parental* figure in a child’s life. Section 41 of the *Care of Children Act* expressly sanctions formal agreements that address the role of a known donor in a child’s life and the amount of contact the donor will have with the child.³⁸⁸ The agreement itself cannot be enforced under the *Act*, but a court may, with the consent of all parties to it, make a consent order that embodies some or all of the terms of the agreement.³⁸⁹ That order, insofar as it relates to contact with the child, can be enforced under the *Act* as if it were a parenting order relating to contact.³⁹⁰ Importantly, neither the agreement nor the order have any impact on the donor’s status. They do not enable him to become a legal parent, nor on their own do they produce guardianship status. Although the terms of the agreement can be varied by a court, and the best interests of the child principle will always prevail, the *Care of Children Act* provision provides some scope for opting in on the part of an involved donor.

³⁸⁷ Known donor recognition by way of registrable “parenting plans” was recommended by the New South Wales Gay and Lesbian Rights Lobby in a 1999 report on the legal recognition of lesbian and gay parenting relationships. However, the recommendation has not been picked up by the NSW legislature. See New South Wales Gay and Lesbian Rights Lobby, *And Then.... the Brides Changed Nappies: Lesbian Mothers, Gay Fathers and the Legal Recognition of our Relationships with the Children we Raise*, A Community Law Reform Project, Final Report, April 2003. Online: <http://www.glrll.org.au/publications/major_reports/brides_nappies/Brides_Nappies01.htm> [GLRL, “Brides”].

³⁸⁸ *Care of Children Act* 2004 (NZ), s. 41(2) [*Care of Children Act*]. Section 41 only applies to “donor” relationships, and cannot be used by a third party who has not donated genetic material.

³⁸⁹ *Ibid.* at s. 41(3).

³⁹⁰ *Ibid.* at s. 41(4).

A number of law reform bodies have also discussed the possibility of “opt-in” provisions for known donors, whether in the capacity of parents or significant non-parental figures. Most recently, both the New Zealand Law Commission (NZLC)³⁹¹ and the Victorian [Australia] Law Reform Commission (VLRC)³⁹² proposed parental recognition for donors in a number of discrete circumstances and always in addition to presumptions in favour of the primary parent(s). For example, in its Position Paper Two on parentage in the context of assisted reproductive technology, the VLRC recommended that in addition to parental presumptions in favour of a single mother or same-sex couple, a donor be permitted to opt in as the legal parent of a child.³⁹³ However, a donor could only opt in with the consent of the birth mother and her partner (if she has one), and the application to opt in must be made as early as possible in the child’s life.³⁹⁴ Thus, in circumstances where the birth mother, her partner, and the donor *intend* the donor to be recognized as one of the child’s parents, the donor should be able to secure all of the legal rights and responsibilities of parenthood.³⁹⁵ It was expected that

³⁹¹ The NZLC made recommendations very similar to those proposed by the VLRC. The NZLC recommended that a child should be able to have three legal parents, providing that a two stage process be followed. The first stage applies before conception or birth. It requires that the couple and donor appear before a registrar of the Family Court with the following documentation: (a) a sworn statement by the two women that the donor will be a genetic parent of the child and that they want him to be a legal parent, as well as a sworn statement by the donor that will be a genetic parent of the child and that he wants to be a legal parent; (b) evidence that all three parties have received independent legal advice; (c) evidence that all three parties have received counseling about the issues raised by their planned family; and (d) an agreement setting out the nature of the donor’s involvement with the child. If the registrar is satisfied that the documentation is in order, s/he shall give interim approval of the appointment. The second stage occurs after the child is born. Upon proof of the donor’s genetic parentage of the child, the registrar shall approve the appointment and a parent/child relationship shall exist. At no point is the registrar permitted to express an opinion as to the merit of the application. His or her job is to ensure that the legal requirements have been met and that the paperwork is in order. New Zealand Law Commission, *New Issues in Legal Parenthood*, Report 88, April 2005, at paras. 6.58-6.73 [NZLC, “New Issues”].

³⁹² Victorian Law Reform Committee (Victoria, Australia), *Assisted Reproductive Technology and Adoption: Position Paper Two – Parentage*, Melbourne, July 2005 [VLRC, “Assisted Reproductive Technology”]. Similar recommendations were made by the NSW Gay and Lesbian Rights Lobby in 1999. See, GLRL, “Brides”, *supra* note 387.

³⁹³ VLRC, “Assisted Reproductive Technology”, *supra* note 392 at para 4.32.

³⁹⁴ The VLRC eventually recommended that the application be made before the child turns one.

³⁹⁵ In order for parties to achieve recognition under Australian federal law, it was proposed that opting in be completed via adoption. Australian federal law recognizes relationships created through adoption, while state

only a few families would adopt such a model, and that in most instances it would be lesbian mothers who were co-parenting with a known donor. The VLRC felt, however, that this model should be equally available to heterosexual parents. In making their recommendations, both the VLRC and the NZLC supported the possibility of a child having three legal parents. Responding to suggestions that this may increase family law disputes, the VLRC noted that an opt-in model might actually reduce potential conflict “because the opt-in process would assist the parties to reflect on and clarify their roles and expectations in respect of the child from the outset.”³⁹⁶

The VLRC did not recommend extending any kind of *non-parental* recognition to known donors. The Commission considered the issue, noting that many donors are involved in their children’s lives without being legal parents, but concluded that the legal protection of non-parental donor/child relationships was best achieved through existing legal frameworks. For example, it was suggested that known donors could apply for a parenting order, which could include access, under section 65C of the *Family Law Act* 1975 (Cth). This section allows “any other person concerned with the care, welfare or development of the child” to seek a parenting order.³⁹⁷ The VLRC did express some concern about the use of this provision by donors, particularly in circumstances where the donor was not intended to play a role in the

recognition of donor parental status would only be recognized if subsequent amendments were made to federal law. Given the conservative nature of Australia’s federal government there is little chance of such amendments being introduced.

³⁹⁶ VLRC, *supra* note 392 at para 4.35. Similar statements were made by the NZLC, “New Issues”, *supra* note 391 at paras. 6.67-6.73. The NZLC also noted that what was being proposed was no different than a child having multiple parental figures in their lives as a result of step-parenting, open adoption, or customary practices in Maori, Pacific Island and other cultures where extended families exist.

³⁹⁷ *Family Law Act* 1975 (Cth), s. 65C. Similar provisions are available in a number of provincial family law statutes in Canada.

child's life.³⁹⁸ Because the *Family Law Act* does not require a parenting order applicant to be a legal parent, donors could easily frustrate the intentions of a lesbian family through a section 65C application. While the VLRC expressed concern about this situation, because it could not recommend amendments to federal laws it was unable to suggest more appropriate provisions. The VLRC ultimately recommended that the most effective way to reduce the uncertainty in this area was through the provision of legal information, counselling, and advice to women and their donors.³⁹⁹

A growing body of academic literature addressing parentage in the context of assisted reproduction has also emerged in recent years and, while most of it continues to focus on the two parent heterosexual family, some commentators have considered the issue beyond this limited framework.⁴⁰⁰ Some of the earliest work in the field was undertaken in the United States by Nancy Polikoff and Paula Ettelbrick.⁴⁰¹ Both Polikoff and Ettelbrick argued for the recognition of non-biological lesbian mothers on the basis of contract principles as well as legislative presumptions based on the parties' mutual consent to parent together. Both Polikoff and Ettelbrick's work emerged in response to a number of legal decisions in which donors successfully sought access to their biological children. In an effort to counteract the

³⁹⁸ VLRC, "Assisted Reproductive Technology", *supra* note 392 at para. 4.26.

³⁹⁹ *Ibid.* at para. 4.29. The VLRC also noted that conflict with known donors would be reduced by ensuring women had access to anonymous donor sperm.

⁴⁰⁰ See, eg, Kate Harrison, "Fresh or Frozen: Lesbian Mothers, Sperm Donors and Limited Fathers" in Martha Albertson Fineman & Isabel Karpin, eds., *Mothers in Law: Feminist Theory and the Legal Recognition of Motherhood* (New York: Columbia University Press, 1995) 167-201; Janet Dolgin, *Defining the Family: Law, Technology, and Reproduction in an Uneasy Age* (New York: New York University Press, 1997) 183-212; Edwards, Gillies & Ribbens McCarthy, *supra* note 342 at 101-02; Alison Harvison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family" (1998) 6 *American Journal of Gender & Law* 505 at 518; Polikoff, "Redefining Parenthood", *supra* note 120.

⁴⁰¹ Polikoff, "Redefining Parenthood", *supra* note 120; Paula Ettelbrick, "Who is a Parent? The Need to Develop a Lesbian Conscious Family Law" (1993) 10 *N.Y.L. Sch. J. Hum. Rights* 513.

application in these cases of biological norms, it was argued that legislative presumptions based on intention were required.

While the contributions of Polikoff and Ettelbrick focused on protecting the single or two mother lesbian family, American legal academic Fred Bernstein argued in favour of an additional legal category: the “involved sperm donor with visitation”.⁴⁰² This category derived from Bernstein’s view that donors who are regularly involved in their children’s lives occupy a significant space between father and stranger that is worthy of some legal protection.⁴⁰³ Bernstein’s proposal involves providing protection, via a series of legal presumptions, to involved donors who have developed a healthy relationship with a child and who are subsequently barred from continuing that relationship by the child’s legal parents.⁴⁰⁴ Thus, Bernstein’s model is retrospective; it applies only when already established access is subsequently denied. The model includes three presumptions. First, that a known donor who currently exercises access with his child is deemed an “involved donor”. Second, absent unfitness, permitting an involved donor contact at a level that approximates his involvement in the child’s life prior to conflict is presumed to be in the child’s best interests. Third, permitting the involved donor access (or any other) rights beyond those that are already being exercised is presumed not to be in the child’s best interests.⁴⁰⁵ Bernstein argues that his model protects all of the parties involved:

⁴⁰² Fred Bernstein, “This Child Does Have Two Mothers...And a Sperm Donor with Visitation” (1996) 22(1) N.Y.U. Rev. L. & Soc. Change 1. Bernstein’s article was actually a response to an article written by Nancy Polikoff in which she recommended that the law incorporate parental presumptions in favour of non-birth mothers in situations of assisted conception. Polikoff, “Redefining Parenthood”, *supra* note 120.

⁴⁰³ Edwards et al have made similar arguments with regards to step parents. See Edwards, Gillies & Ribbens McCarthy, *supra* note 342 at 101.

⁴⁰⁴ Bernstein, *supra* note 402 at 52.

⁴⁰⁵ *Ibid.*

It reconciles the involved sperm donors' need to know that their relationships with their children will be preserved, lesbian mothers' need to know that the law will protect the families they create, and children's need to know that relationships with adults they have come to view as important – including relationships with biological progenitors – will be protected.⁴⁰⁶

While Bernstein's proposal is designed to apply in situations of conflict, there is no reason why the deeming provision could not be applied at birth so that the involved donor/child relationship can be legally established in the absence of conflict. The benefit of a model that applies at birth is that it requires parties to discuss access arrangements from the outset, arguably reducing the likelihood of later disagreement. It is also likely reinforce the important role intention plays in lesbian-headed families.

While not dealing specifically with donor recognition or lesbian parenting, Martha Fineman has also suggested a parentage model that allows for various opt-in relationships, including non-parental ones, that could extend the family beyond the two parent model.⁴⁰⁷ Fineman argues that the fundamental familial unit deserving of the protection of law is the nurturing unit of caregiver and dependent, exemplified by the mother/child dyad.⁴⁰⁸ Her choice of the mother/child dyad is based on her argument that this unit, because of its dependent nature, is inherently vulnerable.⁴⁰⁹ By drawing the family boundary around the mother/child dyad, Fineman demands that it, rather than the marital unit, attract the special and preferred

⁴⁰⁶ *Ibid.* at 6.

⁴⁰⁷ Martha Albertson Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (New York: Routledge, 1995).

⁴⁰⁸ *Ibid.* at 228. This conclusion is reinforced by her argument that legal supports for the sexual family, and marriage in particular, should be abolished.

⁴⁰⁹ Fineman does note, however, that the mother/child dyad is simply a metaphor and that "mothering" can be carried out by a person of either sex. *Ibid.* at 234.

treatment of the state.⁴¹⁰ Any additional familial arrangements, whether parental or not, would be secured through private contract.⁴¹¹ Thus, mothers would have the option of creating contractual relationships with conjugal partners or other adults that gave them some form of legal recognition within the family. Fineman's proposal is designed to maintain the integrity of, and draw attention to, the vulnerability of the mother/child unit, while simultaneously allowing for additional familial relationships to be legally recognized.⁴¹² Her proposal closely resembles the opt-in model, but with an emphasis on private contracting rather than a legislative regime.⁴¹³

While many of the pre-existing proposals deal with aspects of the combination model and have been very helpful in my thought process around drafting legal provisions, none of them have *combined* parental presumptions and opt-in procedures to create a comprehensive legislative model of parental recognition. In the next section I will propose such a model.

5.4.1 The proposed legislation

Drafting legislation is a difficult task, not least because of the challenge of turning complex concepts into clear, precise and succinct statements. More often than not, proposals undergo several incarnations. I therefore approached my own attempt at legislative drafting as a

⁴¹⁰ *Ibid.* at 231.

⁴¹¹ *Ibid.* at 229.

⁴¹² Alison Harvison Young has also suggested protecting the "core unit" of the family while simultaneously allowing for additional "supplementary roles". She suggests that "parents" or a "core unit" be identified in order to allocate support obligations, testamentary issues, and decision-making authority. However, this identification should not "preclude the development of supplementary roles which could be legally recognized and which could generate significant links and support systems for children." Harvison Young, *supra* note 399 at 518.

⁴¹³ Other commentators have also suggested that, because it gives effect to the intent of the parties, private contracting may provide a solution to the confusion created by the use of assisted reproductive technologies. See, eg, Marjorie Schulz, "Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality" (1990) Wis. L. Rev. 297 at 349; Dolgin, *supra* note 400 at 207-12.

starting point for what will inevitably be an ongoing discussion. In fact, my goal in drafting the legislation was primarily to highlight the issues that I think need to be contemplated by the law, based on what my narrators have told me. I also found that I could not incorporate some of my narrators' key points into a legislative framework. For example, while it was easy to translate into a legislative context my narrators' view that intention was fundamental to parenthood, giving legislative recognition to their belief that caregiving was also at the heart of what made someone a parent proved more difficult. Because legal parentage rules apply at the moment of birth, it was impossible to incorporate into them any consideration of caregiving patterns. No caregiving had actually been done.

The proposed legislation includes two parts. Part 1 deals with parental presumptions and applies to both heterosexual and same-sex couples, as well as individuals, who have conceived children through some form of alternative conception method. This Part applies specifically to the alternative conception context because of the need in such a situation to provide legislative (intention based) presumptions contrary to those based in biology. The first three sections of Part 1 focus on establishing a parental presumption in favour of the intending parent(s). This is done through the concept of a "parental project", which is introduced in section 1. Adapted from the *Civil Code of Quebec*,⁴¹⁴ the term "parental project" is used in the proposal to refer to a situation in which an individual or couple decide by mutual consent to conceive a child via alternative conception.⁴¹⁵ The "parental project"

⁴¹⁴ *Civil Code of Quebec*, *supra* note 74. The Quebec model was chosen as optimal because it did not automatically presume that all partners of the birth mother intended to be parents. Rather, it was only those who engaged in a "parental project" who would be caught by the provision. While you could argue that the "consent" requirement found in other existing models achieves the same goal, a partner may "consent" to the procedure (whether donor insemination or IVF) but may still not intend to parent. This is arguably what happened in the recent Alberta decision discussed in footnote 378, above.

⁴¹⁵ *Ibid.* at art. 538.

exists from the moment the decision to conceive a child through alternative conception is made, though legal parentage is not extended until the child is born.⁴¹⁶ While somewhat clinical, I chose to adopt the term "parental project" specifically because it did not resemble any pre-existing family law terminology.⁴¹⁷ It would therefore be clear that I was not invoking an already existing concept.

While the Quebec legislation does not specifically define the term "parental project", other than to state that such a project "exists from the moment a person alone decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project",⁴¹⁸ I felt it would be helpful to provide some legislative guidance as to the meaning of the term. Legislative guidance would help ensure that judges apply the legislation uniformly and in accordance with its purpose. Thus, in section 2 of the proposed legislation, decision-makers are provided with a non-exhaustive list of criteria that might indicate participation in a "parental project". The list includes whether the non-biological parent participated in pre-conception planning (including but not confined to the choosing of a donor of genetic material), was present during inseminations, attended pre-natal appointments, and was present at the child's birth.

Once it has been established that a parental project exists, the parental presumption contained in section 3 applies. Thus, in circumstances where a couple has agreed to participate in a "parental project", the partner of the woman who gives birth is presumed to be the child's

⁴¹⁶ Legal parentage is extended post-birth on the grounds that one cannot be a parent in the absence of an actual child. The focus on the post-birth period is also recommended to avoid the complications for abortion law of treating a foetus as a "child".

⁴¹⁷ Other than in Quebec, where the term is already used in the same context as I am applying it.

⁴¹⁸ *Civil Code of Quebec*, *supra* note 74 at art. 538.

legal parent. In the case of a single mother, the presumption applies solely to her. Thus, the effect of these sections is two fold. First, they give automatic parental status to couples who mutually agree to parent, whether they are biologically related to the child or not. Second, they allow single parents, as well as individuals who do not intend to parent with their conjugal partner, to achieve sole parental recognition in circumstances where they make it clear that the parental project is theirs alone. While sections 1-3 inevitably prioritize the conjugal couple (where one exists), the opt-in provisions in Part 2 ensure that a non-conjugal parent could also be granted legal recognition.

While sections 1-3 ensure that the intentions of non-biological parents are given legal force, section 4 permits the partner of a woman who gives birth to a child to *contest* the presumptive parentage of a child on the basis that the partner was not a party to a mutual parental project. This section is designed to protect those women (or men) who are partnered to the birth mother, but who do not intend to parent. Finally, section 5 extinguishes the parental rights, as well as any non-parental right of access, of a donor in relation to a child born via his or her genetic contribution, except in the narrow circumstances described in Part 2. This section is designed to sever any rights or responsibilities that donors might have in relation to children conceived using their donated contributions, and thus protect the intentional family.

Part 2 of the draft proposal addresses the opt-in procedures: how they will apply and what rights and responsibilities will flow from them. Part 2 applies to both heterosexual and same-sex couples and in situations where conception is achieved via intercourse or alternative

conception methods.⁴¹⁹ Section 7 permits an additional party to apply to opt in, with the consent of the legal parent(s), to the status of parent. Such an application must be made within one year of the child's birth and, if granted, extends all of the rights and responsibilities of parenthood to the third party. This section is designed to meet the needs of those families that include (from the outset) three or four actively involved parents. Section 8 permits an additional party to apply, with the consent of the legal parent(s), to opt in to the status of "non-parental adult caregiver". Absent unfitness, a non-parental adult caregiver will have a right of access to the extent determined, in writing, by the child's legal parent(s). Mirroring the donor agreement system in New Zealand's *Care of Children Act*,⁴²⁰ the written agreement will be registered alongside a successful opt in application and will be enforced, with the consent of the parties, as if it were a parenting order. An application to be a non-parental adult caregiver must be made within one year of the child's birth.⁴²¹ These provisions are designed to protect the rights of the parents, while still allowing for some role for a donor or other third parties providing that the parents give their consent. By requiring that access arrangements be put in writing, the provisions also force parents and non-parental adult caregivers to discuss their intentions at the outset. This will hopefully minimize future disagreement. Section 8(e) makes it clear that granting non-parental adult caregivers additional rights beyond those consented to by the parents is presumed not to be in a child's best interests. This provision is designed to deter a judge from presuming that because an adult shares a biological link with a child, or because a child does not have a male or female

⁴¹⁹ While it was necessary to address specifically the circumstances of assisted conception in Part 1 (primarily because of the need to create presumptions contrary to biology), couples who conceive using alternative conceptions methods do not require specialized provisions when it comes to applying the opt-in procedures.

⁴²⁰ *Care of Children Act*, *supra* note 388 at s. 41.

⁴²¹ An additional individual may become involved after the first year of the child's life and there may be some desire to have his/her role legally recognized. In the interest of certainty, both for the primary parents and the child, I decided that the one year window was appropriate.

parent, that it is in the child's best interests to have a relationship with an adult beyond what was consented to by the child's parent(s).

As noted above, the proposed legislation that follows is designed to highlight the issues that need to be contemplated by any future legislative regime, and serve as a starting point for further discussion.

PART 1: Parental presumptions

Section 1

A parental project involving assisted procreation exists from the moment a person alone decides, or spouses or common law partners by mutual consent decide, in order to have a child, to use for the purpose of conception the genetic material of a person who is not party to the parental project.

Section 2

(1) Subject to section 1, in determining whether a parental project exists between two parties, the court shall consider whether the spouse or common law partner of the woman who gave birth to the child:

- (a) participated in pre-conception planning, including but not confined to the choosing of a donor of genetic material;
- (b) was present during inseminations;
- (c) attended pre-natal appointments;

(d) was present at the child's birth.

(2) The failure of the partner of the woman who gave birth to the child to participate in any of the activities listed in sub-sections (a)-(d) is not conclusive evidence of the absence of a parental project.

Section 3

If a child is born of a parental project involving assisted procreation between two spouses during their marriage or common law relationship or within 300 days after its dissolution or annulment, the spouse or common law partner of the woman who gave birth to the child is presumed to be the child's parent.

Section 4

No person may contest the parentage of a child solely on the grounds of the child being born of a parental project involving assisted procreation. However, the spouse or common law partner of the woman who gave birth to the child may contest parentage if there was no mutual parental project or if it is established that the child was not born of the assisted procreation.

Section 5

The contribution of genetic material for the purposes of a parental project does not create a parental relationship between the contributor and the child born of the parental project or entitle the contributor to access with a child, except in the circumstances described in Part 2.

Section 6

For the purpose of this Part, a woman's common law partner is the person who, not being married to the woman, is cohabiting with her in a conjugal relationship of some permanence.

PART 2 – Opt in procedures

Section 7

Upon the birth of a child and with the consent of the legal parent or parents of that child, any person can apply to the court to opt in to the status of legal parent.

- (a) An application to opt in as a legal parent must be made within one year following the birth of a child.

Section 8

Upon the birth of a child and the consent of the legal parent or parents, any person can apply to the court to opt in to the status of non-parental adult caregiver.

- (a) An application to opt in as a non-parental adult caregiver must be made within one year of the child's birth.
- (b) Absent unfitness, a non-parental adult caregiver has a right of access at a level determined by the child's parent or parents.
- (c) Access agreements must be in writing and filed with the opt-in application.

(d) Access agreements will be enforced as if they were a parenting order relating to access.

(e) Absent unfitness, permitting a non-parental adult caregiver access at the level determined by the child's parent or parents is presumed to be in the child's best interests.

(f) Permitting a non-parental adult caregiver rights beyond those determined by the child's parent or parents is not presumed to be in the child's best interests.

(g) A non-parental adult caregiver shall have no child support liability unless otherwise agreed.

In addition to the provisions included above, subsequent amendments would need to be made to any legislation that addresses legal parentage, particularly laws which limit parental status to two legal parents. A number of other issues would also need to be clarified, such as whether and how opt-in parents or non-parental adult caregivers might appear on a child's birth certificate. In its discussion of third parent recognition, the VLRC suggested that the third parent's details be included in the "Notes" section of the Victorian birth certificate. Another alternative would be to create a parental registry in which additional parents register their status when their opt-in application is accepted. The child could then have his or her birth certificate reissued with the additional parents being listed as "registered parents". The same procedures could be applied to non-parental adult caregivers.

5.5 Conclusion

Recognition of the lesbian family requires a creativity that has rarely been evident in law reform efforts to date. The approach that has tended to prevail – tinkering with the pre-existing framework and then requiring lesbian families to mould themselves to it – provides little more than a band-aid solution. This is not to say that these efforts have had no impact. To the contrary, they have radically changed the legal circumstances within which lesbian mothers parent. Lesbian mothers today experience a level of family security that could have barely been imagined two decades ago. Unfortunately, however, the reforms that have occurred have done little to challenge the traditional ideological assumptions underlying the legal family. For example, reforms such as the introduction of second-parent adoption have simply added a same-sex twist to the conjugal, two-parent unit. While this might be sufficient for some lesbian families, the vast majority of the mothers I spoke to demanded a more flexible system, whether their own families resembled the traditional model or not.

Recognizing the lesbian family in all its diversity thus requires a significant rethinking of legal parenthood. The usual signifiers of parenthood – biology and/or adult relationship status – are simply insufficient in the lesbian context. Many of the mothers suggested that these rules are increasingly problematic in the heterosexual context as well, particularly in families where conception is achieved via a method other than intercourse. What is needed is an approach that recognizes that while the two parent conjugal model continues to be popular, many lesbian families also include additional individuals who play a significant role in the child's life. The lesbian family thus demands a variety of legislative provisions that derive from both formal and substantive equality strategies: presumptive forms of

recognition for the conjugal couple, as well as more flexible opt in provisions for multiple parent families, all of which flow from the intentions of the parties involved. The combination model – capable of protecting lesbian mothers at the same time that it opens up the family to include multiple parents and non-parental adult figures – appears to be the model most suited to this task. It incorporates flexibility through its opt-in procedures, while maintaining the security of the mother or mothers through automatic legal presumptions based on the existence of a parental project. It also translates easily into a heterosexual context and, most importantly, has the potential to change the way we think about legal parenthood.

6 CONCLUSION

6.1 Introduction

As I sat down to write the final chapter of this dissertation, I marked the five year anniversary of the death of the little boy who inspired it. On 11th September 2007, Patrick would have turned eight years old. As I explained in Chapter 3, while working on the *Re Patrick* case, I saw first hand the potentially tragic effects of the failure of law to respond to the needs of the ever increasing population of lesbian-headed families with children. I am pleased to see that five years later, the government of the state of Victoria, Australia has responded to the *Re Patrick* case, and is considering a new legislative regime designed specifically to address the needs of parents, particularly lesbian and gay parents, who conceive using alternative conception methods. If passed into law, the reform proposals will represent one of the most progressive and inclusive systems of parental recognition in the world. While Canada has not suffered a tragedy of the magnitude of *Re Patrick*, lesbian mothers in Canada are no less deserving of government attention. For too long, lesbian mothers have been forced to take their legal concerns to the nation's courts, while provincial legislatures have done little to meet their needs. In fact, the failure of most provincial legislatures to review their parentage provisions, even as same-sex families have been granted increasing levels of recognition outside of the parental context, has created a number of legal incongruities. For example, while same-sex couples can now marry, children born into a same-sex marriage still share no automatic legal relationship with their non-biological mother.⁴²² Parenting laws thus need to

⁴²² The one exception to this is the province of Quebec, where parties to a "parental project", whether married or not, are deemed to be the child's legal parents. As noted earlier, following the legalization of same-sex marriage, section 2(1) of the federal *Divorce Act*, S.C., 1985, c.3 (2nd Supp), was amended so that such a child could be considered a "child of the marriage". However, this does not make the non-biological mother a legal parent. The question of legal parentage is dealt with under provincial law, and most provinces continue to bar non-

catch up with legislative reform in other areas, and pressure needs to be put on provincial governments to act.

While legislative reform is an important next step for lesbian families in Canada, it should not proceed without careful consideration of their diverse and complex needs. As my narrators argued, it is not sufficient to simply map the existing legal framework on to lesbian families, as formal equality is likely to do. Such an approach will only lead to exclusions. Instead, reform must be grounded in the kind of qualitative empirical research contained within this dissertation. Ultimately, what might be needed are a series of provincial government committees that are directed to facilitate public consultations on same-sex parenting, consider the research that already exists, and commission additional research on parenting issues that have not yet been adequately explored. A reform process that does not engage with the lesbian parenting community and those who study it is unlikely to capture the diversity of needs, or the complexity of the family relationships, that exist.

In this chapter, I summarize my key research findings, highlighting in particular what my narrators had to say about the strategies for reform they prefer, and the nature of the legal change they recommend. Second, I briefly revisit the question of what role law is capable of playing in the process of progressive social transformation. In revisiting this question at the end of the dissertation, I hope to inject into the debate the voices of my narrators, whose refusal to engage with law uncritically demonstrated a remarkably sophisticated

biological mothers from automatic legal parentage. That they are married to the biological mother is not legislatively relevant.

understanding of law's complexity. Finally, I conclude by considering what I have learned from this project and what additional work still needs to be done.

6.2 Key findings: recognizing the plural family

While lesbian mothers in most Canadian provinces have access to at least some form of parental recognition, as I explained in Chapter One, the existing provincial laws are incomplete. While the frameworks vary from province to province, none of the existing legislative regimes, with the possible exception of Quebec, adequately recognize non-biological mothers or resolve the legal status of known donors. Furthermore, no province allows for the recognition of more than two legal parents, though three parent families living in Ontario may be able to convince a court that their relationships are akin to those of the parties in *A.A. v B.B.*⁴²³ The lack of uniformity between the provinces (the jurisdictional level at which "parentage" is primarily defined), means that the options for legal recognition available to lesbian mothers vary across the country.

Over the past fifteen years, lesbian mothers have responded to the inadequacy of the existing legislative frameworks by initiating court-based equality challenges under the *Charter* or provincial human rights codes. Relying primarily on formal equality or "sameness" arguments, they have tended to argue that lesbian relationships and families exhibit all of the same qualities and characteristics as their heterosexual counterparts and should therefore be entitled to equal treatment. Through these challenges, lesbian mothers have secured same-sex second-parent adoptions and, in some provinces, gender-neutral birth certificates.

⁴²³ *A.A. v B.B.*, *supra* note 76.

While both second-parent adoption and the new birth certificates were enormous legal victories for lesbian mothers, it is important to consider the terms upon which these victories were won. Rather than arguing for legal recognition *despite their differences*, lesbian mothers who have gone to court have typically sought recognition on the basis of a fairly conservative notion of "sameness". As discussed in Chapter 3, their affidavits have tended to highlight, no doubt for strategic reasons, the very traditional nature of their intimate relationships, the strictly nuclear structure of their families, and social science evidence that compares the gender and sexual development of their children with that of children raised by heterosexual parents.⁴²⁴ A critique of this approach has developed in the context of lesbian and gay relationship recognition, particularly same-sex marriage, because of its tendency to reinforce existing hierarchies and intensify the marginalization of those relationships and families, queer or otherwise, that exist outside of the dominant framework.⁴²⁵ Those who have made this critique have also argued that because a formal equality strategy tends to reify existing norms, possibilities outside of the traditional normative dyadic model – such as a three parent family or non-conjugal parenting partners – become even less intelligible.⁴²⁶

While the critique of a formal equality strategy can certainly be applied to the parenting cases, I suggested in Chapter Two that the argument is somewhat less compelling outside of the relationship recognition context. The most obvious distinction between the two areas of the law is the presence in the parenting scenario of a vulnerable third party – a child – whose

⁴²⁴ See, eg, *Re K*, *supra* note 73; *Gill*, *supra* note 9; *M.D.R.*, *supra* note 74.

⁴²⁵ See, eg, Boyd & Young, "Same-Sex", *supra* note 108 at 763-65; Boyd, "Outlaw to Inlaw", *supra* note 108; Young & Boyd, "Losing", *supra* note 165; Butler, *supra* note 108; Robson, "Lesbian (Out)law", *supra* note 96; Shapiro, *supra* note 108; Phelan, *supra* note 108; Herman, *supra* note 108.

⁴²⁶ See, eg, Butler, *supra* note 108.

protection and security rests on the law recognizing the adults (whether one, two, or more) who actually parent them. For example, a non-biological parent who has no legally recognized relationship with her child cannot consent to the child's medical treatment, enroll her in school, or take her across an international border. These limitations obviously put the child in an extremely vulnerable position. The people who parent her may actually be prohibited from performing the very responsibilities that enable parenting. It can thus be argued that the stakes are higher in the parenting context and that a pragmatic approach, such as resort to an otherwise problematic formal equality strategy, might be more easily *justified*. A second concern with the critique of formal equality in the parenting context is that the alternative to it, perhaps a more expansive multiple-parent approach, is extremely risky for lesbian mothers given the enormous influence of fathers' rights rhetoric in Canadian family law.⁴²⁷ By embracing a more expansive concept of "family" that extends beyond the nuclear model, lesbians arguably run the risk of having "fathers" imposed upon them.⁴²⁸

By raising these issues I do not intend to suggest that a "sameness" approach to parental recognition is not problematic, or that formal equality is the only way by which lesbian mothers can achieve legal protection. Rather, the goal was to highlight the reasons why a complete rejection of a formal equality strategy may be more difficult to sustain in the parenting context. A certain pragmatism may be necessary to ensure that lesbian mothers and their children enjoy a satisfactory degree of legal stability. Thus, what might ultimately be needed are critical strategies that move beyond an either/or framing of the issue. For

⁴²⁷ Boyd, "Demonizing Mothers", *supra* note 55; Boyd & Young, "Influences", *supra* note 55.

⁴²⁸ Kelly, "Nuclear Norms", *supra* note 80; Kelly, "In Search of a Father: Sperm Donors, Lesbian-headed Families, and the *Re Patrick* Case" in Heather Grace Jones & Dr. Maggie Kirkman, eds., *Sperm Wars: The Rights and Wrongs of Reproduction* (Sydney: ABC Books, 2005) 252.

example, strategies that focus not only on achieving equality, but also on expanding the concepts of "parenthood" and "family" to include a *plurality* of relationships.⁴²⁹

Given that the debate about the merits of applying a formal equality strategy was heard most frequently (though not exclusively) within academic circles,⁴³⁰ one of the key issues I wanted to investigate was the extent to which the debate was present within the planned lesbian parenting community itself. In other words, were lesbian mothers also troubled by the social and political implications of presenting themselves as indistinguishable from the heterosexual norm and in what ways, if any, did they resist this traditional positioning of their families. What I found was a fairly uniform rejection of a purely formal equality approach, both in philosophy and sometimes in practice. In fact, while about two thirds of my narrators parented within a primarily nuclear structure,⁴³¹ few argued for its preservation as the exclusive form of family. Rather, the vast majority advocated for the expansion of the concept of "family", which necessarily incorporated a broad definition of "parent". A significant portion of them, already lived their lives in this manner. Interestingly, some of the mothers felt that a broader understanding of family would benefit not just lesbians but society in general. It would help diminish the stigma attached to non-nuclear forms of parenting, such as single mothering, and would also contribute to the validation of the diverse parenting practices found within some Aboriginal and other racialized communities.

⁴²⁹ Weeks, Heaphy & Donovan, *supra* note 250.

⁴³⁰ One of the most critical voices from within the lesbian and gay community came from the community newspaper *Xtra!*, distributed in Toronto (*Xtra!*), Vancouver (*Xtra West!*) and Ottawa (*Capital Xtra!*). Though not universally critical, a significant number of *Xtra!* articles and editorials questioned the assimilationist nature of the marriage campaign. See, eg, Tom Warner, "Simply Yes, Yes, Yes and No: What the Supreme Court Should Have Said", *Xtra!* (9 December 2004); Susan Thompson, "Unhappy Union of Marriage and Queerness, *Capital Xtra!* (11 March 2004). Online: <<http://archives.xtra.ca/Story.aspx?s=3127164&k=same-sex+marriage>>.

⁴³¹ Some of these "nuclear" families were actually reconstituted families that included step-parents, while others included known donors who played a limited role in their children's lives.

The mothers' questioning of traditional norms, and ultimately of a "sameness" strategy, emerged in a number of additional contexts. First, despite the increased legal recognition of the lesbian nuclear family in recent years, the vast majority of the mothers continued to define their families, sometimes quite self-consciously, through the concept of "chosen family".⁴³² This was quite striking given that the notion of "chosen family" emerged within the lesbian and gay communities at a time when there was very little legal, institutional, or social recognition of same-sex families. That the mothers continued to invoke "families of choice", even in circumstances where a significant degree of assimilation within more traditional family configurations was possible, is indicative of the mother's ongoing pattern of resistance. The "families of choice" the mothers described included former partners, lesbian and gay "aunts" and "uncles", involved known donors, and roommates who shared caregiving and domestic labour. A number of mothers also indicated that they were open to communal parenting as well as families that included multiple adults who were sexually intimate.

The mothers' resistance to traditional norms was further illustrated by the widely, though not uniformly, held belief that the law should be capable of recognizing a three or four parent family (or a two parent non-conjugal family in the case of a single lesbian mother) if that was what the parties had agreed to prior to conception.⁴³³ The mothers felt that the legal recognition of multiple parent families in situations where the parties had agreed to such an

⁴³² The concept "chosen family" derives from Kath Weston's research with lesbians and gay men living in the United States in the 1980s. Weston, *supra* note 3.

⁴³³ The mothers were only willing to support a multiple parent model if inclusion of a third party was permitted only in the event of the primary parents' (two mothers or a single lesbian mother) consent.

arrangement would not only respond to existing practice, but might also help expose the challenges, particularly for women, of parenting within a nuclear model. For example, one mother argued that if more than two individuals could be granted legal recognition as parents it might challenge the assumption that two parents should be able to provide everything that is necessary to raise a child. That said, the mothers *were* nervous that extending the family outside of the two parent norm might encourage courts to "find fathers" for lesbian families. However, by limiting third party involvement to situations in which the primary parent(s) (two lesbian mothers or a single lesbian mother) have provided their consent they felt reasonably confident that their rights would be protected.

The final example of the mothers' resistance to traditional norms, and arguably formal equality, was their dismissal of any particularly positive connection between marriage and parenting. In fact, while almost all expressed deep concern that their parental relationships be legally recognized, the majority dismissed legal marriage as something they were "not interested in".⁴³⁴ This severing of the traditionally positive link between becoming a parent and being married was somewhat unexpected given the frequency with which proponents of same-sex marriage have used the fact that lesbian and gay men are now parenting to support their legal claims.⁴³⁵

⁴³⁴ Same-sex couples were permitted to marry in both B.C. and Alberta at the time I conducted the interviews. Nine of the mothers I spoke to were married and only two others had any intention of getting married. This was despite the fact that most of the women had been in a relationship with their same-sex partner for over a decade. Of those who were married, only three made a link between their desire to marry and a sense of it being important for their children and parenting relationships.

⁴³⁵ See, eg, *Halpern* factum, *supra* note 148 at paras. 23, 27, 89.

Given the mothers' skepticism about traditional familial norms, it is perhaps not surprising that when it came to the primary focus of the study – their definitions and understandings of "parenthood" – they continued to complicate the normative model. With almost complete uniformity they retreated from the biogenetic construction of parenthood that tends to dominate Canadian family law,⁴³⁶ and in its place asserted an understanding of parenthood that derives from a combination of intention and caregiving. As they explained, parents were the individuals who intended to parent, evidenced through a commitment to the process of conception and birth.⁴³⁷ Once the child was born intention became performative; that is, parents performed their intention through active caregiving. While biological relationships were never completely displaced, the meaning attributed to a biological connection was diminished in the absence of a significant caregiving relationship. In turn, a substantial caregiving relationship overcame the need for a biological connection.

The mothers' discussions of parental definitions crystallized around two related issues: the status of non-biological mothers and of known sperm donors. Given their emphasis on intention and caregiving as the primary indicators of parental identity, the mothers gave little weight to the fact that a non-biological mother did not share a biogenetic connection with her child. Rather, they argued that such a woman was a "parent" because she participated in the planning and conception of a child and then, subsequent to birth, played an active role in

⁴³⁶ While the biogenetic construction of parenthood continues to dominate Canadian family law, the courts have not been completely unwilling to recognize social parents. For a discussion of these trends see: Boyd, "Gendering", *supra* note 227.

⁴³⁷ The mothers' definitions were, of course, reflective of their own experiences of motherhood. For example, by arguing that a commitment to conception and birth were evidence of intention they were necessarily focused on women who become parents through some biological process. Evidence of intention would obviously be different in an adoption context. The fact that the mothers I spoke to focused on conception and birth was obviously a product of having constructed a sample that excluded women who became mothers outside through adoption or fostering.

caregiving. Several of the narrators extended this logic to apply to biological mothers, arguing that the biological relationships these women shared with their children were only given meaning because they also had a social relationship with them. In other words, because parents were understood to be the people who did the work of parenting, both non-biological *and* biological mothers were awarded parental status on the basis of their active involvement in the daily care of their children. This final point helps explain why known sperm donors were rarely understood in a parental light. Because donors were generally not intended to be "parents" and almost never played a significant caregiving role in their children's lives, they were usually understood outside of the parental context. Many were seen as "symbolic fathers" or "special uncles". However, in the few instances that donors did take on a significant caregiving role the mothers extended to them parental status. They were generally understood as additional "co-parents" who shared in the labour of child-rearing.

Because parenthood was understood through a combination of intention and caregiving the mothers did not automatically draw the boundaries of "family" around the (biological) nuclear unit. If additional individuals, by way of an agreement with a lesbian couple or a single lesbian mother, intended to parent and were performing that intention through regular caregiving, many of the mothers felt that some form of legal status should ensue. They were careful to note that legal recognition should be granted only with the consent of the primary parent(s). However, in the event of mutual agreement, the vast majority of the mothers felt that a three or four parent family should be legally possible. In addition, many of these women supported the legal recognition of some diminished non-parental status – perhaps that of an "involved known donor" – in circumstances where the primary parent(s) had consented

to such an arrangement.⁴³⁸ The rights associated with this status would generally be limited to prescribed access. The mothers who supported these proposals felt that the legal recognition of these additional parental and non-parental relationships not only reflected their intentions and caregiving practices, but also protected the relationships their children developed with significant adults in their lives. Interestingly, a number of the mothers noted that had the law provided these additional recognition mechanisms and their associated protections, they might have chosen a known donor.⁴³⁹

Given the priority the mothers attributed to self-definition within the family, it is not surprising that the parental recognition model they ultimately favoured prioritized intention above all else. This was achieved by combining parental presumptions grounded in the shared intentions of a couple (or the intention of an individual), with opt-in mechanisms that allowed the primary parents to expand their family beyond the two parent model in the event of an additional intention to do so. This approach was favoured by the mothers for three reasons. First, it was seen to protect the two-mother, or single mother family, as the presumptive parental unit. By providing immediate, presumptive and exclusive recognition of both mothers as parents, it gave legal weight to their joint intention to parent together. In the situation of a single lesbian mother, it protected her intention to parent alone. At the same time, because it was an intention-based model it did not confer parental status on individuals in circumstances where the intention to parent did not exist. The second reason the mothers supported the model was that it did not draw the line of “family” around the nuclear unit.

Rather, multiple constructions of family were made possible if the primary parents intended

⁴³⁸ This arrangement was actually much more common amongst my narrators than a three or four parent family.

⁴³⁹ Of course, there is always a possibility that the best interests of the child principle or a court's *parens patriae* jurisdiction might be used to subvert the “protections” of legislation.

to incorporate additional individuals within the family unit. Finally, the model was understood by the mothers to provide much needed clarification of the status of known donors. The presumptive and opt-in provisions read together made it clear that a donor was only a parent if there was a shared intention (that is, both mother(s) and the donor has agreed to it)⁴⁴⁰ that the donor could opt-in. Thus while the provisions created a legal framework by which donor relationships could be legally recognized, they also protected mothers from unplanned donor involvement.

In choosing a model for reform that protects the intentional nuclear family while simultaneously allowing for an expansion of it, the mothers arguably addressed critically the either/or dilemma first raised in Chapter Two. Noting the enormous practical benefits that equal treatment can provide the lesbian nuclear family, the mothers refused to completely reject formal equality as a legal strategy. At the same time, they acknowledged its limitations by simultaneously demanding more. By suggesting that recognition of their difference was as important as recognition of their sameness, they made it clear that they did not wish to be merely assimilated into the existing legal and social framework.

6.3 Law and (progressive) social transformation

In Chapters One and Two, I raised the question of whether legal change, particularly when achieved through the courts on the basis of formal equality, can realistically be expected to effect progressive social change for lesbian mothers.⁴⁴¹ In other words, what are the strengths and weaknesses of using law (and litigation in particular) as a tool for positive social

⁴⁴⁰ As was the case in *A.A. v B.B.*, *supra* note 76.

⁴⁴¹ Progressive social change for lesbian mothers would arguably have a roll on effect for other groups in society whose families exist outside of the normative framework.

transformation. "Positive social transformation" can, of course, mean different things for different people. In the context of my own research, I understand it to refer to two related factors. First, progressive social transformation for lesbian mothers would involve a significant increase in the levels of social acceptance experienced by lesbian families with children. Acceptance would extend beyond the law itself to incorporate public and private institutions such as schools, hospitals, community organizations, parenting groups, sporting associations, and the media, as well as ordinary members of the general public who simply encounter lesbian mothers in the course of their daily lives. Acceptance would be measured not by the degree to which individuals and institutions comply with the law, but rather the extent to which they embrace and validate the relationships between lesbian mothers and their children.

Second, and significantly more ambitious, progressive social change for lesbian mothers would involve a fundamental shift in the ideological paradigm through which both "family" and "parenthood" are understood. In other words, the legal recognition of lesbian motherhood, and the debates that would necessarily accompany it, would become a catalyst for the rethinking of family relationships more generally. For example, extending parental status to non-biological lesbian mothers on the basis of their intention and caregiving may challenge wider society to rethink the assumption that parental rights should always stem from a biological relationship. Treating donors as "parents" only in circumstances where the parties have agreed to such an arrangement and the donor is involved in caregiving is likely to encourage similar debates. By introducing the prospect of three or four parent families, the legal recognition of lesbian motherhood may also produce new societal narratives about the

permissible boundaries of the family unit. For example, the presence of three or four parent queer families may encourage heterosexuals to rethink the units around which they erect their "family" boundaries.

Some scholars have questioned the ability of law, particularly judicial decision-making, to elicit either of the types of social change I have described. Drawing on this literature, I argued in Chapter One that while law is often regarded by marginalized groups as a key site of social struggle, several factors inhibit its capacity to contribute to progressive social change. First, as critical scholars such as Michel Foucault have argued, because law is not the sole site of social power, a singular pursuit of legal strategies is unlikely to completely transform existing relations of power.⁴⁴² For example, while a lesbian non-biological mother might secure legal parental status via a second parent adoption, she may still experience discrimination at the hands of public institutions, such as schools or hospitals, who view her status as secondary to that of the biological mother. In fact, a number of the non-biological mothers interviewed told stories of teachers who asked them which woman was the "real mother", directed all of their attention to the biological mother, and sought information about the child's "father". In all of these cases, the non-biological mother was one of the child's legal parents. These stories point to the presence of non-legal sites of regulatory power that continue to impact negatively on lesbian mothers even in situations where they have obtained legal recognition as parents.

⁴⁴² Gordon, *supra* note 87; Smart, "Power of Law", *supra* note 92. It should be noted that Foucault and Smart take different positions on the relative power of law in society. Foucault argues that law is a diminishing site of power, while Smart argues that in some areas of society, such as human reproduction, legal regulation is increasing.

Law's inbuilt conservative tendency, particularly in the family arena, also limits its ability to produce progressive social transformation. The conservative nature of law is the product of a number of factors. First, the role of precedent in the positivist common law tradition means that case law tends to be backward looking. As Naffine explains, "[the doctrine of precedent] means that like cases are treated alike; judicial decisions are made by reference to previous judicial decisions in analogous cases; the present is bound by the past".⁴⁴³ Thus, incorporated within legal-decision making and adjudication is a preference for the status quo. Naffine does go on to argue that *in practice* the doctrine of precedent can be fairly flexible: only a small part (the *ratio decidendi*) of each judgment is binding on subsequent decision-makers, the *ratio* can often be interpreted in multiple ways, and judges can limit the effect of previous decisions that they consider "unsound" by interpreting their *ratios* narrowly. Thus, precedent does not always prevent judges from breaking new ground.⁴⁴⁴ However, it does place significant limitations on what can be achieved through litigation and certainly encourages the re-assertion of the (typically conservative) normative position. In the context of the family, the normative position tends to prioritize the hetero-normative, two-parent, biological family.

The second factor contributing to law's conservatism is the inextricable and mutually perpetuating link between law and ideology, which means that law is both constrained by and reproduces dominant "social values": ideas, beliefs and practices which are treated as natural,

⁴⁴³ Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Sydney: Allen & Unwin, 1990) at 36.

⁴⁴⁴ *Ibid.* at 38. The situation in which new ground is most likely to be broken is when a judge is presented with a new fact scenario that is not yet the subject of legal deliberation. While decision-making in this context is still limited by whatever precedent can be found, the absence of any directly related jurisprudence provides judges with a certain degree of discretion. Cases dealing with lesbian and gay (or other forms of alternative) parenthood, such as *A.A. v B.B.*, provide some of the best examples of this gap in the system of precedent.

inevitable and necessary to the proper functioning of society.⁴⁴⁵ In the context of lesbian parenting, the importance of analyzing law as ideology is perhaps best illustrated by considering how law articulates "the family". As Gavigan explains:

"The family" is presented in law...as the basic unit in society, a sacred, timeless and so natural an institution that its definition is self-evident. Its privacy is sought to be protected and its sanctity proclaimed. That it is the fittest place to raise children is again so self-evident as to not merit question, and the hold of the family is strong despite the knowledge that large numbers of individuals live in households which bear no resemblance to the ideal family.⁴⁴⁶

The "common sense" nature of law's understanding of the family makes the detection of law's ideological content and prejudicial effect a somewhat difficult task. In fact, as Gavigan notes, looking for blatant manifestations of discrimination will rarely expose the role of ideology in law.⁴⁴⁷ Such an approach tends to miss "the subtle processes" by which legal doctrine and judicial interpretation and decision-making reproduce and reinforce traditional (biological and hetero-sexist) norms.⁴⁴⁸ The subtlety of the relationship between law and ideology makes it very difficult for lesbian mothers to tackle with any specificity the nature of their exclusion, particularly in situations where the law-as-legislation appears to be in their favour.

Despite the complex and often complicated relationship between law reform and progressive social change, marginalized groups such as lesbian mothers rarely have the luxury of giving up on law altogether. As demonstrated throughout this dissertation, lesbian mothers and their

⁴⁴⁵ Roger Cotterrell, *The Sociology of Law: An Introduction* (London: Butterworths, 1984) at 121-12.

⁴⁴⁶ Shelley Gavigan, "Law, Gender & Ideology" in Anne Bayefsky, ed., *Legal Theory Meets Legal Practice* (Edmonton: Academic Printers and Publishing, 1988) 283 at 293.

⁴⁴⁷ *Ibid.* at 293-4.

⁴⁴⁸ *Ibid.* at 293.

children continue to experience the very real harm of existing outside of the current legal framework. Thus, engaging with law in order to secure some of its practical benefits is arguably a necessity,⁴⁴⁹ even if legal change makes only a limited contribution to progressive social transformation. In fact, as Patricia Williams argues in the rights context, the suggestion that law is of limited utility because it simply reinforces existing norms could be understood to trivialize the experience of any group whose vulnerability has actually been protected by law.⁴⁵⁰ Law therefore remains an important strategic tool and site of affirmation for lesbian mothers. The question that remains is *how* they might engage with law so as to increase the possibility of progressive social transformation, and minimize law's assimilationist tendencies. The type of law with which the mothers engage – case law or legislation – may also be significant.

6.4 Positive engagement with law

As noted in Chapter 5, many of the mothers approached law cautiously, alert to its deficiencies. In fact, while a number spoke positively of the "legitimacy" and practical benefits legal recognition of their families offered, few understood legal engagement – particularly with the courts – as *solely* positive. The mothers cited a number of reasons for their position, the majority of which focused on litigation and judicial decision-makers. First, many of the mothers were distrustful of the legal system and those who administered it. Somewhat echoing the argument made above about the relationship between law and ideology, the mothers felt that the law and those who interpreted it embodied a certain set of

⁴⁴⁹ For lesbian mothers, the practical benefits that come with being recognized as a legal parent include the ability of non-biological mothers to consent to medical treatment and enrol their children in school.

⁴⁵⁰ For example, I imagine that my narrators would have been deeply offended if I had suggested that their quest for legal status is of limited value because it may not produce significant social change. Williams, *supra* note 93 at 152.

norms that meant that even in situations where lesbian mothers were legally protected the law would not always be applied in a way that would honour or respect their families. Second, as discussed in Part 1 of this Chapter, many of the mothers viewed the current approach to law reform – a court-based strategy grounded largely in formal equality – as assimilationist and incapable on its own of creating any real understanding or acceptance of their families within wider society. They were particularly skeptical of law reform efforts that simply mapped their families on to the current framework. Finally, a significant portion of the mothers felt that reform – even legislative reform – of the current parenting laws would not, in itself, produce significant or immediate progressive social change. In fact, many of the mothers expected acceptance and understanding to take time and that for many members of the public it would not be until they had some direct contact with same-sex families that their attitudes might begin to change. The vast majority of the mothers therefore felt reluctant to put all of their hope, time, and resources into law.

While most of the mothers made at least some reference to law's limitations, most had engaged with law in one way or another and they universally favoured further law reform. Not surprisingly, given their reservations about the courts and judges, the mothers spoke particularly favourably about legislative reform. Thus, despite their reservations, law was understood as a necessity and, even, of some positive value. It extended practical benefits and provided the mothers with a sense of family security. For those mothers who had parented during times of minimal legal recognition the enabling power of law was particularly well understood. Because they had experienced what it was like to have no legal

status, this particular group of mothers could see with the greatest clarity the benefits the new forms of recognition could provide.

What most of the mothers refused to do, however, was to engage with law uncritically. This finding is worthy of attention, not only because it suggests that many lesbian mothers are cognizant of the limitations of law as a tool for progressive change, but also because it suggests that the lesbian and gay voices that are often heard in the courts are neither fully representative nor universal.⁴⁵¹ In fact, unlike so many of those who have participated in the marriage and parenting litigation, most of the mothers I interviewed refused to accept that their entitlement to legal recognition rested on the extent to which their families reflected traditional norms.⁴⁵² Rather, most of the mothers understood their entitlement to derive from society's obligation to reflect family diversity. When one looks at the legislative proposals ultimately favoured by the mothers, there is further evidence of this critical edge. Severely diminishing the significance of the biological, two-parent family, the reform model the mothers chose purports to alter some of family law's most entrenched norms. While the introduction of such a legislative model may not produce immediate social change (and may even result in backlash), its contribution to the gradual fracturing of the ideological framework within which the existing law operates, may be a first step towards greater social acceptance of both lesbian families and alternative families more generally.

⁴⁵¹ For example, the voices of the marriage case litigants as well as the opinions expressed in the public statements of groups such as EGALE and Canadians for Equal Marriage

⁴⁵² Though as noted in Chapter 2, some of the litigants may not have actually endorsed a "sameness" approach outside of the courtroom. Rather, engagement with law may have led them to make strategic decisions contrary to their own political beliefs.

The critical edge demonstrated by many of the mothers I spoke to was, of course, enabled by the context in which the conversations took place. In talking to me they enjoyed the rather utopian possibility of being able to ask for exactly what they wanted. They did not need to grapple with courtroom strategy, the trends within s. 15 equality rights jurisprudence, or the conservative media. Rather, they were able to imagine freely and what they imagined is revealing. The mothers did not start from a position of formal equality or an idealized vision of what family life should look like. Rather, they identified their own "family practices"⁴⁵³ and worked backwards.⁴⁵⁴ They argued that their families, like many of those headed by heterosexuals, come in diverse forms and that *diversity* should be the value that underlies family recognition. Thus, rather than seeking to equate their families with existing conceptions, they demanded that the concept of "family" be rethought.

Rethinking "family" is not an easy task, and some portions of Canadian society will undoubtedly attack the reform model that I have developed (based on the suggestions of the mothers) for its lack of "real world" practicality. While similar proposals were actually recommended in a 2005 discussion paper published by the Victorian Law Reform Commission in Victoria, Australia, the prospect of three or four parent families is still likely to be beyond the comprehension and/or comfort zone of many Canadians.⁴⁵⁵ Whether the mothers' proposals are understood as realistic or utopian, what is important is that they illustrate a critical engagement with law that has the potential to maximize the possibility of

⁴⁵³ Morgan describes "family practices" as practices that are "to do with those relationships and activities that are constructed as being to do with family matters." David Morgan, *Family Connections: An Introduction to Family Studies* (Oxford: Polity Press, 1996) at 192.

⁴⁵⁴ Alison Diduck has explained this difference between an idealized norm and actual family practice as the difference between "families we live *by*" and the "families we live *with*". Diduck suggests that people are always and simultaneously a part of both kinds of family. Alison Diduck, *Law's Families* (London: LexisNexis UK, 2003) at 20.

⁴⁵⁵ VLRC, "Assisted Reproductive Technology", *supra* note 392.

progressive social transformation. In the wake of the same-sex marriage debate, it is perhaps exactly the kind of approach to legal engagement needed by the lesbian and gay communities of Canada.

6.5 Moving forward

From the first successful second-parent adoption case in 1995, to the recent three parent decision in 2007, many courageous lesbian mothers in Canada have been willing to subject their families to judicial scrutiny in the hope that their parental relationships might be recognized. Significant legal victories have been won through the litigation process, and many lesbian-headed families have benefited from favourable judicial decisions. In fact, recent cases, such as the three parent decision of *A.A. v B.B.*, suggest that at least some judges are willing to go to significant lengths to lend legal support to lesbian-headed families. What I have learned from my narrators, however, is that the time has come for a new legal strategy. While litigation has served lesbian mothers well in the past, it cannot produce the broader conceptual changes that this research supports. The solution is thus likely to lie in the legislative process. Unconstrained by the existing legal framework or precedent, the statutory reform process provides an environment in which creative responses are more likely enabled; new conceptual frameworks can be debated, experts and their research can be consulted, and multiple voices can be heard.

Generating legislative change is not a simple or straightforward task. While court action can be initiated by individuals, legislative reform requires extensive campaigning, public education and support and, ultimately, government agreement. Lesbian mothers might

therefore need to take a two pronged approach. First, they will need to garner the support of already existing advocacy groups who might have the resources, political connections, and media savvy that are often necessary to run a successful reform campaign. The most obvious organization from which to seek support is EGALE, though as noted on several occasions throughout this dissertation, EGALE has sometimes taken quite a conservative stance with regard to “the family”. With the backing of a well known, and increasingly well respected, organization such as EGALE, lesbian mothers might be able to generate the kind of public and government interest that a successful reform campaign requires. In fact, now that the same-sex marriage debate has concluded, EGALE is likely to be looking to launch its next campaign. Given the organization’s recent focus on queer family issues, the legal recognition of parenting relationships seems like an appropriate choice.

While lesbian mothers may benefit from aligning themselves with a pre-existing organization, they may also need to form their own lobby groups. Ultimately, this was the strategy adopted in Victoria, Australia following the *Re Patrick* decision, as well as several other negative decisions around lesbian access to fertility services.⁴⁵⁶ By forming grassroots organizations that then lobbied government for legislative change, the lesbian parenting community in Victoria, Australia was able to convince the government to refer the issue to the Victorian Law Reform Commission. Over a four year period, the VLRC carried out public consultations, issued three discussions papers, and ultimately published a report that recommended legislative changes very much in line with what lesbian mothers had

⁴⁵⁶ In the wake of *Re Patrick*, as well as ongoing battles over lesbian access to fertility clinics, a number of lobby groups were formed. The Fertility Access Rights Lobby, Rainbow Families, and Love Makes a Family, have all worked, often in conjunction with the more established Victorian Lesbian and Gay Right Lobby, to have the laws of the state of Victoria, Australia changed.

requested.⁴⁵⁷ The success of the Victorian experience illustrates what can be achieved even by small lobby groups committed to change. Many of my own narrators expressed an interest in legal lobbying. However, they also noted that raising children put significant constraints on the time they had available to do such work.

Whether lesbian mothers choose to align themselves with a large organization like EGALE, or create their own grassroots lobby groups, they will need to look for strategic opportunities to raise their concerns. For example, lesbian mothers in British Columbia should use the government's recently initiated family law reform process to their advantage.⁴⁵⁸ While the review of B.C.'s *Family Relations Act*⁴⁵⁹ is not designed to deal specifically with the issues raised by lesbian families, lesbian mothers can influence the direction of the reform process by making written submissions that draw attention to their concerns. Lesbian mothers might also manage to attract the attention of provincial governments by pointing to the contradictions between the new marriage legislation and the increasingly out-dated parenting laws. As noted above, the fact that a child born into a same-sex marriage (or common law relationship) is not considered to be the child of both parties to that marriage, appears to be quite a startling contradiction. While the majority of my narrators sought to sever the relationship between marriage and parenting, highlighting such contradictions in the existing law may provide entry points from which lesbian mothers can push for further reforms.

⁴⁵⁷ Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Final Report, June 2007. Online: <<http://www.lawreform.vic.gov.au/>>.

⁴⁵⁸ The British Columbia government is currently reviewing the *Family Relations Act* via public consultation and will, as part of the consultation, address the question of legal parentage. Online: <<http://www.ag.gov.bc.ca/legislation/>>.

⁴⁵⁹ *Family Relations Act*, *supra* note 235.

While lesbian mothers have secured a number of significant legal victories through the courts over the past decade, the kind of reform my narrators support can only be achieved through legislative change. The time has thus come for a concerted legislative campaign for parenting reform in every province. Gaining government attention will not be an easy task. However, the experience in Victoria, Australia, suggests that even the smallest of lobby groups can contribute to reform and perhaps, eventually, progressive social change. If their campaign for reform is successful, lesbian mothers will not only secure legal recognition for themselves, but will also make a significant contribution to the ongoing debate about what it means to be a "legal parent".

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APPENDICES

APPENDIX A: Narrator profiles

Diane is the biological mother of Pamela, aged two years, who she co-parents with her partner, Celia. Pamela was conceived via anonymous donor insemination. The family lives in downtown Vancouver.

Callie and Sam, who were interviewed together, are the parents of Aiden and Lara, aged one and three. Each woman is the biological mother of one of the children. The children were conceived via anonymous donor insemination. The family lives in co-operative housing in East Vancouver.

Nic is the non-biological mother of Katrina, aged seven years. Nic and her ex-partner, Lucy, separated when Katrina was four. The two mothers have a joint custody agreement and Katrina shares her time equally across the two households. Nic also has two adopted teenage daughters who continue to have a relationship with Lucy. Katrina was conceived via known donor insemination. Her donor cares for her regularly and is considered to be her father. The family lives in co-operative housing in East Vancouver.

Michaela is the biological mother of Richard, aged one year, who she co-parents with her partner, Ellen. Richard was conceived via anonymous donor insemination. The family lives in their own home in East Vancouver.

Carey is the biological mother of Simon, aged three, who she co-parents with her partner, Nadia. Simon was conceived via known donor insemination. His donor, Tim, sees him twice monthly and is understood to be somewhere between a “father and an uncle”. The family was renting an apartment in East Vancouver when I conducted the interview, but was about to move to co-operative housing, also in East Vancouver.

Penny is the biological mother Melody, aged 29 years. Melody was conceived via anonymous donor insemination. Penny was a single mother for most of Melody's childhood and considers herself to be Melody's sole parent. Penny lives in a rental property in East Vancouver.

Elisha is the biological mother of Akeela, aged ten years, who she parents with three other co-parents: a non-conjugal parenting partner (Cassandra), Akeela's biological father (Kyle), and Akeela's biological father's former partner (Nick). Akeela was conceived via donor insemination. Kyle and Nick are considered to be her "dads". Akeela sees Cassandra as her second mother, though Cassandra and Elisha have never been in a conjugal relationship. Akeela spends time with all of her parents, though she lives primarily with Elisha. The family lives in a rental property in East Vancouver.

Mischa is the biological mother of Jade, aged nine years, who she co-parents with her former partner, Janice. Jade was conceived via known donor insemination. She sees her donor, who also has an adopted son, once a week. He is understood to be Jade's "dad", but not one of her parents. Mischa and Janice separated when Jade was eight months old and while the separation was initially conflictual they now enjoy a fairly amicable fifty/fifty custody arrangement. Mischa lives in her own home in East Vancouver.

Anna is the non-biological mother of Neil and Hazel, aged seven and four, who she co-parents with her partner, Anne-Marie. The children were conceived via known donor insemination. Their donor, Edgar, sees the children approximately once a week, and for two weeks during the summer they travel with him to visit his family in Eastern Canada. The family lives in their own home in East Vancouver.

Antonia is the non-biological mother of twin boys, Craig and Taylor, aged eleven years. Antonia co-parents the boys with her former partner, with whom she shares a joint custody arrangement. The boys were conceived via known donor insemination and their donor, Roger, as well as his male partner, Rory, are considered to be their "dads". The boys spend several weeks a year with Roger and Rory, who live in Atlantic Canada.

Sylvie is the non-biological mother of Leesa and Miriam, aged five and three, who she co-parents with her partner, Carissa. Leesa and Miriam were conceived via known donor insemination. Their donor, Edward, sees them occasionally and plays a very minor role in their lives. He is understood to be a donor and not a father. The family live in co-operative housing in East Vancouver.

Rochelle is the biological mother of Madison, aged one year, who she co-parents with her partner, Abigail. Madison was conceived via anonymous donor insemination, conducted at home. Rochelle and Abigail imported the sperm from the United States so that they could choose an "identity release" donor. Rochelle and Abigail are married. The family lives in their own home East Vancouver.

Maureen and Gillian, who I interviewed together, are the parents of Brandon, aged seven years. Brandon was conceived via anonymous donor insemination. The family lives in their own home in a small community on the edge of the Greater Vancouver Regional District.

Jasmine is the biological mother of Christopher, aged six years, who she co-parents with her partner, Chloe. Christopher was conceived via known donor insemination. Christopher's donor, Terry, sees Christopher twice a month and is considered to be his "dad", but not a parent. The family lives in their own home in East Vancouver.

Janet is the biological mother of Mia and Caleb, aged seven and three, who she co-parents with her partner, Felicity. Mia and Caleb were conceived via anonymous donor insemination. The family lives in their own home in suburban Vancouver.

Delia is the biological mother of Casey, aged two, who she co-parents with her partner, Paige. Casey was conceived via anonymous donor insemination. Delia and Paige are married. The family lives in their own home suburban Vancouver.

Yael is the biological mother of Aaron, aged twenty-one, and the non-biological mother of Freya, aged twenty-eight. Yael separated from her partner when Freya was seven and Aaron was one month. She co-parented Freya with her former partner after their separation, but raised Aaron primarily on her own. Yael lives in a rental property in East Vancouver.

Sara and Lisa, who I interviewed together, are the parents of Riley, aged one year. Riley was conceived via anonymous donor insemination, though her donor is part of the "identity release" program. The family lives in a rental property in East Vancouver.

Rhona is the biological mother of Caden and Max, aged thirteen and eight, who she co-parents were her partner of seven years, Doris. Caden and Max were born via known donor insemination while Rhona was unpartnered. Each boy has a different donor, but the two men were once partners. Caden and Max see their dads on a weekly basis, and little distinction is drawn between which man is the biological father of each boy. Both men are considered to be parents, as is Doris. Rhona and Doris are married. The family lives in a rental property in East Vancouver.

Nicole is the biological mother of Clarissa, aged nineteen, who she co-parents with her partner, Talia. Clarissa was born via known donor insemination but has no contact with her donor. Clarissa has three adult children from a previous marriage who, when they were children, lived with Clarissa and Nicole. The family lives in a small community in the Fraser Valley.

Paula is the biological mother of Dakota, aged two years, who she parents with her partner, Jana. Dakota was born via anonymous donor insemination. The family lives in co-operative housing in East Vancouver.

Sophie and Catherine, who I interviewed together, are the parents of Alain, aged three years. Alain was born via anonymous donor insemination and is being raised in a francophone household. The family lives in their own apartment in downtown Vancouver.

Emily and Lesley, who I interviewed together, are the parents of Maddox, aged three years. Maddox was born via known donor insemination. Maddox's donor, Ryan, sees his twice a month. Ryan is understood to be a "donor" and is known to Maddox by his first name. Emily and Lesley are married. The family lives in a rental property in suburban Vancouver.

Tracey and Helen, who I interviewed together, are the parents of Jayden, aged four months. Jayden was conceived via known donor insemination. His donor, Brian, lives overseas with his male partner, but has visited Jayden since his birth. The family lives in an apartment in downtown Vancouver, but was moving to a recently purchased home in East Vancouver.

Julia and Virginia, who were interviewed together, are the parents of Kieran, aged eighteen years. Kieran was conceived via anonymous donor insemination, though the donor's identity is known by a third party intermediary. The family lives in a rental property in inner-city Calgary.

Christy is the biological mother of Macy, aged three years. Macy was conceived via anonymous donor insemination. When Christy was pregnant she formed a relationship with Deidre. While Deidre was not considered to be Macy's parent at first, as the relationship developed, Deidre took on a parental role. Christy and Deidre are now separated, but Deidre continues to play a significant role in Macy's life and is considered to be her second mother. The family lives in Calgary.

Yvonne is the biological mother of Kayla, aged fourteen. Yvonne separated from Kayla's non-biological mother when Kayla was a toddler. They now share custody of Kayla, though she spends most of her time with Yvonne and her partner of eight years, Sheila. Sheila is considered to be Kayla's step-mother. Kayla was conceived via anonymous donor insemination. The family lives in a small town (population 22,000), approximately thirty kilometers from Calgary.

Sally is the biological mother of Owen, who she co-parents with her partner, Mae. Owen was born via anonymous donor insemination. The family lives in their own home in suburban Calgary.

Laurie and Simone are the parents of Maggie and Hailie, aged five and ten months. Maggie and Hailie were born via in vitro fertilization using an embryo created with Laurie's egg and anonymous donor sperm. Simone carried both children. The family lives in their own home in suburban Calgary.

Rosie and Toni, who were interviewed together, are the parents of Liam, aged six years. Liam was conceived via anonymous donor insemination. The family lives in their own home in a small town (population 10,000) approximately 100 kilometres from Calgary.

Brigid and Coral, who were interviewed together, are the parents of Cailyn, aged one year. Cailyn was born via anonymous donor insemination. The family lives in their own home in suburban Calgary.

Naomi is the non-biological mother of Ahava, aged two years, who she parents with her partner, Chaya. Ahava was conceived via anonymous donor insemination. She is being raised to be aware of Jewish heritage. The family lives in their own home in inner-city Edmonton.

Jacky and Carly, who were interviewed together, are the parents of Dana, aged two years. Carly was pregnant with their second child at the time of the interview. Dana was conceived via sexual intercourse with a donor. The donor plays no role in Dana's life. The second child was conceived via anonymous donor insemination. The family lives in a rental property in the outer suburbs of Edmonton.

Veronique is the biological mother of Nathan, aged ten years, who she co-parents with her partner of eight years, Edele. Nathan was born to Veronique at the end of a previous relationship and it was not intended that her partner be Nathan's co-parent. Nathan was born

via anonymous donor insemination. Veronique and Edele are married. The family lives in their own home in Edmonton.

Ruth and Kinwa, who were interviewed together, are their parents of Bailey, aged ten years. Bailey was conceived via anonymous donor insemination. Kinwa is a member of a local Aboriginal band and, although Kinwa is Bailey's non-biological mother, Bailey is being raised to be aware of his family's Aboriginal heritage. Ruth and Kinwa have been trying to adopt a child from the child protection system for several years. The family lives in their own home in Edmonton.

Mary Jane and Shannon, who were interviewed together, are the parents of Britt, aged eight months. Britt was conceived via anonymous donor insemination. The family lives in their own home in Edmonton.

APPENDIX B: Interview schedule

INTERVIEW SCRIPT: THE LEGAL RECOGNITION OF LESBIAN AND GAY PARENTING RELATIONSHIPS

Section I: Family arrangements

This section focuses on your own family arrangements.

1. Can you describe your family? Who does it include?
2. How were your children conceived?
3. If you conceived your children via donor insemination did you use a known or unknown donor? What factors influenced your decision?
4. Who do you define as your children's "parents"?
5. Do you make any distinction between biological and non-biological parenting within your family?
6. If you conceived using the sperm of a known donor, does he play a role in your children's lives? How much contact with the children does he have?
7. Would you describe his role as "parental"? Why or why not?
8. If you wouldn't describe the relationship between your donor and your children as "parental" how would you describe it?
9. Have your family arrangements changed over the course of your child's life? (eg, is your donor more or less involved than he was at the time of the child's birth?)
10. Are you married? Has the option of same-sex marriage changed your family arrangements in any way?

Section II: Family definitions

This section deals with how you define key familial terms such as mother, father and parent. It also addresses whether you feel that your own definitions of family are accepted within wider society.

11. What is your definition of “family”?
12. Can you define what it means to be a “mother”? What characteristics, if any, make up this identity?
13. Can you define what it means to be a “father”? What characteristics, if any, make up this identity?
14. Do you consider a known sperm donor to be a “father”? Why or why not? If he is not a father, how would you define his status?
15. Can you define what it means to be a “parent”? What characteristics, if any, make up this identity?
16. Do you draw any distinction between biological and non-biological motherhood/ fatherhood/ parenthood? Why or why not? Do your children?
17. Do you think that your definitions of mother/father/parent are accepted within wider Canadian society (eg, schools, doctors, other parents)? Can you provide examples of where your definitions have conflicted or been in conformity with societal norms?
18. Do you think that your definitions of mother/father/parent are accepted within the lesbian and gay community? Can you provide examples of where your definitions have conflicted or been in conformity with gay and lesbian community norms?
19. Do you think your definitions of mother/father/parent are reflected within Canadian law? Can you provide examples of where your definitions have conflicted or been in conformity with legal norms?

Section III: Family Law

This section deals with what legal arrangements, in any, you made when planning your family.

20. When you think about your family do you consider the law and the legal recognition of lesbian and gay parental relationships to be of high, medium or low priority? Why?

21. If the law and the legal recognition of your family relationships is only a medium or low priority for you, are there other family policy issues that concern you more? (eg, child care, housing, health care, education)
22. Does your status as a lesbian mother in any way effect how you experience these other family policy issues?
23. When planning your own family did you enter into any legal arrangements, or have you entered into any since your child was born (eg, contract with donor, second-parent adoption)? Why or why not?
24. If you did, what legal arrangements did you make?
25. Did you get legal advice before entering into these arrangements? Who/where from?
26. Have you ever had to rely on your legal arrangements (eg, have you ever relied on them to “prove” your or someone else’s parental status?) Was it successful?
27. Have you ever been involved in any court hearings with regards to your children?
28. Why, or why didn’t you, choose to engage with law? Might you have used the law, or used it more, had it been different?
29. Are you fearful that if there was conflict or an emergency in your family your parental status might not be legally recognized? Why or why not?
30. Overall, does the current law adequately meet your family’s needs? Why or why not?

Section IV: Law reform

This section deals with what law reform you would recommend if Canadian parenting laws were to be changed.

31. In relation to your own family, what is the biggest legal issue that concerns you?
32. Given your concerns, what changes, if any, would you make to Canadian parenting laws?
33. Who should be covered by same-sex parenting laws? Should the law only recognize two legal parents (eg, two mothers), or should it be able to give parental status to more than two parents (eg, two lesbian mums and an involved sperm donor dad)? Why or why not?
34. If the law were to recognize families that contain more than two parents, should all parenting relationships be treated equally, or should a distinction be made between primary caregivers and other parents?

35. How should legal recognition be achieved? Should it be automatic according to legislative rules (eg, a child born into a lesbian relationship is automatically the legal child of both women)? Or should it require people to opt-in by taking formal steps (eg, registration of parental status through the courts)?

36. Does your answer to question 26 differ when discussing: (i) non-biological mothers; (ii) sperm donors; (iii) married same-sex couples?

37. In what ways, if any, will law reform in the area of same-sex parenting change your family?

38. Do you think that changing the law will change people's attitudes towards lesbian and gay parents?

CLOSING STATEMENT

39. These are all the questions I have for you today. Is there anything else you would like to add at this time?

40. Would you be willing to be contacted again if I need to clarify any of the information contained in this interview?

Thank you for taking the time to do this interview.

APPENDIX C: Consent form (couple)

THE UNIVERSITY OF BRITISH COLUMBIA INFORMED CONSENT BY SUBJECTS TO PARTICIPATE IN A RESEARCH PROJECT

THE LEGAL RECOGNITION OF SAME-SEX PARENTING RELATIONSHIPS

The University of British Columbia and the researchers on the “Legal Recognition of Same-sex Parenting Relationships Project” are committed to doing research in ethical and respectful ways. We want to be sure that you, as a research participant, understand how and why this research is being conducted. We also want you to feel comfortable while you are taking part in it.

The project investigators are Fiona Kelly (Ph.D. candidate, UBC Faculty of Law – Tel: 604 731 3637) and Susan B. Boyd (Professor of Law, UBC – Tel: 604 822 6459). The main objectives of the study are to investigate the nature of parenting within the lesbian and gay communities, and to produce a law reform agenda around the issue of legal recognition of same-sex parenting relationships. You have been approached to participate in the study because you are either a lesbian mother, a gay father, or a sperm donor to a lesbian mother. The study is designed to determine the ways in which “family” and “parenthood” are constructed within same-sex families, the extent to which lesbian and gay parents currently utilize the law, and how lesbian and gay parents might envisage law reform directed towards recognizing and protecting themselves and their children, focusing on *who* should be covered by same-sex parenting laws and *how* legal recognition should be achieved. The project investigators can be contacted at the telephone numbers above to answer any questions about the study.

We are asking you to sign this form to indicate that you understand the following:

- (1) The goals and procedures for the legal recognition of same-sex parenting project.
- (2) That you are being asked to participate in an interview and that your participation in this research is entirely voluntary.
- (3) That the interview will be approximately 60 - 90 minutes long and will focus on your views about the legal recognition of same-sex parenting relationships.
- (4) That the interview will be tape-recorded and will be transcribed into typewritten form.
- (5) That you may request and receive a copy of the typed transcript of your interview.
- (6) That you may stop the interview at any time for any reason and/or withdraw from the interview at any time.
- (7) That to ensure confidentiality your name and/or personal information will not be recorded or divulged in the audio tapes, and that your name will appear only on

this consent form. In the event that your name and/or personal information is inadvertently divulged during the interview, it will be deleted from the typed transcript.

- (8) That you may be asked if you are willing to be contacted for a follow-up interview.
- (9) That in answering the interview questions, particularly those that relate to any incidents of discrimination you may have experienced because of your status as a lesbian or gay parent or any family law disputes in which you may have been involved, you may experience some emotional distress.
- (10) That the interviewer can provide you with a list of affordable, gay and lesbian friendly, resource and counselling services.
- (11) That research materials such as audio tapes and transcripts will be held in a secure location and will not be publicly accessible and that when data analysis is completed and project findings presented, the tapes and transcripts will be destroyed after five years.
- (12) The results of this study will be presented in Fiona Kelly's Ph.D. thesis which will be available in the Koerner and Law libraries of the University of British Columbia. The results may also be published in journal articles by Fiona Kelly.
- (13) That you may register any concerns you might have about the way this research is conducted with the Director of the UBC Office of Research Services and Administration (Tel: 604 822 8598).
- (14) That you may obtain copies of the results of this study, upon its completion, by contacting: Professor Susan Boyd, Faculty of Law, University of British Columbia, 1822 East Mall, Vancouver, V6T 1Z1; 604 822 6459; boyd@law.ubc.ca.

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I agree to participate in this research by granting an interview to the researchers identified above, and to use of the information for the purposes stated above. I also acknowledge receipt of a copy of the consent form.

Name: _____

Signature of Researcher: _____

Name: _____

Date: _____

Signature: _____

Signature: _____

APPENDIX D: Consent form (single)

THE UNIVERSITY OF BRITISH COLUMBIA INFORMED CONSENT BY SUBJECTS TO PARTICIPATE IN A RESEARCH PROJECT

THE LEGAL RECOGNITION OF SAME-SEX PARENTING RELATIONSHIPS

The University of British Columbia and the researchers on the “Legal Recognition of Same-sex Parenting Relationships Project” are committed to doing research in ethical and respectful ways. We want to be sure that you, as a research participant, understand how and why this research is being conducted. We also want you to feel comfortable while you are taking part in it.

The project investigators are Fiona Kelly (Ph.D. candidate, UBC Faculty of Law – Tel: 604 731 3637) and Susan B. Boyd (Professor of Law, UBC – Tel: 604 822 6459). The main objectives of the study are to investigate the nature of parenting within the lesbian and gay communities, and to produce a law reform agenda around the issue of legal recognition of same-sex parenting relationships. You have been approached to participate in the study because you are either a lesbian mother, a gay father, or a sperm donor to a lesbian mother. The study is designed to determine the ways in which “family” and “parenthood” are constructed within same-sex families, the extent to which lesbian and gay parents currently utilize the law, and how lesbian and gay parents might envisage law reform directed towards recognizing and protecting themselves and their children, focusing on *who* should be covered by same-sex parenting laws and *how* legal recognition should be achieved. The project investigators can be contacted at the telephone numbers above to answer any questions about the study.

We are asking you to sign this form to indicate that you understand the following:

- (1) The goals and procedures for the legal recognition of same-sex parenting project.
- (2) That you are being asked to participate in an interview and that your participation in this research is entirely voluntary.
- (3) That the interview will be approximately 60 - 90 minutes long and will focus on your views about the legal recognition of same-sex parenting relationships.
- (4) That the interview will be tape-recorded and will be transcribed into typewritten form.
- (5) That you may request and receive a copy of the typed transcript of your interview.
- (6) That you may stop the interview at any time for any reason and/or withdraw from the interview at any time.
- (7) That to ensure confidentiality your name and/or personal information will not be recorded or divulged in the audio tapes, and that your name will appear only on this consent form. In the event that your name and/or personal information is

inadvertently divulged during the interview, it will be deleted from the typed transcript.

- (8) That you may be asked if you are willing to be contacted for a follow-up interview.
- (9) That in answering the interview questions, particularly those that relate to any incidents of discrimination you may have experienced because of your status as a lesbian or gay parent or any family law disputes in which you may have been involved, you may experience some emotional distress.
- (10) That the interviewer can provide you with a list of affordable, gay and lesbian friendly, resource and counselling services.
- (11) That research materials such as audio tapes and transcripts will be held in a secure location and will not be publicly accessible and that when data analysis is completed and project findings presented, the tapes and transcripts will be destroyed after five years.
- (12) The results of this study will be presented in Fiona Kelly's Ph.D. thesis which will be available in the Koerner and Law libraries of the University of British Columbia. The results may also be published in journal articles by Fiona Kelly.
- (13) That you may register any concerns you might have about the way this research is conducted with the Director of the UBC Office of Research Services and Administration (Tel: 604 822 8598).
- (14) That you may obtain copies of the results of this study, upon its completion, by contacting: Professor Susan Boyd, Faculty of Law, University of British Columbia, 1822 East Mall, Vancouver, V6T 1Z1; 604 822 6459; boyd@law.ubc.ca.

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I agree to participate in this research by granting an interview to the researchers identified above, and to use of the information for the purposes stated above. I also acknowledge receipt of a copy of the consent form.

Name: _____

Signature of Researcher: _____

Signature: _____

Date: _____

APPENDIX E: British Columbia advertisement

THE LEGAL RECOGNITION OF SAME-SEX PARENTING RELATIONSHIPS

Are you a **LESBIAN MOTHER** (biological or non-biological) who has a child conceived via:

- artificial insemination (including self-insemination); or
- in vitro fertilization?

Or a **GAY FATHER/DONOR** (biological or non-biological) who has conceived a child in the same circumstances?

And do you live within 200km of Vancouver?

If so, I want to hear from you! I am a PhD candidate at the UBC Faculty of Law, conducting a project on the legal recognition of lesbian and gay parents. I would like to interview lesbian mothers, gay fathers, and gay sperm donors.

The goals of the project are:

- to investigate how the concepts “family”, “mother”, “father” and “parent” are understood and utilized by lesbian and gay parents;
- to determine what, if any, legal arrangements lesbian and gay parents make to protect their families and why;
- to determine how lesbian and gay parents might envisage law reform directed towards recognizing and protecting themselves and their children, focusing on *who* should be covered by same-sex parenting laws and *how* legal recognition should be achieved; and
- to produce a law reform agenda around the issue of legal recognition of lesbian and gay parenting relationships.

Your participation would involve a 60-70 minute taped interview which would be conducted at a time and place that suits your schedule.

Further information, including information about the researcher, can be found on the study website: **fjkellybc.tripod.com**

Or by contacting:

Fiona Kelly
parentingstudy@yahoo.ca
Ph: 604 731 3637

All phone calls and emails are confidential.

The results of this study will be presented in Fiona Kelly's PhD thesis.

APPENDIX F: Alberta advertisement

THE LEGAL RECOGNITION OF SAME-SEX PARENTING RELATIONSHIPS

Are you a **LESBIAN MOTHER** (biological or non-biological) who has a child conceived via:

- artificial insemination (including self-insemination); or
- in vitro fertilization?

Or a **GAY FATHER/DONOR** (biological or non-biological) who has conceived a child in the same circumstances?

And do you live within 200km of Calgary or Edmonton?

If so, I want to hear from you! I am a PhD candidate at the UBC Faculty of Law, conducting a project on the legal recognition of lesbian and gay parents. I would like to interview lesbian mothers, gay fathers, and gay sperm donors.

The goals of the project are:

- to investigate how the concepts “family”, “mother”, “father” and “parent” are understood and utilized by lesbian and gay parents;
- to determine what, if any, legal arrangements lesbian and gay parents make to protect their families and why;
- to determine how lesbian and gay parents might envisage law reform directed towards recognizing and protecting themselves and their children, focusing on *who* should be covered by same-sex parenting laws and *how* legal recognition should be achieved; and
- to produce a law reform agenda around the issue of legal recognition of lesbian and gay parenting relationships.

Your participation would involve a 60-90 minute taped interview which would be conducted at a time and place that suits your schedule. I will be conducting interviews in the Calgary and Edmonton areas in early-mid September 2005.

Further information, including information about the researcher, can be found on the study website: **fjkellybc.tripod.com**

Or by contacting:

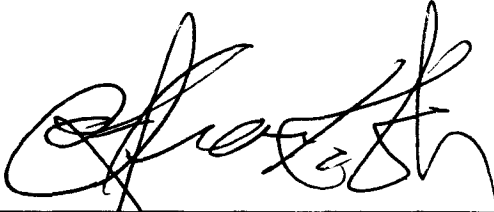
Fiona Kelly
parentingstudy@yahoo.ca
Ph: 604 731 3637

All phone calls and emails are confidential.

The results of this study will be presented in Fiona Kelly's PhD thesis.



Certificate of Approval

PRINCIPAL INVESTIGATOR Boyd, S.B.	DEPARTMENT Law	NUMBER B05-0039
INSTITUTION(S) WHERE RESEARCH WILL BE CARRIED OUT		
CO-INVESTIGATORS: Kelly, Fiona, Law		
SPONSORING AGENCIES		
TITLE : The Legal Recognition of Same-Sex Parenting Relationships		
APPROVAL DATE FEB 14 2005	TERM (YEARS) 1	DOCUMENTS INCLUDED IN THIS APPROVAL: Feb. 6, 2005, Consent form / Advertisement / Jan. 12, 2005, Questionnaire / Contact letter
CERTIFICATION: <p>The protocol describing the above-named project has been reviewed by the Committee and the experimental procedures were found to be acceptable on ethical grounds for research involving human subjects.</p> <div style="text-align: center;"> <hr/><p><i>Approval of the Behavioural Research Ethics Board by one of the following:</i> Dr. James Frankish, Chair, Dr. Cay Holbrook, Associate Chair, Dr. Susan Rowley, Associate Chair Dr. Anita Hubley, Associate Chair</p></div> <p>This Certificate of Approval is valid for the above term provided there is no change in the experimental procedures</p>		