BABIES OR BLASTOCYSTS, PARENTS OR PROGENITORS?

EMBRYO DONATION AND THE CONCEPT OF ADOPTION

by

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ABSTRACT

Donating embryos to third parties who might otherwise have difficulty achieving pregnancy began in 1983, but the term "embryo adoption" surfaced as a descriptor only recently. To some, "embryo adoption" is merely a misnomer coined by anti-abortion advocates to enhance public support for the legal rights of fetuses and embryos. However, the concept of "adopting" an embryo is becoming a social fact, despite legitimate concerns about terminology, and may provide insight into the actual working of embryo donation (ED). For ED to be legal adoption, progenitors must be parents, and blastocysts must be babies. This thesis examines whether either proposition is true, legally or socially, taking account of the feminist literature on reproductive technology (RT) and adoption. Since ED is not about perpetuating genes, involves gestation and childbirth, and has less exploitative potential than both adoption and IVF, it could be a more feminist option for non-coital parenthood. Viewing ED through Canadian law on parentage exposes several inconsistencies and recent trends that overemphasize genetic ties. Historically, neither legal maternity nor paternity were based solely on genes. The thesis concludes the legal parentage of offspring from donated embryos might be uncertain in Canada due to a societal bias towards genes that affects jurisprudence, but is unlikely to be attributed to the progenitors once a baby is born. Progenitors are probably not legal parents. Many RT users prefer to avoid the appearance of adoption wherever possible; pre-conception intent to parent is the preferred public presentation of family formation. Studies of embryo and gamete donors and recipients demonstrate gender differences but some donors believe they are parents, and some recipients agree, even when asserting their own parental status. However, it is still unclear how different people really regard their embryos (as children? property? mere cells?) and how this affects donation behaviour. Ironically, insisting that embryo creators are parents in the "embryo adoption" construct may promote the alternative family constructs favoured by some feminists;

that is, progenitors may simply be one type of parent in a world where multiple parents, sometimes with different roles, are gaining acceptance – if only for a minority.

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CHAPTER 1: INTRODUCTION

For years, people unable to achieve a pregnancy coitally only could only rely on adoption as a way of having their own children. Then, the birth of the first "test-tube baby" in 1978 allowed a few women with certain reproductive problems such as blocked fallopian tubes to get pregnant.[1] Although the practice of donating embryos[2] "left over" from *in vitro* fertilization (IVF) to third parties who might otherwise have difficulty achieving pregnancy began in 1983,[3] it is only in recent years that "embryo adoption" has surfaced as a descriptor of the practice. The year 2005 brought continued attention to the phrase, with parties at the White House and a designation as one of the ideas of the year.[4] A percentage of clinics, hospitals and independent agencies now go as far as applying standards employed in traditional adoption of children – home studies, openness agreements, etc. – to embryo donation. To some, the term "embryo adoption" is merely a misnomer coined by anti-abortion advocates who wish to enhance legal and public support for the rights of fetuses and embryos.[5] This tactic appears to have had some success in the United States, where a few state legislatures have made it illegal to destroy embryos, the Federal Government has given over $1 million to promote embryo adoption programs, and media coverage of the "adoptions" has generally been positive.

The concept of "adopting" an embryo is becoming a social fact, regardless of legitimate concerns about terminology. Indeed, it appears that for at least some embryo creators, the construct of open adoption – where the genetic/birth parents have at least some contact and

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[1] P.C. Steptoe & R.G. Edwards, "Birth After Reimplantation of a Human Embryo" (1978) 336 Lancet.
[2] For an explanation of the terminology used to describe cryopreserved fertilized human ova, see Chapter 2 Part II below.
[3] H. Widdows & F. MacCallum, "Disparities in parenting criteria: an exploration of the issues, focusing on adoption and embryo donation", (2002) 28 J Med Ethics 139 at 141.
[4] See discussion in Chapter 2, Part II below, and Sarah Blustain, "Embryo Adoption", *New York Times Magazine*, "Year in Ideas" issue, 11 Dec. 2005.
[5] See discussion in Chapter 2, Part II below.

information exchange with the legal/social parents – provides the only framework within which they would be willing to donate their excess fertilized eggs. As the American Fertility Association points out, however, "[e]mbryo donation...is largely uncharted psychological, legal and social territory."[6]

Embryo donation is unique in reproductive technology (RT) because the receiving family has no genetic connection to any child born, but still shares the biological experience of gestation with the baby. Egg and sperm donation, and surrogacy, usually involve a genetic connection with one of the intended parents, while a gestational link is absent from surrogate mother agreements. Given that many feminists have criticized the rise in RT use as perpetuating a patriarchal obsession with genetics, does the popularity of the concept of "embryo adoption," with its focus on pregnancy and childbirth, represent a more feminist use of RT than the other options? Feminist theories of adoption and RT are explored in Chapter 3, and throughout the thesis, with an eye to answering this and other questions about embryo donation.

Other feminist issues arise in the legal and medical treatment of embryo donation participants. Canadian courts have not given much weight to the gender-specific experiences of pregnancy and childbirth when forced to make determinations of parentage or other related orders.[7] It seems that the actual history of legal parentage determination is rarely considered, and is increasingly replaced by a "gender-neutral" and incorrect assumption that genetics are the main source of basic maternity and paternity in law. Also, researchers frequently ignore the possibility of distinction between male and female responses to embryo donation questionnaires; it is not unusual to give the survey to the woman and ask the intended recipient parents to fill it out together, or to otherwise mix individual responses and refer in the results to couples.[8] The

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[6] American Fertility Association, *Embryo Donation: Prospective Donors* (New York, American Fertility Association, 2006), online: <http://www.theafa.org/index.html> at 2.
[7] See discussion in Chapter 4, Parts III & IV below.
[8] Pia Broderick & Iain Walker, "Information access and donated gametes: how much do we know about who wants to know?" (1995) 10 Human Reprod. 3338 at 3339.

few studies that make a distinction have found differences in the way women and men think about their unused embryos, however.[9]

Examining the concept of "embryo adoption" also provides insight into actual adoption. In describing embryo donation as an adoption, and suggesting legal and social norms in reproductive technologies should follow those in adoption, or in disputing these ideas, people reveal what they really think about adoption. While public opinion polls demonstrate that most think that the adoption of a child without a home is highly commendable,[10] people unable to conceive a child coitally usually list adoption as their last family creation option, for a variety of reasons.[11] Commentators have noted this ambivalence,[12] and my review of embryo donation provides more examples of public conceptions and misconceptions about adoption. Much of the Canadian jurisprudence on RT involves parents who wish to avoid the adoption process and have their families legally recognized as they themselves perceive them, revealing a bias against adoption that judges seem to wholeheartedly accept.[13] Strangely, most commentary implies that regular adoption is now very open – involving information exchange between and even identity disclosure of the two families – despite the fact that continued openness is still not the norm, especially in the United States where most embryo adoption literature originates.[14] In another twist, even people who refer to embryo donation as adoption can stress that it is much better than actual adoption because the recipient woman controls the pre-natal environment.[15] When we link

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[9] See discussion in Chapter 5, below.

[10] Charlene Miall and Karen March, *Social Support for Adoption in Canada: Preliminary Findings of a Canada-wide Survey* (Hamilton, ON: McMaster University, 2002), online: <http://socserv2.mcmaster.ca/sociology/faculty/Miall-News.pdf> at 3; Dave Thomas Foundation for Adoption (Canada), "Adoption in Canada: A Report on Public Opinion" August 2004, online at: <http://www.davethomasfoundation.ca/resources/study.asp>.

[11] Patricia K. Jennings, *Genetic Ties and Genetic "Others": Race, Class and Infertility* (PhD thesis, University of Kentucky Graduate School, 2000) [unpublished] at 59-65; Susan Frelich Appleton, "Adoption in the Age of Reproductive Technology" (2004) U Chi. Legal Forum 393.

[12] Katarina Wegar, *Adoption, Identity, and Kinship: The Debate over Sealed Birth Records* (New Haven: Yale U.P., 1997) at xi.

[13] See discussion in Chapter 4, Parts III & IV below.

[14] See discussion in Chapter 2, Part III c) ii), footnotes 152 & 153 and accompanying text.

[15] Paige C. Cunningham, "Embryo Adoption or Embryo Donation? The Distinction and Its Implications" (17 April 2003), online: Center for Bioethics and Human Dignity, at <http://www.cbhd.org/resources/reproductive/

this with other research that shows some potential adopters question the ability of birth mothers to provide the optimum womb conditions, hinting that the deficiency is also likely genetic, it reveals more reasons why adoption is stigmatized.[16] Even the embryo creators who think of the embryo as their child, which would make embryo donation like a real adoption, are highly unlikely to donate them to someone else for reproductive use. Adoption, it seems, is not popular even when it is not really an adoption.

Despite the multiplicity of complex questions that may arise from embryo donation, this thesis will attempt to focus on the question of parentage. A few themes are touched upon in almost all of the legal articles on embryo donation, including the rights of the embryo/resulting child and compulsory donation laws, but none pops up more frequently than the legal, psychological, biological and moral status of the gamete donors in relation to the embryo: are they parents, in any meaning of the word?[17] Generally, in the legal literature, donors are presumed to become a type of parent only once a child is born (if we remove the "life begins at conception" advocates from the mix), and the resulting legal parent status is presumed extinguished by contract or statute. Few authors delve into the subject in detail, however. When we take a look at the historical determinations of legal parenthood as well as the modern Canadian law, it is not entirely clear whether a court would find embryo donors to be legal parents, although it is very clear that genetics were never the full definition of "mother" and

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cunningham_2003-04-17.htm>; Gina Kolata, "Clinics Selling Embryos Made for 'Adoption'" *New York Times* (23 Nov. 1997) A1; Paul McKeague, "Born into a Legal Limbo" *Edmonton Journal* (29 May 1999) H3; Robyn Taylor, "At long Last, a Family" *Winchester Star* (VA) (14 January 2005), online: <http://www.winchesterstar.com/>.

[16] Jennings, supra note 11 at 108.

[17] Another related theme is how the law can ensure these people cease to be parents, the usually unstated assumption being that one can only have two parental units, one of each gender. Although some writers accept single parenthood, almost no one will consider allowing three or more people to remain parents. Although beyond the scope of this paper, the assumption that such radical technological advances will not change the nature of "exclusive" parenthood merits attention: see Alison Harvison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family" (1998) 6 Amer. U. J. Gender & L. 505; R. Alta Charo, "And Baby Makes Three – Or Four, Or Five, Or Six: Redefining the Family after the Reprotech Revolution" (2000) 15 Wis. Women's L.J. 231.

"father" in the law. Certainly, simply using a contract is unlikely to be enough to decide the point, as we shall see in Chapter 4.

The psychological, genetic and moral categories of parentage are less certain, but language and issue identification points to presumptive parenthood for the genetic donors. While some authors are often careful to refer to donors, gamete providers, embryo creators etc., most do call the donors parents and almost all refer to the concern about having biologically-related children/offspring/progeny without having personal contact with them.[18] "[P]arents exist only through a double recognition: to recognise a parent is to have already recognised a child."[19] If one has children, then one is a parent, even if only in the genetic or psychological realm. By extension, this seems to lead to psychological and moral parenthood in the minds of many, and the link is confirmed in the numerous embryo divorce cases, where embryo creators who want the embryos destroyed or donated to research win because courts are loathe to impose unwanted psychological parenthood on them.[20] Strangely, at least some of the people who cite their parental feelings as the reason not to donate embryos to other people, believe that the best

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[18] Jill R. Gorny, "The Fate of Surplus Cryopreserved Embryos: What is the Superior Alternative for their Disposition?" (2004) 37 Suffolk U L Rev 459 at 474 (she says this is one reason people should instead donate surplus embryos to research); Jennifer P. Brown, '"Unwanted, Anonymous, Biological Descendants': Mandatory Donation Laws and Laws Prohibiting Preembryo Discard Violate the Constitutional Right to Privacy" (1993) 28 USFL Rev. 183; Katheryn D. Katz, "Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation" (2003) 18 Wisc. Women's L J 179 at 189; Kim Schaefer, "In-vitro Fertilization, Frozen Embryos, and the Right to Privacy – Are Mandatory Donation Laws Constitutional?" (1990) 22 Pac. L J 87 at 106. An exception is Charles P. Kindregan, Jr. & Maureen McBrien, "Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos" (2004) 49 Villanova L Rev 169 at 200, who refer to "the belief that they have biological children they will never know." Interestingly, they are two of the very few legal writers who come down solidly on the side on anonymous embryo donation; they appear to put far less emphasis on genes than most other authors.

[19] Marilyn Strathern, *Reproducing the Future: Anthropology, Kinship and the New Reproductive Technologies* (New York: Routledge, 1992) at 148.

[20] Ellen Waldman, "The Parent Trap: Uncovering the Myth of 'Coerced Parenthood' in Frozen Embryo Disputes" (2004) 53 Am. U L Rev. 1021at 1027 and throughout the article – she challenges the notion that biological content always equals psychological ties, at least for men, but she is writing about the embryo disputes and not embryo donation (although a few of the divorce cases do involve a party who wants to donate the embryos rather than use them personally). See also Tracey S. Pachman "Disputes Over Frozen Preembryos and the "Right Not to be a Parent"" (2003) 12 Colum. J Gender & L 128. Other commentators are quite clear that "unwanted parenthood can be devastating" even when the genitor has no legal parental obligations or social connections: Joseph Russell Falasco, "Frozen Embryos and Gamete Providers' Rights: A Suggested Model for Embryo Disposition" (2005) 45 Jurimetrics 273 at 295.

resolution for their excess embryo crisis is destruction, which some commentators consider a bizarre way to deal with one's "child". This will be discussed in more detail in Chapter 5.

All of these areas are enormously relevant to adoption. It is generally assumed that anyone giving a child away in adoption has parental status (we call them birth parents), although the man's circumstances are sometimes very similar to gamete providers for embryos, and to sperm donors. The experience of gestation likely changes the perspective for women, but it is hard to be certain since comprehensive representative studies of birth mothers are virtually non-existent, and theorists may be over-relying on the experiences of the minority of women who choose to speak out and describe the pain they feel after giving a child away for adoption. Some birth mothers, however, do not consider themselves a mother or parent, explaining that the social and legal mother holds that role after adoption.[21] Regardless, few people would choose to question the designation "mother" for a woman who gives birth and then surrenders the child for adoption, despite the fact that this is not a legal given, especially in some European civil law jurisdictions.[22] The resulting children, coupled with the acts of gestation and childbirth, leave few doubts to most people: motherhood IS pregnancy and birth by definition for many people.

This definition issue highlights a particular problem with this work: this thesis is rife with contested usages, mostly because that is completely unavoidable in this field. Certain explanations about language will be made in the body of the text – for instance, the distinction between embryo donation and "embryo adoption"[23] – but here I would like to deal with a central concept to this thesis: the word parent, and all of its modified forms (i.e., birth parent, social parent, genetic parent, etc.). Most authors have at least sometimes referred to genetic providers

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[21] Paul Sachdev, *Unlocking the Adoption Files* (Lexington, Mass.: Lexington Books, 1989) at 64.

[22] In France, Luxembourg and Italy, women can give birth anonymously in the hospital, and never accrue the legal status of mother. The child is available for adoption but there are no parental rights to terminate first: Katherine O'Donovan, "'Real' Mothers for Abandoned Children" (2002) 36 L & Soc'y Rev 347 at 360. She also distinguishes between motherhood and physical maternity.

[23] The key distinction between embryo donation and "embryo adoption", and the cultural relevance of the latter, is explained in Chapter 2, Part II. This section also covers alternative terms for "embryo," and reasons for their use.

as parents, although a few carefully avoid this practice.[24] This thesis uses the terms parent, mother, and father, usually modified by some appropriate adjective, to describe anyone who could possibly be considered a parent by any definition (although I do also revert to words such as "donors" and "progenitors" to introduce some variety). This strategy would appear to predetermine my ultimate question: are embryo donors parents at any part of the procedure?

To most casual observers in Western society, that question has already been answered in the affirmative whether or not the law agrees. The material presented in this thesis confirms the popularity of the "genes equal family" hypothesis, even if legal parenthood does not follow.[25] Perhaps the debate is more aptly expressed as whether one can have more than two parents, and whether everyone needs to obey the apparent set hierarchy of parents, when more than two people might claim the role. Many commentators who express the hope that law will move beyond "exclusive parenthood" and recognize different types of parent-child relationships also note that society has already made this change.[26] Part of my question then becomes who believes embryo creators are parents, and why?

One obvious way to challenge the status of genetics in regards to family and kinship is to use terminology that refuses to comply with expectations. Despite my dislike for the qualifier "real" when discussing kinship, I must note that in my daily life, as an adoptee, I refer to my social and legal parents as simply "parents" and my biological contributors as "birth parents," or sometimes "genetic parents" when discussing genes. Unqualified use of a term implies that it is the norm, the common reality, and that all others are lesser or partial, to be compared to the

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For discussion of the definition of infertility, see Chapter 3, Part I, footnote 189. For the feminist dispute about the term "surrogate mother" see Chapter 3, Part I, footnote 191.

[24] For example, Janet L. Dolgin, "Surrounding Embryos: Biology, Ideology and Politics" (2006) 16 Health Matrix 27. Her paper also provides an excellent overview of some language issues in the public and political debate about the status of embryos.

[25] See especially Chapters 4 & 5, below.

[26] Supra note 17; see also Roxanne Mykitiuk, "Beyond Conception: Legal Determinations of Filiation in the Context of Reproductive Technologies" (2001) 39 Osg. Hall L J 771.

norm.[27] For me, these people are unquestionably my parents and the other (biological) relatives are not, so I – and the practice of adoption in general – seem to be guilty of a reverse societal bias here, bucking the genetic trend by reclaiming the unmodified word parent. At the same time we reinforce the idea that there are "real" parents, and then there are partial/inferior/imitation parents. Furthermore, this approach still refers to genetic relatives as a type of parent.

But at least part of this usage stems from social realities. If I were to always refer to "my social and legal parents", I inevitably will invite the question "what other parents do you have?". This leads to explaining my adoption, something that at a minimum is time-consuming and ultimately unnecessary in most conversations. Referring to the people who surrendered me for adoption as simply "my parents" also invites the misunderstanding that these are the people I grew up with. Unfortunately, though, we suffer from a lack of better terms to employ instead. "Progenitor" does not include gestation, erasing uniquely female experience from the equation, and some people might not know what it means. In part, then, societal norms lead me to choose the terms that are least likely to be misunderstood or invoke lengthy explanation, which leads to a certain hierarchy of my language, despite my assertion that, for people who do not live in a nuclear/genetic family (which most of us do not)[28] it should be possible to acknowledge multiple parental figures without automatically privileging certain roles over others. Those of us who do acknowledge certain parents over other people make choices that might not align with choices others have made. We might feel very strongly about the fact that the people who raise you are

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[27] In linguistics, these are known as unmarked and marked terms, the "marked" terms being the inferior, abnormal or partial. To borrow from Janet Dolgin's explanation (Janet L. Dolgin, *Defining the Family: Law, Technology and Reproduction in an Uneasy Age* (New York: New York UP, 1997) at 106 and footnote 26) parent is an unmarked term which, in our society today, still usually connotes heterosexual biological parents who were married at one point. If one is referring to anything else, one must use the qualifiers or risk being misunderstood.

[28] In North American society today, the increased prevalence of divorce, when joined with adoption, RT, false paternity, switched babies (about 1 in 1000 U.S. babies are accidentally exchanged at the hospital: Jennifer L. Foote, "What's Best for Babies Switched at Birth? The Role of the Court, Rights of Non-Biological Parents, and Mandatory Mediation of the Custodial Agreements" (1999) Whittier L Rev. 315) and single parenting, means the majority of children will not grow up raised with both of their genetic parents in the same home.

"first-order" parents but no one has the right to speak for anyone else, or to impose this language on anyone else, regardless of interesting theories about genetic relatedness.

Refusing to call genetic providers parents, when so many people think that there is a level of parental activity involved, is simply disrespectful of those opinions, some of which are passionately held. One cannot read the comments of embryo creators who must decide what to do with surplus embryos without sympathy for their predicament,[29] even if some might consider their concern over the disposition of their genes to be somewhat misplaced. While going against the norm may help subvert the genetic message, it may also send the message that those certain choices should not be valid. My message is instead that other choices may be equally valid – not deficient, but merely different.

Another possible critique of this project is the focus on a practice – embryo donation – which will be experienced by a scant fraction of the population. Or, to paraphrase a colleague's comments about my thesis, this research affects so few people. However, as noted above,[30] most Canadian children today will not be raised by both genetic parents for their entire childhood, and that does mean that some of these issues regarding parenthood and genetic connection are more universal than marginal. The whole process of regulating and debating the use of reproductive technologies inevitably affects how society thinks about both reproduction and kinship.[31] As Maggie Kirkman points out, "[w]omen participating in egg and embryo donation not only situate themselves within contemporary discourses of motherhood but also contribute to their modification."[32] Since Western culture still largely seems to equate womanhood with

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[29] See details in Chapter 5, Part I below.
[30] Supra note 28 and accompanying text.
[31] Strathern, supra note 19 at 15; John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton, NJ: Princeton UP, 1994) at 5.
[32] Maggie Kirkman, "Egg and Embryo Donation and the Meaning of Motherhood" (2003) 38(2) Women & Health 1 at 2.

motherhood, all women need to pay attention to these developments, even those of us who choose not to mother – socially, gestationally, or genetically.

The recent media attention paid to embryo donation, despite the fact the practice is uncommon, indicates its contribution to discourses on motherhood, families and procreation. Therefore, we need to examine the media and legal attention to embryo donation before we can continue discussion of the legal and social parenthood questions that arise from the concept. That examination follows in Chapter 2. The chapter looks at the reasons people have extra embryos in the first place, as well as general background on RT processes that lead to cryopreserved embryos. This will be followed by a more detailed review of the (mostly American) political arguments surrounding the concept of "embryo adoption" and the linguistic issues inherent in the embryo debates. The relevant Canadian and foreign law on embryos is covered, including the touchy issue of the legal status of the embryo: person, property or somewhere in between? There is also some relevant foreign law on embryo donation to discuss. Finally, Chapter 2 summarizes the existing legal analysis of "adoption-like" issues in embryo donation, including the parental status of the embryo donors, the concept of open adoption and the rights of any resulting children to know of their genetic heritage (or even to actually meet their genetic families), and issues of screening recipient parents for parental fitness.

Chapter 3 is a brief attempt to summarize the various strands of feminist theory on adoption and RT, there being far more of the latter than the former. Many feminists have criticized both RT and adoption as forms of exploitation of women, but others acknowledge that women are not powerless and frequently make their own choices even in the face of coercion – some of these choices even help women form alternative families. Rather than condemning either of these practices wholesale, we should instead perhaps be scrutinizing the way in which they are performed. The Chapter also looks at pronatalism. An overview of the work in this area indicates that motherhood does not seem to be innate to either genetic or gestational links,

despite widespread beliefs that being a woman is about being a mother. Neither forcing all women who give birth to think of themselves as mothers nor refusing to support women who want to become mothers through adoption or RT accomplishes much in the way of separating the role "woman" from the role "mother." Although many feminists see genetic links as male-defined and the quest for them as male-driven, this review shows that many women value genes as well. Perhaps the criticism is more correctly directed at those who value genes primarily as the test of motherhood instead of also giving weight to pregnancy, childbirth and social parenting. All four need to be factored into the equation.

The legal meat of the thesis is provided in Chapter 4. Legal parentage of a child resulting from a donated embryo is unclear at best, although historical analysis would indicate that intentional donors should not be able to obtain legal parentage in any but the most egregious scenarios. The proposed Canadian federal regulations on the matter do not add clarity. The chapter will review the assertions that genes are the basis of legal parenthood and explain why that cannot possibly solve all of the potential disputes in the twenty-first century. Reviewing the history of legal paternity demonstrates that it was never solely about genetic connections, but blood ties were sometimes relevant and seem to be gaining ground in the modern jurisprudence, although the area is still in flux. Legal maternity is even more disputed, and the falsity of a popular Latin maxim is revealed here. Despite indications that pregnancy and parturition were key to the legal basis of maternity at common law, most modern Canadian cases give them little weight, often instead revealing a bias for the genetic tie. This summary of current law indicates that embryo donors are not legal parents, but the final decision may depend on the court hearing the case, and the individual judge's beliefs about genes and "real" parentage.

The final substantial chapter considers social and psychological parenthood in embryo donation, from the perspectives of both the donors and the recipients, using data gleaned from medical studies and from media reports. Embryo creators do not like to donate their excess

embryos to other people for reproductive purposes, and some but not all of them think the embryos are children. Others say the embryo is only a potential child, while a few have no such feelings. There are conflicting data on gender differences in embryo disposition and in potential parental feelings towards them, but not all of the studies are reliable, which may explain a few of the discrepancies. A percentage will not donate the embryos because they are wary of what the resulting offspring might do down the road, such as make contact with them. Embryo and gamete recipients also have a variety of positions on parenthood, possibly even more conflicted than those of the potential donors. People struggle with the lack of terms to describe their relationships. It appears that the most important contribution the media attention to embryo donation can make is highlighting the fact that many people do not believe that everyone has only two parents, one of each sex.

Embryo donation is the perfect vehicle to highlight Western culture's complicated multiple definitions of family in 2006. Although a great deal more is research needed, this work attempts to make some sense of at least some of the questions.

CHAPTER 2: EMBRYO DONATION AND EXISTING LEGAL ANALYSIS

Existing legal analysis of the issues involved in embryo donation is sparse, based almost entirely in the United States, and is largely preliminary. Most commentators have paid scant attention to several significant questions regarding genetic parentage, analogies to and differences from adoption and other uses of reproductive technologies, and (possible) gender distinctions in these areas. An examination and comparison of the legal writings on embryo donation aids in the illumination of these gaps. First, however, it is necessary to review the general background on the process of embryo donation as well as the current public and political debates.

I. Background on Embryo Donation

The capabilities of reproductive technology (RT) took a giant leap forward in 1978 with the first successful pregnancy resulting from *in vitro* fertilization (IVF).[33] The IVF process combines egg and sperm in a laboratory, and, when fertilization occurs, allows the earliest stages of embryonic development to continue outside the human body.[34] When the fertilized eggs have divided into four to eight cells, the embryo can either be implanted in a woman (not necessarily the egg provider) in hopes of developing a viable pregnancy, or cryopreserved for future use. While men achieve sperm extraction through a low-tech and familiar procedure, acquiring eggs

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[33] P.C. Steptoe & R.G. Edwards, "Birth After Reimplantation of a Human Embryo" (1978) 336 Lancet.

[34] For a good overview of various reproductive technologies and issues, written for the non-medical professional, see Lawrence J. Kaplan & Rosemarie Tong, *Controlling our Reproductive Destiny: A Technological and Philosophical Perspective* (Cambridge, Mass.: MIT Press, 1996), especially Chapter Nine. Embryos are also created through intracytoplasmic sperm injection (ICSI), when sperm is injected into an egg to facilitate fertilization, a technique used with "weak" sperm or when there are very few sperm; this procedure is making donor insemination (DI) less common: E. Karpman, D.H. Williams, & L.I. Lipshultz, "IVF and ICSI in male infertility: update on outcomes, risks, and costs" (2005) 5 Scientific World J 922. Women may also use either of these processes when one or both partners is concerned about passing on a genetic disease to their offspring; embryos can currently be tested for over 100 genetic diseases prior to implantation: Laurie Tarkan, "Screening for Abnormal Embryos Offers Couples Hope After Heartbreak" *New York Times* (22 Nov 2005).

for IVF requires a woman to take hormones that spur her ovaries to produce more than the usual one egg per menstrual cycle. The actual egg extraction involves outpatient surgery, and both the hormones and the surgical procedures can have painful side effects that, in rare circumstances, are life-threatening.[35] Although fertility clinics have been freezing sperm for decades, human eggs rarely survive cryopreservation undamaged;[36] therefore, egg extraction used to be performed every time IVF was attempted, sometimes as many as eight times on the same woman hoping to achieve a full-term pregnancy.[37]

Due to the discomfort inflicted on women, and to reduce the overall cost of the RT process (which can be substantial),[38] medical researchers developed the process of freezing embryos. If the initial IVF cycle does not produce a child, or if the contracting party desires more

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[35] Paul C. Redman and Lauren Fielder Redman, "Seeking a Better Solution for the Disposition of Frozen Embryos: Is Embryo Adoption the Answer?" (2000) 35 Tulsa L J 583 at 584-585; Tracey S. Pachman "Disputes Over Frozen Preembryos and the "Right Not to be a Parent"" (2003) 12 Colum. J Gender & L 128 at 129-130; Ellen Waldman, "The Parent Trap: Uncovering the Myth of 'Coerced Parenthood' in Frozen Embryo Disputes" (2004) 53 Am. U L Rev. 1021 at 1053. In the early days of RT, a few women died following egg removal, although techniques and accompanying medications have since changed: Lori B. Andrews, *The Clone Age: Adventures in the New World of Reproductive Technologies* (New York: Henry Holt, 1999) at 35; Gina Kolata, "Clinics Selling Embryos Made for 'Adoption'" *New York Times* (23 Nov. 1997) A1. See also Kaplan & Tong, ibid., for information about newer egg extraction techniques, at 258-9.

[36] Scientists have made some progress in this area, with several recent reports of successful pregnancies after oocyte freezing, including in Canada: Helen Branswell, "Montreal team solves dilemma of freezing human eggs; baby born using approach" *Canadian Press* (30 May 2005). See also Michael Tucker, Paula Morton & Juergen Liebermann, "Human oocyte cryopreservation: a valid alternative to embryo cryopreservation?" (2004) Eur. J Obstet. & Gynecol. & Reprod. Bio. S24. If this method is ever widely perfected, cryopreserved embryos will become far more rare, since many parties will opt to freeze egg and sperm separately. However, no one knows how long the embryos currently in storage will be viable; women have given birth using embryos which had been frozen at least 12 and 13 years: A. Revel, A. Safran, N. Laufer, A. Lewin, B. E. Reubinov, & A. Simon, "Twin delivery following 12 years of human embryo cryopreservation: Case report" (2004) 19 Human Reprod. 328 and Alex Barnum, "Baby 13 years in the making" *San Francisco Chronicle* (5 July 2005), online: <http://sfgate.com>.

[37] Katheryn D. Katz, "Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation" (2003) 18 Wisc. Women's L J 179 at 183-184.

[38] Prices vary, but seem lower in Canada than in the United States and some other countries. Genesis Fertility Centre in Vancouver advertises a price of $4500 CAD per IVF cycle for residents of British Columbia, Alberta, the Yukon and the Northwest Territories, and $5500 for other Canadians or non-residents, excluding medications which may run $1500-3000 per attempt: "Fees", online: Genesis Fertility Centre <http://www.genesis-fertility.com/fees/index.htm>; The Fertility Centre in Ottawa charges $5900 for IVF and $3000-5000 for the necessary medications: "Fees", online: The Fertility Centre , <http://www.conceive.org/eng/patientcentre_fees.htm>. Most American costs seem to run from $10,000-15,000 USD, meaning some Americans go to clinics abroad, including in Canada: Felicia R. Lee, "Driven By Costs, Fertility Clients Head Overseas" *New York Times* (25 Jan. 2005). See also Daniel I. Wallance, "Defrosting Embryo Adoption" (17 Dec. 2003), online: Center for Adoption Policy Studies, at <http://www.adoptionpolicy.org/pdf/embryo_adoption.pdf>, citing an average low-end cost of $12,400: at 5; Virginia Lynn, "Pressure on to limit eggs in IVF process" *Pittsburgh Post-Gazette* (31 July 2005), online: <http://www.post-gazette.com>, cites a starting price of $12,500.

than one child, the embryos can be thawed and implanted several years after their creation. Due to the low success rate of RT, in terms of the number of live babies born,[39] most women undergo more than one implantation and therefore prefer to create as many embryos as eggs can be harvested. This has led to a huge number of embryos being stored in facilities worldwide, with more than 400,000 in the United States alone.[40] Although most stored embryos are earmarked for use by the parties who contracted to create them,[41] some patients release the remaining embryos for research, request they be destroyed, or consent to donating the embryos to another woman who wants to become pregnant. In addition, many gamete providers leave their embryos in frozen limbo and cannot later be reached when clinics try to request instructions on, or payment

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[39] David I. Hoffman et al, "Cryopreserved embryos in the United States and their availability for research" (2003) 79 Fertility & Sterility 1063 at 1065, reports a median live birth rate of 31% to women under 35 in US clinics in the year preceding the study; considerably lower numbers are frequently seen.

[40] Hoffman et al, ibid., reported almost 400,000 known cryopreserved embryos and estimated another 50,000 existed in clinics that did not respond to the survey: at 1063. By comparison, there were more than 50,000 stored in the UK in 1996 and 71,000 in Australia and New Zealand in 2000: ibid. One of the few surveys taken in Canada reported 15,615 embryos in cryopreservation in 2003, but only 13 of Canada's 24 RT clinics responded to the questionnaire: Francoise Baylis, Brenda Began, Josephine Johnston, and Natalie Ram, "Cryopreserved Human Embryos in Canada and Their Availability for Research" (2003) 25 J Obstetrics & Gynaecology Canada 1026 at 1028. Perhaps to avoid the storage problem, some American clinics apparently refuse to create and freeze embryos unless the gamete providers promise that all viable embryos would eventually be implanted in someone: Kim Schaefer, "In-vitro Fertilization, Frozen Embryos, and the Right to Privacy – Are Mandatory Donation Laws Constitutional?" (1990) 22 Pac. L J 87 at 89; Andis Robeznieks, "Ethics for extra embryos: Doctors face a dilemma" *AmedNews.com* (14 Feb. 2005), online: American Medical Association, <http://www.ama-assn.org>.

[41] Hoffman at al, supra note 39, report that 88% of stored embryos are awaiting patient use: at 1066. However, it does appear that many people also say they intend to use their embryos when they instead are unsure what to do with them, in effect delaying a final decision: Catherine A. McMahon, Frances Gibson, Jennifer Cohen, Garth Leslie, Christopher Tennant & Douglas Saunders, "Mothers Conceiving Through In Vitro Fertilization: Siblings, Setbacks, and Embryo Dilemmas After Five Years" (2000) 10 Repro. Tech. 131 at 134. People admit to this in media interviews: Susan Baer, "Fertility drugs complicate stem-cell feud" *Detroit News* (13 June 2005); Lynn Harris, "Clump of cells or 'microscopic American?'" *Salon* (5 Feb. 2005), online: <http://www.salon.com>. Unlike the United Kingdom and other jurisdictions, the United States has no official time limits for embryo storage in any legislation: Heidi Forster, "Recent Development: The Legal and Ethical Debate Surrounding the Storage and Destruction of Frozen Human Embryos: A Reaction to the Mass Disposal in Britain and the Lack of Law in the United States" (1998) 76 Wash. U. L. Q. 759 at 763-764; Bradley J. Van Voorhis, Dan M. Grinstead, Amy E. T. Sparks, Janice L. Gerard & Robert F. Weir, "Establishment of a successful donor embryo program: medical, ethical and policy issues" (1999) 71 Fertility & Sterility 604 at 604.

for, continued storage.[42] Some embryo creators may be evading tough decisions through such inaction.[43]

The idea of attempting pregnancy with a donated embryo appeals to different women for different reasons, including struggles with infertility, lack of her own eggs due to disease or injury, an inheritable disease in her own DNA, and lack of a male partner. Commentators note it is particularly attractive to lesbians and unpartnered women,[44] and the cost of implantation is lower than other RT treatments and may even be covered by some medical insurance plans.[45] Costs are usually also lower than in traditional domestic or international adoptions, and the recipient mother is able to experience pregnancy and childbirth and control the pre-natal environment, if the implantation procedure is successful, a bonus not available when one adopts an existing child.[46] Currently in most Western countries that allow embryo donation, recipients are not legally required to undergo a home study and other personal screenings that are necessary in adoption.[47] Some think that the certainty involved, when compared to birth parents who may change their minds at the last moment, is another benefit compared to traditional adoption.[48] For

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[42] Christopher R. Newton et al, "Embryo donation: attitudes toward donation procedures and factors predicting willingness to donate" (2003) 18 Human Reproduction 878, conducted an opinion survey of couples who had created extra embryos in London, Ont. but had not returned to use them over the previous 3-8 years, but "only 49% could be successfully located despite considerable effort."

[43] "How can couples 'forget' they have a frozen embryo? Isn't that like a man conveniently forgetting he has a wife?": Andrews, supra note 35 at 67. Not responding to clinic enquiries may be one way evading responsibility (at least in one's mind) for destruction in jurisdictions with storage time limits: Agneta Skoog Svanberg, Jacky Boivin, & Torbjörn Bergh, "Factors influencing the decision to use or discard cryopreserved embryos" (2001) 80 Acta Obstet Gyneol Scand. 849 at 853-854; M. Cattoli, A. Borini & M.A. Bonu, "Fate of stored embryos: our 10 years experience" (2004) 115S Eur. J Obstet. & Gyn & Reprod. Biology S16 at S17.

[44] See, for example, *Robert B. v. Susan B.*, 109 Cal. App. 4th 1109 (2003), where Susan B. an unpartnered woman, requested an anonymously donated embryo so there would be no parental challenges from the gamete donors; she intended to be a lone mother. Unfortunately, someone else's embryos were implanted in error and the court declared that the sperm provider was the legal father; the egg donor was anonymous and the intended mother (the sperm provider's spouse) had no legal status at all.

[45] Katz, supra note 37 at 226; Naomi D. Johnson, "Excess Embryos: Is Embryo Adoption a New Solution or a Temporary Fix?" (2003) 68 Brook. L Rev 853 at 863.

[46] Katz, supra note 37 at 226-229; Redman and Redman, supra note 33 at 587-589.

[47] Katz, supra note 37 at 227-228.

[48] Olga Batsedis, "Embryo Adoption: A Science Fiction or an Alternative to Traditional Adoption?" (2003) 41 Fam. Ct. Rev. 565, at 573; Kolata, supra note 35, quotes one embryo recipient as saying "It's an adoption, but we have control...We don't have to worry about the birth mother changing her mind. We don't have to worry that she'll take drugs while she's pregnant."

people worried about the social stigma of infertility and of raising a non-genetically related child, gestation permits them to conceal the origins of the child.[49] Couples considering surrogacy, DI or egg donation sometimes express concerns about one parent having a genetic connection to the child that the other one lacks;[50] receiving an embryo means that both intended parents (when there are two of them) start out on equal footing in regards to genetics.[51] A survey of forty (mostly American) clinics that have performed embryo donation at least once reported a live birth rate of 22 percent,[52] numbers mirrored in a Finnish programme.[53] An Australian study at one clinic had much lower numbers, with only 11 percent of embryo transfers resulting in a "take-home baby."[54] These rates are lower than that for IVF and ICSI, perhaps because the donated embryos may be of lower quality than those used first.[55]

II. Factors Driving the Promotion of "Embryo Adoption"

Embryo donation first led to pregnancies in 1983,[56] and some fertility specialists have always offered the procedure. However, in the early and less-scrutinized days of IVF, doctors occasionally performed these third-party implantations without the consent of the original

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[49] In theory, a woman could also conceal this fact from her obstetrician, a point stressed on a website for a fertility clinic in Bombay, India: Embryo Adoption, online: Malpani Infertility Clinic, <http://www.drmalpani.com/embryoadoption.htm>.

[50] Helena Ragoné, *Surrogate Motherhood: Conception in the Heart* (Boulder, CO: Westview Press, 1994) at 98-99; Rachel Cook, "Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation" in Andrew Bainham, Shelley Day Sclater and Martin Richards, eds., *What is a Parent? A Socio-Legal Analysis* (Oxford: Hart Publishing, 1999) 121 at 128-129.

[51] Johnson, supra note 45 at 865.

[52] Sheryl A. Kingsberg, Linda D. Applegarth & Jeffrey W. Janata, "Embryo donation programs and policies in North America: survey results and implications for health and mental health professionals" (2000) 73 Fertility & Sterility 215 at 216.

[53] Viveca Söderström-Anttila, Tuija Foudila, Ulla-Riitta Ripatti & Rita Siegberg, "Embryo donation: outcome and attitudes among embryo donors and recipients" (2001) 16 Human Reprod. 1120 at 1122.

[54] Gabor T. Kovacs, Sue E. Breheny & Melinda J. Dear, "Embryo donation at an Australian university in-vitro fertilisation clinic: issues and outcomes" (2003) 178 Med J Australia 127 at 128.

[55] Julinda Lee & Christine Yap, "Embryo donation: a review" (2003) 82 Acta Obstet. Gynecol. Scand. 991 at 995.

[56] J.E. Buster, M. Bustillo, I. Thorneycroft et al, "Nonsurgical transfer in in-vivo fertilized donated ova to five infertile women: report of two pregnancies (letter)" (1983) 2 Lancet 223-224; A. Trounsen, J. Leeton, M. Besanko, C. Wood, & A. Conti, "Pregnancy established in an infertile patient after transfer of a donated embryo fertilized in vitro" (1983) 286 Br. Med. J 835.

donors,[57] and few regulations or laws governed the process. The concept of these embryos being adopted in the same manner as existing children is a more recent development, although at least a few researchers and commentators applied adoption language to embryo donation since before the procedure was available.[58] Louisiana State law, which mandates implantation of all embryos created, does refer to "adoptive implantation", and this statute has been in effect since 1986.[59] Some of the earliest intense media coverage regarding "prenatal adoption" came in 1996 when a cardinal at the Vatican encouraged married women to volunteer to gestate unwanted frozen embryos, a plea triggered by a mandatory embryo destruction law about to take effect in Great Britain.[60]

Although a few clinics and agencies use the word "adoption" in regards to embryo donation, the term "embryo adoption" is most frequently associated with one of its most vigorous and vocal promoters, the Snowflakes Program run by Nightlight Christian Adoptions. Spokespeople for the Fullerton, California agency repeatedly state that life begins at conception, and that the embryos are "children locked in frozen orphanages" and are "preborn".[61] Snowflakes was the big winner when the United States Congress allocated $1 million to embryo adoption public awareness campaigns in 2002: of three projects gaining funding, Snowflakes

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[57] Charles P. Kindregan, Jr., and Maureen McBrien, "Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos" (2004) 49 Villanova L Rev 169 at 176; also Katz, supra note 37 at 185.

[58] Andrews, supra note 35 at 20, mentions hearing about the concept referred to as adoption at a conference in 1980. The scientist, Richard Seed, claims a prospective patient called and asked if he could adopt an embryo.

[59] Jennifer P. Brown, "'Unwanted, Anonymous, Biological Descendants': Mandatory Donation Laws and Laws Prohibiting Preembryo Discard Violate the Constitutional Right to Privacy" (1993) 28 USFL Rev. 183 at 189-190, discussing LA Rev Stat Ann § 9: 121-130 (West 1991). If a child is born, a constructive adoption has legally occurred under this legislation: Katz, supra note 37 at 209. See Part III, below, for further discussion of the Louisiana embryo laws.

[60] See discussion in Janette M. Puskar, "'Prenatal Adoption': The Vatican's Proposal to the *In Vitro* Fertilization Disposition Dilemma" (1998) 14 NY L Sch. J Hum Rts 757, at 776-779; John Berkman, "Adopting embryos in America: a case study and an ethical analysis" (2002) 55 Scottish J Theology 438 at 440-441; Francesco Demartis, "Mass Pre-Embryo Adoption" (1998) 7 Cambridge Q of Healthcare Ethics 101; Forster, supra note 41. British legislation mandates destruction of embryos after five years in cryopreservation, unless the gamete providers request an extension: Peter R. Brinsden, Susan M. Avery, Samuel F. Marcus, & Michael C. MacNamee, "Frozen embryos: decision time in the UK" (1995) 10 Human Repro. 3083.

[61] Katz, supra note 37, at 180, 191-194; Nightlight Christian Adoptions, Snowflake Embryo Adoption, "Message to Adoptive Parents", online: < http://www.nightlight.org/message_adoptive.asp>.

took home $500,000.[62] A subsequent round of funding a few years later brought another $325,000.[63]

The middle of 2005 saw intense media and White House attention to embryo "adoption." This coincided with increased efforts on the part of legislators and scientists to allow federal funding for stem cell research using supernumerary embryos donated for such purposes.[64] The White House hosted a party for children born after embryo donation (all of which came from the Snowflakes program),[65] using the legendary cuteness of children to drive home George W. Bush's point that "there is no such thing as a spare embryo."[66] Some children wore shirts with the slogan "this embryo was not discarded."[67]

The result was a glut of happy media stories about the previously desperate heterosexual couples who, after years of trying to conceive or adopt, found "embryo adoption" was the solution to all their problems, bestowing upon them the much desired All-American family.[68] However, the administration also faced a barrage of criticism from journalists and commentators who pointed out the flaws in the argument: that very few people want to donate their embryos to

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[62] Katz, supra note 37, at 196; Kathryn L. Miehl, "Pre Embryos: The Tiniest Speck of Potential Life Carrying the Seeds for Sweeping Change" (2003) 6 Pgh. J. Tech. L. & Pol'y 1.
[63] Robeznieks, supra note 40.
[64] Lawrence M. O'Rourke, "U.S. House backs bill to aid stem-cell study" *Globe and Mail* (25 May 2005), online: <http://www.theglobeandmail.com>.
[65] "Fact Sheet: Valuing Life Through Embryo Adoption and Ethical Stem Cell Research" (24 May 2005), online: The White House, <http://www.whitehouse.gov/news/releases/2005/05/20050524-10.html>.
[66] Eleanor Clift, "Stem-Cell Hypocrisy" MSNBC.com (27 May 2005), online: MSNBC, <http://wwwmsnbc.msn.com>.
[67] Pam Belluck, "From Opponents of Stem Cell Research, an Embryo Crusade" *New York Times* (2 June 2005).
[68] Dorinda Bordlee, "Leftover Lives" *National Review Online* (23 May 2005), online: <http://www.nationalreview.com>; Samantha Levine, "'Snowflake' babies bring the debate to life" *Houston Chronicle* (24 May 2005), online: <http://chron.com>; Bruce Lieberman, "Couple caught up in debate over fate of frozen embryos" *San Diego Union Tribune* (25 May 2005), online: <http://signonsandiego.com>; Diane O'Malley, "'Snowflake' baby travels to the White House with Mom" *FallBrook Bonsall Village News (CA)* (8 July 2005), online: <http://www.thevillagenews.com>; Kerry Korum, "Embryo Adoption Allows Mom to Carry Babies" Channel 14 WFIE (Evansville, IN) (25 July 2005), online: <http://www.14wfie.com>; Elissa K. Zirinsky, "Adoption's New Frontier" *CBS News* (28 July 2005), online: <http://www.cbsnews.com>; Kevin Freking, "Frozen Embryos Focus in Stem Cell Debate" *Los Angeles Times* (16 June 2005), online: <http://www.latimes.com/news/>. One mother described herself as "a pro-life advocate before the age of 10": John Faherty, "Family at centre of embryo debate" *Arizona Republic* (10 June 2005), online: <http://www.azcentral.com>. Another writer noted that this woman, who had difficulty carrying a pregnancy to term, by her own reasoning apparently destroyed 10 lives since only one of the 11 embryos she had implanted made it to a live birth: Ellen Goodman, "Snowflakes in the forecast" *Seattle Times*, (10 June 2005), online: <http://seattletimes.nwsource.com>.

adoption programs, that most stored embryos are not available to other people, that embryos are not children, that embryo donation and stem cell research can coexist, that stem cell research might one day save already existing humans, that there are still live children waiting for adoption.[69] Inevitably, satirists took the assertion that embryos are babies one step further.[70]

Most American commentators acknowledge that the support for the concept of "embryo adoption," along with legislation and government policy documents using the term, intentionally threatens a woman's right to an abortion and even the legality of many RT processes.[71] This could occur through enactment of laws protecting IVF embryos and governing the embryo donation process, gradually accruing rights to the embryo, as has already occurred in Louisiana. Many commentators link Bush's original decision to limit embryo research funding to the "embryo adoption" funding announcements.[72] The Bush administration is also responsible for

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[69] Clift, supra note 66; Belluck, supra note 67; Goodman, ibid.; Richard Cohen, "Life vs. Life" *Washington Post* (26 May 2005) A27; Joanne Cronrath Bamberger, "Embryos are not the real adoption crisis" *D.C. Examiner* (8 June 2005), online: <http://www.dcexaminer.com>; Chris Mooney, "Snow Job: The embryo 'adoption' process – and the Snowflakes families – distract from the real issues in the stem cell debate" *American Prospect* (13 June 2005), online: <http://www.prospect.org>; Starita Smith, "Bush values embryos above potential adoptees" *Duluth News Tribune (MN)* (11 June 2005), online: <http://www.duluthsuperior.com>.

[70] The *Onion*, in its weekly fake "person on the street" interviews, posed the question "The House recently passed a bill lifting restrictions on stem-cell research, but Bush has threatened to veto the bill if it passes the Senate. What do *you* think?" to which one character replied, "They're not stems, they're *babies!* And they're not cells, they're *babies!* And it's not research, it's *babies!*": "What Do You Think?", *Onion* (1 June 2005), online: <http://www.theonion.com>. The popular political comic strip, Doonesbury, addressed the issue in a Sunday comic mostly devoted to the rising American death toll in the war in Iraq. Two lead characters speculated that Bush might be having trouble sleeping at night. The final panel, representing the White House at night, read "What's wrong, dear?" reply: "It's the stem cells. I hear their cries." *Doonesbury*, (10 July 2005).

[71] One exception is Batsedis, supra note 48, who thinks that the anti-abortion argument is unfounded, since no state considers embryos to have the same moral status as children: at 571. Another interesting dissent comes from Susan Frelich Appleton, who speculates that proponents of "embryo adoption" are not just interested in undermining abortion rights but want to portray themselves and other RT users 'child savers' who are "providing a family for a child (or embryo) in need." She further notes that embryo recipients are really just meeting their own adult needs to have a child, and that child welfare has nothing to do with it. Susan Frelich Appleton, "Adoption in the Age of Reproductive Technology" (2004) U Chi. Legal Forum 393 at 439-441. I would extend this analysis somewhat to postulate that at least some embryo adoption boosters are also trying to promote the concept of adoption itself, at least the type where a child is taken from a single parent home into a two-parent, married heterosexual one – an act many of these Christian activists also view as child saving, not just because the birth mother might not want to raise the child, but because they think she is not suitable to do so. In general, the anti-abortion movement portrays adoption as the valid alternative to an unplanned pregnancy: Maureen A. Sweeney, "Between Sorrow and Happy Endings: A New Paradigm of Adoption" (1990) 2 Yale J. L. & Feminism 329 at 333.

[72] See generally Miehl, supra note 62; Katz supra note 37 at 194-197, details how two embryo recipients brought their twin sons born through embryo donation to the Congressional Hearings on stem cell research, asking, "Which one of my children would you kill [by using the embryo for research]?"

granting state health insurance eligibility to fetuses and embryos.[73] Incremental legal protections and restrictions on abortion access and procedure are the current preferred tactic of the U.S. anti-abortion movement.

Even the continued public use of the phrase "embryo adoption" can lead to members of the general public believing that embryos deserve personhood protection, bolstering support for more legal restrictions on embryos.[74] Any comparison of embryo donation to traditional legal adoption of a child must be conscious of this agenda. From one perspective, since adoption applies to children and embryos are not children, the phrase "embryo adoption" is simply legally inaccurate and misleading. Although some academics believe that adoption law provides at least some guidance when legislating on embryo donation, the most thoughtful and comprehensive reviews of the topic refuse to use the term "embryo adoption."[75]

In this political context in the United States, some legal commentators worry that the terminology used in articles and case law will be responsible for expanding protections for embryos and restricting research and access to abortion. "Preembryo" has become popular in legal writing and is used by several courts in the US and elsewhere; by some accounts it is the more correct scientific term,[76] and more importantly, one can argue that law, regulations and

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[73] Susan L. Crockin, ""What Is an Embryo?": A Legal Perspective" (2004) 36 Conn L Rev. 1177 at 1184. Existing eligibility for pregnant women was not expanded, despite demands for coverage. In 2003, 41 million Americans had no health care coverage at all: Miehl, supra note 62 at footnote 158. Even laws protecting the rights of embryos look ridiculous when one considers the lack of health care access and the still-high infant mortality rates in the United States: Janet Gallagher, "Eggs, Embryos and Foetuses: Anxiety and the Law" in Michelle Stanworth, ed., *Reproductive Technologies: Gender, Motherhood and Medicine* (Minneapolis: U of Minnesota Press, 1987) 139-150, at 149.

[74] Kindregan and McBrien, supra note 57 at 188. This public dialogue may also embolden those who want to take up test cases, as well as influence the judges who hear those cases. A Chicago couple received standing to sue for "wrongful death" when a fertility clinic revealed it had destroyed an embryo rather than cryopreserving it: Dee McAree, "Wrongful Death Suit Allowed Over Embryo" *National Law Journal* (18 Feb. 2005), online: <http://law.com>.

[75] See further discussion in Part III c).

[76] Brown, supra note 59 at 183, footnote 2; Crockin, supra note 73 at 1178; Kindregan and McBrien, supra note 57 at 170, footnote 1.

policies written about embryos and fetuses do not apply to preembryos.[77] "[S]emantical distinctions are significant in this context, because language defines legal status and can limit legal rights."[78] "Zygote", "prezygote" and "blastocyst" also technically apply, and all of them do turn up in the American jurisprudence. In contrast, the new Canadian *Assisted Human Reproduction Act*[79] [AHRA] includes a simple definition

> "embryo" means a human organism during the first 56 days of its development following fertilization or creation, excluding any time during which its development has been suspended, and includes any cell derived from such an organism that is used for the purpose of creating a human being.[80]

Any fertilized egg that develops past 56 days is then defined as a "foetus",[81] and retains that designation until birth. For sake of consistency with Canadian law, and also with the medical literature regarding embryo donation,[82] this thesis uses "embryo" to mean all of the above medical terms which could also apply, until the embryo reaches the foetus stage. Simplicity is not to be sneered at, nor is a definition that seems to foreclose some of the worries American commentators express.

III. Existing Legal Analysis of Embryo Donation

a) The Legal Status of Embryos

Absent specific legislation regarding the disposition of embryos, commentators and courts have analogized fertilized eggs to existing legal constructs, with particular attention to medical and RT law, although there are very few materials dealing with the Canadian context.

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[77] Crockin, supra note 73, is the most detailed review of the multitude of terms that can be used to describe a fertilized egg which has less than a dozen cells and has developed for fewer than 14 days, and for the "leeway" that alternative terminology can deliver in law.
[78] *Davis v. Davis*, 842 S.W.2d 588 (1992 Tenn. SC) at 592. *Davis* was the first case where a divorcing couple litigated the disposition of their frozen embryos.
[79] S.C. 2004, c.2.
[80] Ibid., s.3.
[81] Ibid.
[82] Apparently, most MDs and patients talk about "embryos" as well: Redman and Redman, supra note 33 at 583 (author Paul C. Redman is a medical doctor in Obstetrics and Gynecology).

The literature discusses three possibilities: that embryos are pure property, that embryos are human beings with personhood rights, and that embryos exist in a special middle ground category.[83]

Virtually all American authors reject the "human being" position as inconsistent with U.S. constitutional law regarding abortion and contraception, and argue or at least presume that the Louisiana law that declares the embryo is a "juridical person"[84] would not withstand constitutional scrutiny.[85] If embryos were human beings, they would likely have a right to life that would lead to mandatory implantation and donation laws and would completely preclude destruction or embryonic research.[86] From another standpoint, cryopreserved embryos are not yet individuals because they still have the capability to divide into more than one embryo.[87]

In *Tremblay v. Daigle*,[88] the Supreme Court of Canada ruled that the "foetus" is neither a juridical person under the *Civil Code of Lower Québec* until it is born alive, (after which it can exercise pre-birth patrimonial rights[89]) nor a human being with personhood rights[90] in Canadian common law or under the *Canadian Charter of Rights and Freedoms*.[91] This does not mean,

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[83] Diane K. Yang, "What's Mine is Mine, But What's Yours Should Also be Mine: An Analysis of State Statutes that Mandate Implantation of Frozen Embryos" (2002) 10 J. L & Pol'y 587 at 593-602 provides one of the most complete overviews of the three arguments; see also Brown, supra note 59 at 193-199; Kindregan and McBrien, supra note 57 at 185-189.

[84] "Juridical person" is a civil law concept defining a physical person, as opposed to a legal person such as a corporation. A juridical person can exercise all legal rights pertaining to their patrimony – "the totality of rights that have an economic value recognized in law" – and also extra-patrimonial rights, which include but are not limited to physical and intellectual integrity, freedom of expression, and filiation. See John E.C. Brierley and Roderick Macdonald, *Québec Civil Law: An Introduction to Québec Private Law* (Toronto: Emond Montgomery, 1993) at 203-208.

[85] See discussion in section (b) below.

[86] Redman and Redman, supra note 33 at 589-590.

[87] John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton, NJ: Princeton UP, 1994) at 104.

[88] [1989] 2 SCR 530.

[89] Ibid., paras. 61-64.

[90] Ibid., paras. 65-77.

[91] *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.

however, that an embryo would be accorded no rights or interests whatsoever if IVF embryo litigation should occur in Canada.[92]

The "embryo as property" stance has almost as many detractors, although in a case from Virginia involving donors who were moving out of state and wanted to transfer their frozen embryo to a clinic near their new home, the Court used bailor-bailee law to grant the couple's wishes.[93] The agreement signed between the couple and the clinic governed the dispute. Despite the unpopularity of this argument, some writers still use the language of ownership when discussing embryos and their donors.[94] Snowflakes, while maintaining the embryos are pre-born children available for adoption, strangely claims on its web site that:

> The adoption agreement and relinquishment forms are legal contracts between the two families. As there are no laws regarding adoption of embryos, we have created the contract to match *the current position of the courts that the embryos are property.*[95] [emphasis added]

It appears that anything less than full human status is merely property in the legal opinion of Snowflakes, contrary to their public position on the purpose of their program, but it is quite clear that the limited but existing American jurisprudence does not consider embryos to be mere property.

In the context of embryo donation, most writers support the use of contracts in addition to legislation, to better define rights and obligations and to ensure the parties all turn their minds to

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[92] No case in Canada has gone to trial. When a London, Ont. fertility clinic mistakenly implanted one couples' embryos into another woman, the lawsuit settled out of court. London Health Sciences Centre fired the employee responsible for the error, and assured the genitors that no pregnancy occurred: Mary-Jane Egan, "Pair wants proof there was no pregnancy" *London Free Press* (27 May 1999) A1; Mary-Jane Egan, "Lawsuit against hospital settled out of court" *London Free Press* (14 June 1999). The gamete providers were suing for $650,000. However, it is unclear whether they attempted to argue that the embryo had rights or whether they based their suit solely on property principles.

[93] *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989).

[94] Becky A. Ray, "Embryo Adoptions: Thawing Inactive Legislatures with a Proposed Uniform Law" (2004) S Ill. U L J 423 at 448; this wording is striking because the author is very pro-"embryo adoption" and otherwise accords a high value to the potential for life contained within an embryo; see also Waldman, supra note 35 at 1032.

[95] Snowflakes Embryo Adoptions, "Snowflakes Frequently Asked Questions", online, Nightlight Christian Adoptions: < http://www.nightlight.org/ snowflakes_faqs.asp>.

the details and ramifications of the legal transfer.[96] This differs from requirements for traditional adoption of a child, especially those done through public agencies. Although some birth parents and adoptive parents in Canada draw up contracts regarding future contact and information exchange, these are generally not legally enforceable when litigated.[97]

Most legal commentators appear to believe that gamete providers should be allowed to assert control over the disposition of embryos but not in as an impersonal and absolute manner as with basic forms of property. The overwhelming majority of embryo cases around the world have adopted this middle ground position, meaning there are few applicable legal analogies outside of the medical and reproductive context.[98] This would likely be the finding in Canadian courts as well, once a dispute over the disposition of embryos begins.[99] Since embryos are subject to higher protections and controls than eggs or sperm,[100] they cannot be pure property; arguably, even single gametes are not mere property in existing Canadian law.[101] On the other hand, the Supreme Court of Canada has held that a foetus is not a human being, so it is highly unlikely that an extracorporeal embryo could attain this status, as an embryo is less likely, statistically, to result in a live baby than the foetus is. On the sliding scale, an embryo is somewhere in the middle.

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[96] For example, Kindregan and McBrien, supra note 57 at 189; Ray, supra note 94 at 451; John A. Robertson, "Ethical and legal issues in human embryo donation" (1995) 64 Fertility & Sterility 885 at 892.

[97] Adoption Legislation Review Panel, *Report to the Minister of Social Services of the Panel to Review Adoption Legislation in British Columbia* (Victoria: Province of British Columbia, 1994) at 38; Richard Sullivan & Ellie Lathrop, "Openness in adoption: retrospective lessons and prospective choices" (2004) 26 Child. & Youth Services Rev. 393 at 398.

[98] Most jurisprudence involving cryopreserved embryos takes place when a couple, usually in the process of divorcing, cannot agree on the disposition of their remaining embryos. Leading cases include *Davis*, supra note 78; *Kass v. Kass*, 91 N.Y. 2d 554 (1998, CA); *J.B. v. M.B.*, 331 N.J. Super. 223 (2000); *Nachmani v. Nachmani*, 50(4) P.D. 661 (Israel), *Evans v. Amicus Healthcare Ltd.* [2004] EWCA Civ 727 (U.K). Natalie Evans has appealed to the European Court of Human Rights and lost: Robert Booth, "Woman loses embryos battle" *Guardian* (7 March 2006), online: <http://www.guardian.co.uk/>, and is now planning a final appeal to the grand chamber of the European Court of Human Rights.

[99] See discussion of the status of gametes and embryos in Roxanne Mykitiuk & Albert Wallrap, "Regulating Reproductive Technologies in Canada" in Jocelyn Downie, Timothy Caulfield & Colleen Flood, eds., *Canadian Health law and Policy*, 2nd ed. (Markham, Ont.: Butterworths Canada Ltd., 2002) 367 at 399-408.

[100] See discussion immediately below in Part III b).

[101] Mykitiuk & Wallrap, supra note 99 at 399-408. At best, the proposed regulations could be characterized as employing a "quasi-property" approach to ununited gametes, because an individual is prohibited from certain activities usually allowed with pure property, such as commercial use. The question is unsettled in Canada.

b) Existing Statutes and their Relevance to Embryo Donation

Many countries prohibit embryo donation,[102] some regulate it along with other RT,[103] while other countries allow the process to occur with little to no regulation and legal framework. Canada is finally joining the regulation group, although many of the expected rules are yet to be written or at least enacted. The AHRA, in yet unproclaimed provisions, prohibits any "use" of an embryo without the written consent of the donor that accords with the Regulations.[104] The previous federal government released draft Section 8 Regulations for commentary in September 2005.[105] Donation for third party use and for research would expressly be allowed, if certain procedures are followed, but once donation occurs, the receiving party may do whatever they wish with the embryo, within the other limits of the law. Embryo handling and research would be tightly controlled and embryo creation for the purpose of non-RT use would be prohibited,[106] precluding an understanding of the embryos as mere property. The accordance of control rights

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[102] Embryo donation is banned in Austria, Ireland, Israel, Denmark, Germany, Italy, Norway Sweden and Switzerland, and doubtless other countries that have not been written up in the RT literature: Joseph G. Schenker, "Assisted reproduction practice in Europe: legal and ethical aspects" (1997) 3 Human Reprod. Update 173; S. Bangsbøll, A. Pinborg, C. Yding Andersen, & A. Nyboe Andersen, "Patients' attitudes towards donation of surplus cryopreserved embryos for treatment or research" (2004) 19 Human Reproduction 2415; Christine Rothmayr & Celina Ramjoué, "Germany: ART policies as embryo protection" in Ivar Bleiklie, Malcolm L. Goggin and Christine Rothmayr, eds., *Comparative Biomedical Policy: Governing Assisted Reproductive Technologies* (London and New York: Routledge, 2004) 174; Guiseppe Benagiano, "The four referendums attempting to modify the restrictive Italian IVF legislation failed to reach the required quorum" (2005) 11 Reprod. Biomed. Online 279; Guido Pennings, "What are the ownership rights for gametes and embryos?" (2000) 15 Human Reprod. 979; Kerstin Bjuresten & Outi Hovatta, "Donation of embryos for stem cell research – how many couples consent?" (2003) 18 Human Reprod. 1353; Christine Rothmayr, Frédéric Varone, Uwe Serdült, Arco Timmermans and Ivar Bleiklie, "Comparing design across countries: What accounts for variation in ART policy?" in Ivar Bleiklie, Malcolm L. Goggin and Christine Rothmayr, eds., *Comparative Biomedical Policy: Governing Assisted Reproductive Technologies* (London and New York: Routledge, 2004) 228. Although embryo donation has never been officially prohibited in Canada, apparently many clinics used to refuse to perform the procedure: Maureen A. McTeer, *Tough Choices: Living and Dying in the Twenty-First Century* (Toronto: Irwin Law, 1999) at 145; Marilyn Moysa, "Couple agonized over fate of embryos" *Edmonton Journal* (4 Aug. 1996) A3. These days, not only do Canadian facilities perform the procedure, Canadians have also been involved in cross-border donations through Snowflakes: Lisa Priest, "One couple's tough decision: after agonizing, Mississauga parents opt to offer others their gift of life" *Globe and Mail* (4 Mar. 2002) F1.

[103] One of the earliest examples is Great Britain, with the *Human Fertilisation and Embryology Act 1990* (c. 37) ["HFEA"].

[104] S.8(3). This section will be proclaimed once Regulations are enacted: Health Canada, "Frequently Asked Questions: The *Assisted Human Reproduction Act*", Q. 1, online: <http://www.hc-sc.gc.ca/english/media/releases/2004/2004_12bk1.htm>.

[105] *Assisted Human Reproduction Act (Section 8) Regulations*, C. Gaz. 2005.I.3165 24 Sept. 2005 ("Regs.").

[106] AHRA, s.5(b).

to the "donor"[107] does not appear to extend to eggs and sperm, except for when they are used to create an embryo,[108] but neither do the restrictions on research apply to individual gametes.[109] All in all, the stricter controls on embryos as compared to other reproductive donations indicate a Canadian preference for the middle ground position, that embryos are neither human beings nor mere property, although this says little about how decisions would be made in the event of a disputed embryo donation.

As discussed above, embryos have human status in Louisiana as juridical persons, until they are implanted. The non-corporeal embryo cannot be intentionally destroyed, hence the statute is often described as legislating "mandatory implantation" or "mandatory donation";[110] however, it does not appear to outlaw indefinite cryostorage. Legislation in New Mexico also prohibits embryo destruction, while not going as far as granting personhood status to pre-implantation embryos.[111] Most commentators think these two laws, particularly the juridical person provision, are unconstitutional in light of existing American jurisprudence on abortion, contraception, procreation and the right to privacy.[112] In addition, Diane Yang notes that any

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[107] Under current technology, an embryo when first created should have two donors, unless it is created through cloning, which is expressly prohibited by this legislation: s.5(1)(a). A single person could also use donor gametes to create an embryo with their own egg or sperm. Further, once an embryo is donated to another party, including an individual or research group, the proposed Regulations state that the receiving party is then permitted to use the embryo in any way otherwise allowed by the regulatory scheme, including donation to yet another party, so an embryo could easily have just one donor in these circumstances: Regs., ss. 11 & 14. The implications of this definition will be discussed in later chapters.

[108] S. 8(1), not yet in force.

[109] AHRA requires donor consent for any use of an embryo (s.8(3)) but donor consent under the Act is only mandatory for eggs and sperm when they are going to be used in for human reproduction (s.8(1)). Obviously, this does not affect provincial health laws, which require certain levels of consent for human tissue and all medical procedures (Mykitiuk & Wallrap, supra note 99 at 398-399 & 408-413) but the AHRA levels of written consent will not apply to research on single gametes.

[110] Brown, supra note 59 at 189-190; Yang, supra note 83 at 593-594.

[111] Jill R. Gorny, "The Fate of Surplus Cryopreserved Embryos: What is the Superior Alternative for their Disposition?" (2004) 37 Suffolk U L Rev 459 at 471-472; Miehl, supra note 62 at footnote 81; NM Stat. Ann. § 24-9A-[1]-[7].

[112] For example, see Batsedis, supra note 71 at 570; Brown, supra note 59. One exception in legal commentary is Puskar, supra note 60, who tentatively puts forth analysis on the US right to privacy (while questioning whether such a case would even be decided on this point), and concludes that laws mandating donation "would not interfere with a couple's right to bear or beget a child, nor place any undue burdens on them": at 791.

embryo creators wishing to subvert the law could have the embryos implanted and then exercise the constitutional right to abortion, should a pregnancy take hold.[113]

While no other existing legislation is as restrictive as this, a handful of states do expressly deal with some aspects of embryo donation, although none use the language of adoption found in Louisiana,[114] and none are comprehensive. For example, Florida does require consent from both donors and receiving "couples", apparently restricting embryo donation to married heterosexual partners, as does the wording of Louisiana and Oklahoma law.[115] Oklahoma, Louisiana, Delaware, North Dakota, Texas, Virginia and Washington all expressly extinguish the parental rights of the progenitors, and declare the gestational mother and her partner the legal parents.[116] Texas repealed a similar law in 2001.[117] Florida expressly provides for a third party to carry the pregnancy to term and then surrender the resulting child for adoption by the intended parents, [118] which is really a gestational surrogacy arrangement using a donated embryo instead of commissioning the creation of a new one. New Hampshire regulates embryo donation agreements by mandating pre-approval of all contracts by a court.[119]

c) Legal Opinions on "Adoption-Like" Issues in Embryo Donation

The paucity of legislation regarding embryo donation and RT donation in general presents a sharp contrast to adoption, which is covered by statutory law in tremendous detail, especially in the limitations and requirements it places on the adopting parents. Legal commentators ruminating on the "embryo adoption" concept draw several analogies to

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[113] Yang, supra note 83 at 625.
[114] See supra note 59 and accompanying text.
[115] Ray, supra note 94 at 437 and 441.
[116] Ibid., at 439 and Crockin, supra note 73 at footnote 22 and accompanying text. Most of these states merely mention the scenario of embryo donation in tandem with donation of sperm and eggs as part of general RT legislation, but make no other reference to the process.
[117] Ray, supra note 94 at 432.
[118] Katz, supra note 37 at 210.
[119] Ibid.

traditional adoption, with an eye to proposed legislation for embryos. Some insist that all embryo donation should be treated as adoption,[120] while others distinguish between embryo donation, which is anonymous and analogous to medical donation, and "embryo adoption" which should be treated like an *open* adoption of a live child.[121] Most, however, see the issues as mixed, with some guidance being available in adoption law and policy, while RT law and even regular family law also can apply to certain aspects of the process.[122]

i) Parental Rights and Responsibilities of the Donors

Around eight U.S. states have legislation on this issue, but most jurisdictions do not deal with whether the embryo donors would automatically retain some of the rights, privileges and responsibilities of parenthood when their embryo is brought to term by another woman who intends to raise the child as her own.[123] Many people presume that contracts which explicitly terminate all such rights cover the point sufficiently,[124] especially since courts have frequently upheld contracts and/or prior intent in disputes involving RT.[125] However, in most of the embryo divorce disputes the courts have invalidated prior agreements, both written and oral, or stated

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[120] Paula J. Manning, "Baby Needs a New Set of Rules: Using Adoption Doctrine to Regulate Embryo Donation" (2004) 5 Geo. J. Gender & L. 677 at 679 and 681-2, arguing that both processes lead to genetically unrelated families, justifying similar treatment. Johnson, supra note 45 at 875, thinks adoption law would provide some appropriate guidance if a dispute arises. Katz, supra note 37, argues for several adoption law protections, such as criminal screenings and permanent record keeping throughout her article, but does not think existing adoption law currently applies to embryo donation; she would instead like to see more adoption-like regulation of all types of RT. Robertson, supra note 96, thinks that courts will "most likely" not rely on adoption law when disputes arise: at 891

[121] Angie Boss, "The Basics of Embryo Donation and Adoption", online: Conceiving Concepts, <http://www.conceivingconcepts.com/learning/articles/embryo.html>; Ray, supra note 94 at 425-426; Laura Ungar, "'We are living a miracle' La Grange couple 'adopt' embryo: definitions stir debate" *Courier-Journal* (Louisville, KY) (22 Jan 2006), online: <http://www.courier-journal.com>; Wallance, supra note 38, thinks that embryo donation occurs when an embryo is specially created for the recipient from donated gametes (something many others call embryo creation: see Kindregan & McBrien, supra note 57 at 192-193), but that donation of pre-existing embryos should rightly be called adoption and be treated as such.

[122] The New Zealand Law Commission recommended a fusion of adoption and RT law, since the position of the receiving parents is somewhere between adoption and single gamete donation: Law Commission (New Zealand), *New Issues in Legal Parenthood* (Wellington: Law Commission, 2005) at 105.

[123] In contrast, HFEA, supra note 103, defines the parent of a donated embryo as the woman who gave birth and, where relevant, the man she is partnered with: HFEA, ss. 27 & 28.

[124] Batsedis, supra note 71 at 573; Redman and Redman, supra note 33 at 589. See also the quote from Snowflakes, supra note 95, and accompanying text.

[125] Katz, supra note 37 at 214.

that such contracts were contra public policy, in favour of one progenitor's current wish not to become a biological parent.[126] As well, some surrogacy contracts were deemed to violate public policy and therefore have no force and effect, and adoption legislation generally prohibits a birth mother from giving binding consent to surrender the child until after the birth.[127]

The scanty regulation, complete lack of on-point jurisprudence and relative confusion of arguably analogous litigation leads a few other writers to warn that written embryo transfer agreements might not be upheld if brought before a court of law.[128] When adoption terminology is used in the agreements, parties are even more likely to be misled that a legal, irrevocable adoption has taken place.[129] It is not inconceivable that embryo donors might later have a change of heart, as occurs occasionally with birth parents in adoption, and as has rarely but very famously occurred in surrogate motherhood agreements.[130] They might want to have the embryo destroyed, the pregnancy aborted, or, in the alternative, they might decide they want contact with or even custody of the resulting child. As has occurred in one embryo donation case in the United States[131] and in several gamete donation and surrogacy cases,[132] one of the intended

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[126] See discussion in Helene S. Shapo, "Frozen Pre-Embryos and the Right to Change One's Mind" (2002) 12 Duke J. Comp. & Int'l L 75; Joseph Russell Falasco, "Frozen Embryos and Gamete Providers' Rights: A Suggested Model for Embryo Disposition" (2005) 45 Jurimetrics 273; Waldman, supra note 35; Pachman, supra note 35. The main exception is the Israeli case, *Nachmani*, supra note 98, in which the woman was granted possession of the embryos for implantation after the couple separated and the man no longer wished for the embryos to be brought to term.

[127] Katz, supra note 37 at 214-215.

[128] Kindregan and McBrien, supra note 57 at 174; Yang, supra note 83 at 630.

[129] Kindregan and McBrien, supra note 57 at 174.

[130] *In the Matter of Baby M*, 537 A2d 1227; 109 NJ 396 (Sup. Ct. 1988) and *Johnson v. Calvert*, 851 P.2d 776 (Cal. Sup Ct. 20 May 1993), aff'g 12 Cal. App. 4th 977 (8 Oct. 1991), aff'g X-663190, Sup. Ct. Orange County, 22 Oct. 1990 are the best-known examples, representing traditional surrogacy and gestational surrogacy respectively.

[131] The bizarre case of Jaycee Buzzanca, the child which the trial court declared had no parents, is probably not just a gestational surrogacy case gone wrong, but is in fact an embryo donation using a gestational surrogate. Neither John nor Luanne Buzzanca had viable gametes, so they contracted with a clinic to provide an embryo and then hired a gestational surrogate. When their marriage dissolved before the birth, John tried to disclaim responsibility for the child since neither he nor Luanne was a genetic parent, but the appeal court declared the Buzzancas the legal parents: *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 10 March 1998). What most commentators have missed is this was apparently not an embryo created from separately donated egg and sperm, but instead created by a married couple using his sperm and donated eggs; they gave birth to twins and apparently freed up their remaining embryos for donation: Janet. L. Dolgin, "An Emerging Consensus: Reproductive Technology and the Law" (1998) 23 Vt. L Rev. 225 at 245-246.

[132] *McDonald v. McDonald*, 196 A.D. 2d 7 (NY App. Div. 1994); *In re Marriage of Moschetta,* 30 Cal. Rptr.2d 893 (Ct. App. 1994); *Soos v. Sup. Ct Arizona*, 182 Ariz 470 (1994 Ariz. App).

parents might change their minds during the pregnancy, perhaps at the same time a relationship is ending, and may decide they no longer want the child, or that they do not want their former partner to be a parent as well. If the intended parents use a gestational surrogate mother, she could also make a strong claim for custody and parentage, since she would have a biological link to the child while the intended parents have none.[133] Less likely but still within the realm of imagination, the receiving family could decide they do not want to keep the child, perhaps due to the baby's medical condition or disability.[134] All of these cases would require absolute determination of parentage, for which there is little guidance in Canadian law when an embryo donation is involved.[135]

Even without a legal dispute involving the donors and intended parents, it is arguably in the best interests of the child to have legal parentage clarified.[136] In early adoption cases, sometimes legal parentage was unquestioned until a death occurred, and surviving relatives went to court over who could legally inherit from the deceased, a detail which was not always covered in the adoption legislation nor in the contractual arrangements which were common prior to statutory adoption.[137] An adoptee's right to inherit from her biological family and her adoptive relatives is still not always consistent with a full legal transfer of rights and responsibilities from one family to another. Some U.S. states allow inheritance from the birth family while others restrict inheritance from the adoptive one, especially when legal wills use terminology like "descendant" or "issue".[138] If Canadian law decides not to deal with donated embryos as if they were adopted children, legislation must expressly clarify this particular issue.

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[133] Katz, supra note 37 at 213.
[134] *Judy M. Stiver and Ray E. Stiver v. Philip J Parker M.D., John Hayes, W. J. Ringold M.D., L.C. Jorge M.D., C.M. Decespendes M.D., and Noel P. Keane.* No. 90-1624. (US Ct of App Sixth Circuit 15 Sept 1992); see discussion in Andrews, supra note 35 at 114-117.
[135] See detailed discussion in Chapter 4, below.
[136] Yang, supra note 83.
[137] Naomi Cahn, "Perfect Substitutes or the Real Thing?" (2003) 52 Duke L. J. 1077 at 1126-1139. Kindregan and McBrien, supra note 57, are the only commentators to seriously discuss this potential issue in embryo cryopreservation: at 196-199.
[138] Ibid.

ii) "Open" Embryo Donation, and the Rights of the Child

North American adoption has undergone somewhat of a revolution in recent years with a slow move towards openness in adoption. Unlike regimes of secret identity, birth families and adoptive families may today have some contact around the time of the adoption and on a continuing basis, in the form of everything from yearly letters to regular meetings. At a minimum, most birth parents in Canada now get some voice in selecting the adopting parents,[139] but agreements to have continued contact after the adoption are not legally enforceable.[140] Legal academics have generally accepted arguments that open adoption is less damaging, mentally and emotionally, for all parties involved, although social workers and psychologists are now recognizing that the wave of research and media attention which fuelled open adoption might be flawed and unrepresentative of the actual needs of some adoptees, birth parents and adoptive families.[141] Not all adoptees express an interest in knowing more about or meeting their birth families,[142] not all adoptive parents feel comfortable "sharing" a child, and some birth mothers do not want their identities known, while others who enter openness agreements find them too painful to continue.[143] This debate will likely continue, as will the practice of closed adoption in at least some circumstances.

Not surprisingly, legal analysis of embryo donation is similar to that on adoption and is almost entirely in favour of some elements of openness, especially in regards to ongoing

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[139] Jeannie House, "The Changing Face of Adoption: Challenge of Open and Custom Adoption" 13 C.F.L.Q. 333 at 343; Kerry Daly & Michael Sobol, *Adoption in Canada: Final Report* (Guelph, Ont.: National Adoption Study, University of Guelph, 1993) at 57-58.

[140] See discussion in Cindy L. Baldassi, "The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts and Convergences" (2006) UBC L Rev (forthcoming) ["Customary Adoption"] at Part III C.

[141] See especially Cindy L. Baldassi, "The Quest to Access Closed Adoption Files in Canada: Understanding Social Context and Legal Resistance to Change" (2005) 21 Can. J. Fam. L 211 ["Quest"] at ff218 and Baldassi "Customary Adoption", ibid.

[142] Ibid.

[143] Marlene Webber, "Open Concept: No Secret Files, No Frustrating Searches, Lots of Contact from Day One" (2001) 18(4) Today's Parent 88.

exchange of medical information.[144] Commentators that are most supportive of calling embryo donation an adoption are the most likely to support mandated choice of the recipients by the donors and an exchange of personal information.[145] One common concern mirrors adoptees' arguments for unsealing confidential adoption records: the potential for biological incest to occur, if they are unaware of the identity of their genetic siblings.[146] Snowflakes relies on this concern to justify its requirement for at least some openness between donors and receiving families.[147] Despite this, most clinics currently attach no conditions to embryo donation,[148] and interest in donating drops once people discuss the ramifications of possible genetic offspring being raised in another family and potentially being interested in contacting the donors (although a core of embryo creators who would consider donating an embryo are most likely to consider it if ongoing contact will be maintained).[149] A few writers find that embryo donation is more like other forms of gamete donation than it is like adoption, and therefore support keeping the donor identities secret to protect their privacy rights, although everyone agrees that some non-identifying health background is required.[150]

Perhaps because they are promoting open embryo donation anyway, many writers do not explicitly discuss whether the resulting child should know their biological origins and be able to obtain basic information about their genetic families; it seems to simply be presumed that if the donating and receiving parents have some form of contact, the child will also be included. Again,

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[144] Batsedis, supra note 71 at 574; Ray, supra note 94 at 436 and 440-441.
[145] Ibid.
[146] Batsedis, supra note 71 at 572.
[147] Redman and Redman, supra note 33 at 588.
[148] Beyond North America, in jurisdictions where adoption is more open, embryo donation may also be a more open process. For example, New Zealand is now allowing embryo donation for the first time, but is mandating face-to-face meetings and extensive counselling and controls: National Ethics Committee on Assisted Human Reproduction (New Zealand), *Guidelines on Embryo Donation for Reproductive Purposes* (2005), online: Ministry of Health, New Zealand, <http://www.necahr.govt.nz/guidelines/embryodonation.doc>.
[149] Newton et al, supra note 42 at 879 and 883; Crockin, supra note 73 at 1183-1184. See further discussion in Chapter 5, below.
[150] Kindregan and McBrien, supra note 57 at 195. Yang, supra note 83 at 631 seems to presume that embryo donation will be secret, although she was writing in the context of mandatory implantation laws.

practice belies this assumption. The fact that most current donations are anonymous also carries through to the children, the majority of whom will never be told they are not genetically related to their parents, just as 90 per cent of children resulting from artificial insemination are unaware of this fact.[151] Analysis of this issue in articles on embryo donation demonstrates that some authors make a surprising assumption that almost all adoption is now open in terms of the identities of the parties, something that is still not the norm in North America, especially in regards to information given to the adoptees.[152] This is also found in articles about sperm and egg donation.[153] These mistakes are both puzzling and dangerous, since these adoption "facts" are generally invoked to make arguments about embryo and gamete donation policies. More research is needed on how donor offspring feel about having ongoing contact with their genetic parents; the scant existing data is not enough to make these bold assertions.

Mirroring developments in adoption, some children of RT have expressed a need to know about their biological background and their genetic relatives, especially the donors.[154] Since some psychologists postulate that adoptees' "need to know" comes in part from a belief they were abandoned and unwanted,[155] some writers predict less trouble for kids born using

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[151] Laurie Frisch, "Embryo Adoption Study Flawed" Emediawire, 6 July 2004, online: <http://www.emediawire.com/releases/2004/7/emw138594.htm>; Katz, supra note 37 at 219-220; V. Bolton, S. Golombok, R. Cook, A. Bish, & J. Rust, "A comparative study of attitudes towards donor insemination and egg donation in recipients, potential donors and the public" (1991) 12 J Psychosom. Obstet. Gynaecol. 217.

[152] Manning, supra note 120, at 719, says "adoption laws should be applied to ensure access to information" for the resulting children, ignoring the fact that access to information does not exist for most American adoptees. Also Wallance, supra note 38; Boss, supra note 121; Giuliana Fuscaldo & Julian Savalescu, "Spare embryos: 3000 reasons to rethink the significance of genetic relatedness" (2005) 10 Reprod. Biomed. Online 164 at 166.

[153] "Unlike adoptees, who have gained the right to their original birth certificates, some donor-conceived offspring still do not know how they came to be": Amy Harmon, "Are You My Sperm Donor? Few Clinics Will Say" *New York Times* (20 Jan. 2006). Most American adoptees have no access to their original birth certificates; only seven states – Alaska, Kansas, Oregon, Alabama, Tennessee, Delaware and New Hampshire – allow adoptees access to their original birth certificates, and a few of those have disclosure vetoes, meaning that an adoptee will not receive the birth certificate if a birth family member has vetoed disclosure of their identity. American Adoption Congress, "AAC Legislative Report as of July 2005", online: American Adoption Congress <http://www.americanadoptioncongress.org/legislativereport2005.htm>.

[154] Katz, supra note 37 at 219-225; Madelyn Freundlich, *Adoption and Assisted Reproduction* (Washington, DC: Child Welfare League of America, 2001) at 31-47; Naomi Cahn, "Children's Interests and Information Disclosure: Who Provided the Sperm? Or Mommy, Where (and Whom) do I Come From?" (2000) 2 Georgetown J Gender & L 1 at 10.

[155] See for example, Annette Baran and Reuben Pannor, "Open Adoption" in David Brodzinsky and Marshall Schechter, eds, *The Psychology of Adoption* (New York & Oxford: Oxford U.P., 1990) at 330.

reproductive technologies.[156] Others think the fact that the genitors intentionally created these embryos, but did not implant them when other embryos were chosen first, might lead the children to feel even more rejected than some adoptees are reported to feel.[157]

There is clearly a great difference between knowing the nature of your conception and having detailed information about your genetic relatives. Experts are almost unanimous that adoptees should be told that they are not the biological child of their parents, at a minimum because they will likely find out eventually and secrecy will promote distrust of their adoptive parents;[158] however, the opinions on identifying information are much more mixed. While legal commentary frequently presumes the benefits of disclosing this information, most adoptees do not want to know the identities of their genetic parents or are ambivalent about obtaining the knowledge.[159] There is no proof of a biological imperative to know about your genetic kin, although non-searching adoptees usually consent to a meeting when the birth parents have located them.[160] Regardless, the non-universality of the desire should not be the deciding factor in the issue, since it is clear that some adoptees (and donor children) do want and perhaps even need this information.

As mentioned earlier, the nature of embryo donation makes it far easier to never reveal that the family has received a transferred embryo. This reduces the likelihood that a family member or neighbour will spill the secret to the resulting child, as does occur in adoption

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[156] Katz, supra note 37 at 219-220; Freundlich, supra note 154 at 42-44.
[157] Johnson, supra note 45 at 872.
[158] Ralph Garber, *Disclosure of Adoption Information: Report of the Special Commissioner* (Toronto: Ministry of Community & Social Services, Government of Ontario, 1985) at 18-19; Katherine O'Donovan, " A Right to Know One's Parentage" (1988) 2 Int'l J L & Fam 27 at 34.
[159] Paul Sachdev, *Unlocking the Adoption Files* (Lexington, Mass.: Lexington Books, 1989) at 15-16; Katarina Wegar, *Adoption, Identity, And Kinship: The Debate over Sealed Birth Records* (New Haven: Yale U.P., 1997) at 21 & 63.
[160] See discussion of these issues and a review of the literature in Baldassi, "Quest", supra note 141 at 235-250. It is much more likely that the need to know is a social construction and that many adoptees who do search are in part driven by repeatedly being told that the biological bond is special and different from social bonds. Karen March postulates that adoptees who search are at least in part more affected by this stigma than non-searchers, and see themselves as less stigmatized once they have experienced reunion. Possibly, non-searchers see themselves differently: Karen March, "Perception of Adoption as Social Stigma: Motivation for Search and Reunion" (1995) J of Marriage & Fam 653.

circumstances. One real concern about secrecy is the fact that the child will grow up assuming s/he is liable to inherit a predisposition for certain medical conditions that exist in the family tree. This might lead to people undergoing needless tests and treatments or altering their lifestyles in fear of eventual illness. Of course, this problem is also present in adoptees, especially those who have not been told they are adopted, other anonymous RT children, and the approximately one in 10 people who erroneously believe that their social and legal father is their genetic one too, when in fact their mother conceived with someone else.[161] While disclosure of the donor medical history to the recipient family can be legislated, as is also done in adoption, it is unlikely that governments will enact mandatory disclosure of the fact of their genetic origins to embryo donation children before the other more widespread "secrecy issues" are legislated upon, if ever.

iii) Home Studies, Screening and Counselling

While the majority of current embryo donations are anonymous and often involve few requirements of the recipient woman beyond general good health and the ability to carry a pregnancy to term, traditional adoption involves intensive screening of the adoptive parent/s which includes a home study evaluating their ability to parent, criminal background checks, employment history and economic status. Again, it is hardly shocking that the proponents of "embryo adoption" insist on these protections as well.[162] Although most embryo implantations will fail to produce a baby, other writers do express concern about the best interests of any resulting child and therefore promote corresponding protections in this area.[163] Others

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[161] Carolyn Abraham, "Mommy's Little Secret" *The Globe and Mail* (14 December 2002) F1, F6.

[162] Batsedis, supra note 71 at 569, incorrectly states that home studies are always required, and expresses approval. Much of her paper indicates she is unaware of the existence of programs different from Snowflakes, i.e., the majority of actual embryo donations fly under her radar. Also, Ray, supra note 94 at 443-444 and of course Snowflakes, supra note 95.

[163] Katz, supra note 37 at 230, calls for criminal background screening; Yang, supra note 83 at 631 believes that potential parents should undergo evaluations to ensure they are "mentally, physically and financially fit" to become legal parents.

commentators, however, mention that the lack of screening is one of the benefits of embryo donation as it is usually currently practiced.

Screening of embryo recipients would diverge sharply from existing conduct in all forms of single gamete donation, and more importantly, from coitally-achieved parenthood.[164] Some adoption advocates have questioned the stringent standards that constrain access to adoption but place no requirements on the vast majority of people who are physically able to attain parental status in the more common fashion.[165] Home studies and other screenings are generally justified as necessary when there is no genetic link between the parents and the child,[166] hence step-parent adoptions often take place with minimal screening, since the child will still live with one genetic parent. While the protections of the interests of a living child in adoption might warrant more state intervention than the potential interests of a hypothetical child who may or may not eventually be born through RT, this difference does not adequately account for the very wide disparity in practices.[167] The most likely solution will be to place more requirements on all RT recipients in the long run, but that is pure speculation at this point.

While it might seem that a child needs to exist before one can be a parent, for many it appears that once egg and sperm are joined, genes dictate parenthood. The remainder of this thesis will explore this position in regards to embryo donation, starting with feminist theories of adoption, reproductive technologies and parenthood, which often take issue with the emphasis on genetics. Some authors also object to the perceived lack of focus on the woman and gestational

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[164] A few states mandate screening for the intended parents in surrogacy situations: Manning, supra note 120 at 717. Again, countries beyond North America may have more stringent requirements; the new embryo donation legislation in New Zealand requires criminal checks on the recipients but does not mandate a home study: supra note 148 at para.17.

[165] Elizabeth Bartholet, *Family Bonds: Adoption, Infertility and the New World of Child Production* (Boston: Beacon Press, 1999) at 62-85.

[166] Lori B. Andrews, "Surrogate Motherhood: Should the Adoption Model Apply?" (1986) 7 Child. Legal Rts. J 13 at 14-15. At least one commentator thinks a gestational link is enough to make home studies unnecessary: Wallance, supra note 38 at 13.

[167] H. Widdows & F. MacCallum, "Disparities in parenting criteria: an exploration of the issues, focusing on adoption and embryo donation", (2002) 28 J Med Ethics 139 at 141-142.

experience in various RT practices, something that might very well be done differently in embryo donation.

CHAPTER 3: FEMINIST POSITIONS ON ADOPTION AND REPRODUCTIVE TECHNOLOGIES[168]

Embryo donation is rarer than the use of IVF or of adoption, but contains elements of both; therefore, it is necessary to look at feminist writings on both methods of family formation to come to an adequate understanding of possible feminist positions on the topic. Despite the fact that only a fraction of women will use reproductive technology (RT) procedures, "[u]ltimately [RT] will have an impact on all women,"[169] thus consideration of their impact is a very valid feminist pursuit. After at least 25 years of dialogue, however, there is nothing close to a single feminist approach to the topic.[170] Although there is a common perception that most feminists were completely against RT from the beginning, the reality is in fact more mixed. While some authors considered things such as surrogacy and *in vitro* fertilization (IVF) to be the ultimate in patriarchal control of women,[171] many saw at least some transformative potential in the technologies.[172] Many authors did not reject RT entirely nor see women as completely powerless

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[168] Parts of this chapter build on previous work: Cindy L. Baldassi, "Social and Legal Construction of the Women Known as Birth Mothers" (April 2002) [unpublished manuscript on file with the author] and "Women and Adoption: Some Feminist Theoretical Perspectives" (May 2003) [unpublished manuscript on file with the author].

[169] Rona Achilles, "Desperately Seeking Babies: New Technologies of Hope and Despair" in Katherine Arnup, Andrée Lévesque & Ruth Roach Pierson with the assistance of Margaret Brennan, eds., *Delivering Motherhood: Maternal Ideologies and Practices in the 19th and 20th Centuries* (London & New York: Routledge, 1990) 284 at 287.

[170] Janet Gallagher, "Eggs, Embryos and Foetuses: Anxiety and the Law" in Michelle Stanworth, ed., *Reproductive Technologies: Gender, Motherhood and Medicine* (Minneapolis: U of Minnesota Press, 1987) 139 at 145; Rosemary Tong, "Feminist Perspectives and Gestational Motherhood: The Search for a Unified Legal Focus" in Joan C. Callahan, Ed., *Reproduction, Ethics, and the Law: Feminist Perspectives* (Bloomington, Indiana: Indiana UP, 1995) 55 at 57.

[171] See Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (New York: Harper & Row, 1985); Kathryn Pauly Morgan, "Of *Woman* Born? How Old-Fashioned! – New Reproductive Technologies and Women's Oppression" in Christine Overall, ed., *The Future of Human Reproduction* (Toronto: The Women's Press, 1989) 60; Andrea Dworkin likened debates on patriarchal power and use of RT to those on prostitution: *Right Wing Women* (New York: Pedigree Books, 1983) ff183.

[172] Most famously, Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (New York: William Morrow & Co., 1970), who thought that such inventions as artificial wombs would free women from the drudgery of childbearing and lead to liberation.

to resist its lure, but instead strongly asserted a need to monitor and critique the process to protect women, and to develop more complicated, less "anxiety"-ridden feminist responses.[173]

> Feminist critics of technologies have always and rightly insisted that technologies derive their meaning from the social and political context in which they emerge. But where the context that is invoked in connection with reproductive technologies is the universal victimization of women, then it is easy to underestimate the significance of political struggles concerning the future of reproduction...reproductive technologies are controversial – not only amongst feminists, but among a wider public – because they crystallize issues at the heart of contemporary controversies over sexuality, parenthood, reproduction and the family; and that a concern for self-determination for women must engage, above all, with these struggles.[174]

Even the most ardent feminist supporters of IVF and contract motherhood recognized bias and sexism in the processes and in the medical professionals who control access in a largely unregulated area.[175] What is not in dispute is that RT has spurred a huge production of feminist commentary.[176]

In contrast, until very recently, feminist writing on adoption was scarce.[177] Although the lack of feminist analysis was not surprising when contrasted to the similar lack of non-feminist theory on adoption,[178] it *is* surprising given that "[a] history of adoption...is necessarily a history

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[173] Gallagher, supra note 170; Michelle Stanworth, "Reproductive Technologies and the Deconstruction of Motherhood" in Michelle Stanworth, ed., *Reproductive Technologies: Gender, Motherhood and Medicine* (Minneapolis: U of Minnesota Press, 1987) 10; Thelma McCormack, "When is Biology Destiny?" in Christine Overall, ed., *The Future of Human Reproduction* (Toronto: The Women's Press, 1989) 80.

[174] Stanworth, ibid., at 18.

[175] Liberal feminist Lori Andrews, one of the most active feminist voices for a woman's right to choose to undergo IVF or to be a surrogate mother, also expressed great concern at the lack of regulation in the industry, and the use of women as guinea pigs in untested procedures: "If it has worked in just one animal, it will be tried in a woman." Lori B. Andrews, *The Clone Age: Adventures in the New World of Reproductive Technologies* (New York: Henry Holt, 1999) at 209.

[176] Much of which can not possibly be dealt with here. Except where related to the topic of embryo donation and adoption, this chapter will not delve into issues such as surrogacy, pre-natal testing and disability theory, fetal monitoring and fertility drugs, all of which have been extensively covered in feminist - and other – literature.

[177] Nancy E. Dowd, "A Feminist Analysis of Adoption (Book Review)" (1994) 107 Harv. L. Rev. 913 at 914; Naomi R. Cahn, "Family Issue(s): Book Review" (1994) 61 U. Chi. L. Rev. 325 at 333 ["Issues"]; Twila L. Perry, "Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory" (1998) Yale J. L. & Feminism 101 at 138 notes this is strange because feminist scholars have paid great attention to women who surrender their children for money (surrogacy) but little to those who do it for free; Maureen Sweeney speculates feminists shy away from getting into discussions of adoption because they fear the anti-choice lobby who describe adoption as the alternative to abortion: Maureen A. Sweeney, "Between Sorrow and Happy Endings: A New Paradigm of Adoption" (1990) 2 Yale J. L. & Feminism 329 at 333.

[178] "Most of what is currently known about adoption tends to be inadequately conceptualized from a theoretical perspective": Lise M Beauchesne, *As If Born To: The Social Construction of a Deficit Identity Position for Adopted Persons* (D.S.W. Thesis, Sir Wilfred Laurier University, 1997) [unpublished] at 42. Allen Fisher notes that when

of women."[179] Quite a bit of current work in this area deals with the unfair treatment of birth mothers, positing that adoption is a sad option which should never occur in an ideal world.[180] There is now a more recent wave of material positioning adoption as occasionally being a positive choice for some birth mothers,[181] and several writers, many of whom are adoptive parents, are turning attention to the situation of the adoptive family and even the much-maligned adoptive mother.[182]

Since a good deal of feminist commentary on adoption arises in works that are devoted to RT,[183] and since the relevant embryo donation issues of genetics, gestation and social parenting arise in both, I propose to compare and contrast feminist views on adoption and RT in several key areas: the exploitation and control of women as opposed to the opportunity for women to take control, the definition of mother as it relates to being female, the importance of genetics, and the importance of gestation and childbirth. These comparisons should serve to illuminate further discussions, in Chapters 4 and 5, on the relative importance of genes and gestation, in law and in the (Western) public mind.

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sociologists do deal with adoption, it is often brief, inaccurately negative and unsupported by references: Allen P. Fisher, "Still 'Not Quite as Good as Having Your Own'?: Toward a Sociology of Adoption" (2003) 29 Ann. Rev. Sociol. 335.

[179] Julie Berebitsky, *Like Our Very Own: Adoption and the Changing Culture of Motherhood, 1851-1950* (Lawrence, Kansas: University of Kansas Press, 2000) at 9.

[180] Barbara Katz Rothman, an adoptive mother in an open transracial adoption, still feels adoption should not be part of "long-range feminist social policy": Barbara Katz Rothman, *Recreating Motherhood* (New Brunswick, NJ: Rutgers UP, 2000) at 97; see also Rickie Solinger, *Beggars and Choosers: How the Politics of Choice Shapes Adoption, Abortion and Welfare in the United States* (New York: Hill and Wang, 2001).

[181] Katherine O'Donovan takes issue with the overwhelming cultural assumption in some countries that birth makes a woman a mother, noting that motherhood and physical maternity are not the same thing: Katherine O'Donovan, "'Real' Mothers for Abandoned Children" (2002) 36 L & Soc'y Rev 347; Sweeney, supra note 177 at 335, notes that adoption can be an exercise of choice and power (she is a birth mother); Perry, supra note 177, admits that some birth mothers "probably" believe they participate in adoption of "their own free will": at 107.

[182] For example, many of the chapters in Sally Haslanger and Charlotte Witt, eds., *Adoption Matters: Philosophical and Feminist Essays* (Ithica: Cornell University Press, 2005) are written by adoptive mothers who move their analysis beyond the birth mother (usually to the adoptee); Katarina Wegar, an adoptee, has also looked at the negative construction of the adoptive mother: Katarina Wegar, "In Search of Bad Mothers: Social Constructions of Birth and Adoptive Motherhood" (1997) 20 Women's Studies International Forum 77 ["Bad Mothers"].

[183] Dowd, supra note 177 at 914.

I. Tools of the Patriarchy or Tools to Dismantle Same?

An analysis of feminist critiques of RT could be a thesis in itself; this section can be nothing more than a broad overview of feminist viewpoints on the issue. One major group of feminists, of varying political stripes, thinks that the popularity of reproductive technologies demonstrates the male interest in genetic heritage and in controlling paternity with absolute certainty.[184] Not only do some women subject themselves to onerous procedures simply because their male partner has an infertility problem,[185] the belief that one needs genetic children is also the male-oriented notion of parenthood.[186] IVF has a notoriously low live birth rate, especially for women over 35, a fact infrequently disclosed to patients in the early days, making the voluntary nature of "treatment" questionable.[187] In general, the predominant cultural view that all women should be mothers, discussed in more detail below, is also seen to preclude true consent.

Class also arises as a key factor in these works, since the cost of many procedures is beyond most people, especially given the number of times it can take to become successful (if ever).[188] Several authors note that "infertility"[189] is more prevalent in underprivileged women, the group that can least afford high tech RT services.[190] In particular, only wealthy women can

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[184] Dorothy E. Roberts, "The Genetic Tie" (1995) 62 U. Chi. L Rev. 209 at 239; Rothman, supra note 180, at 19-23; Carol Smart, "'There is of course the distinction dictated by nature': Law and the Problem of Paternity" in Michelle Stanworth, ed., *Reproductive Technologies: Gender, Motherhood and Medicine* (Minneapolis: U of Minnesota Press, 1987) 98 at 100; also supra note 171 and accompanying text.

[185] Achilles, supra note 169 at 292; use of donor insemination in these cases is more likely to produce a pregnancy and has far fewer risks. See discussion of RT procedures and their dangers to women in Chapter 2, footnotes 35 to 37 and accompanying text, and Joan C. Callahan & Dorothy E. Roberts, "A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory" (1995-96) 84 Kentucky L J 1197 at 1228.

[186] Rothman, supra note 180 at 19-23, and Part III, below.

[187] Callahan & Roberts, supra note 185 at 1229; see success rate discussion in Chapter 2, footnote 39 and accompanying text.

[188] Ibid.

[189] Infertility is today most commonly defined as the inability to conceive after one year of heterosexual intercourse without using birth control, or as a woman's inability to carry a pregnancy to term, but most North American doctors used to consider two years the minimum, and Rona Achilles reports that the definition in France is five years: Achilles, supra note 169 at 287; Rothman, supra note 180 at 178-179; Gayle Letherby, "Other than Mother and Mothers as Others: The Experience of Motherhood and Non-Motherhood in Relations to 'Infertility' and 'Involuntary Childlessness'" (1999) Women's Studies Int'l Forum 359 at 370-371, note 1.

[190] Barbara J. Berg, "Listening to the Voices of the Infertile" in Joan C. Callahan, Ed., *Reproduction, Ethics, and the Law: Feminist Perspectives* (Bloomington, Indiana: Indiana UP, 1995) 80 at 98; Stanworth, supra note 173 at 15.

afford the costs of hiring a surrogate mother[191] and it is undisputed that the average woman offering surrogacy services is less advantaged than those doing the hiring (where the law permits paid surrogacy).[192] Dorothy Roberts likens contract motherhood to slavery,[193] echoing concerns that only poor and racialized women will perform the job for pay.[194] Even supporters of other RT uses condemn surrogacy, pointing to the pain experienced by birth mothers who surrender children for adoption as the reason surrogacy contracts are wrong,[195] and even some feminists who think paid surrogacy should be legal recognize the likelihood of exploitation; "[a]s long as women continue to see their essential function as reproductive, they will fall prey to those who want to treat them as baby machines."[196]

Current feminist views on adoption are even more consistent on the exploitation issue: most believe that birth mothers are all exploited by class and other inequalities, to some extent, and therefore do not participate in adoption by choice.[197] More so than with surrogacy, there is much truth in this position, since in the past many birth mothers were indeed coerced and

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[191] Even the term surrogate sets off disagreements. Many feminists consider it a misnomer which focusses on the man's action in hiring a woman to carry a child for him – the child wouldn't consider the woman who gave birth to be a surrogate in any way: Roberts, supra note 184 at 241. Rosemarie Tong prefers the term gestational mother: Tong, supra note 170 at 57; others like the phrase "contract motherhood": Callahan & Roberts, supra note 185 at 1198. After careful consideration, I have decided to use the term surrogate mother since it is the name preferred by the usually working-class women who perform this role: Helena Ragoné, *Surrogate Motherhood: Conception in the Heart* (Boulder, CO: Westview Press, 1994) at 8. While there are very valid concerns with the terminology, it has long ago passed into public usage, and in such a circumstance I prefer to validate the perspectives of the women who are the most vulnerable in the situation. Surrogate mother is also the term used by the *Assisted Human Reproduction Act*, S.C. 2004, c.2. [AHRA], in s.3.

[192] Linda J. Lacey, "'O Wind, Remind Him that I Have No Child': Infertility and Feminist Jurisprudence" (1998) 5 Mich. J of Gender & L 163 at 193 (although she notes that the household incomes of the two groups are not as disparate as some people would have us believe, averaging about $23,000 in difference).

[193] Roberts, supra note 184 at 249-250.

[194] Shari O'Brien, "The Itinerant Embryo and the Neo-Nativity Scene: Bifurcating Biological Maternity" (1987) 1 Utah L Rev. 1 at 31; Achilles, supra note 169 at 292; R. Alta Charo, "Legislative Approaches to Surrogate Motherhood" in Larry Gostin, ed., *Surrogate Motherhood: Politics and Privacy* (Bloomington, IN: Indiana UP, 1990) 88 at 109.

[195] Berg, supra note 190 at 90.

[196] Tong, supra note 170 at 76. She thinks surrogates should be permitted to keep the baby after birth if they wish, following consent laws in adoption, but that if they do not, they can still receive payment. Tong also reviews the main feminist positions on surrogacy at 62-71.

[197] Josephine Reeves, "The Deviant Mother and Child: The Development of Adoption as an Instrument of Social Control" (1993) 20 J. L. & Soc. Pol'y 412; Solinger, supra note 180; Rothman, supra note 180 at 81-92; Dowd, supra note 177 at 927-928 calls the choice involved in becoming a birth mother "questionable."

pressured into surrendering their children, particularly during the years when the dominant social theory in North America was that single mothers were a disgrace and therefore unfit to mother.[198] Even the lack of support for single motherhood is seen as negative coercion; a woman who did not have the financial wherewithal to raise a child by herself can not really be said to have made a true "choice."

Pressure to relinquish a child could come from the family, society in general or the state, but is seen as inherently patriarchal, since it promoted the heterosexual nuclear family with a father at the head.[199] While this family format is not the same throughout history and around the world today, Western conceptions of adoption traditionally involve only one man and one woman as parents, to the exclusion of other people who may claim the title, namely the birth mother.[200] Women who dared to have sex (proven by their pregnancy) outside of the appropriate control of a man (i.e., marriage) were inappropriate parents, unfit to raise the child.[201] Adoption practices developed to replicate the ideal family through careful screening and matching of the adoptive parents, with an end goal of mirroring "what the family **should** be."[202]

Other women are never given the opportunity to make a choice; their children are taken from them and their consent to adoption is dispensed with. These child welfare seizures are disproportionately directed at women in racialized groups and the economically disadvantaged.[203] Today, the increase in international adoption also brings with it the exploitation of women of colour and poor women in at least some circumstances, with the

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[198] See extensive discussion in Solinger, supra note 180, at 103-138; Reeves, ibid; Naomi Cahn, "Birthing Relationships" (2002) 17 Wisc. Women's L. J. 163 at 167-185 ["Birthing"]; Veronica Strong-Boag, "Interrupted Relations: The Adoption of Children in Twentieth-Century British Columbia" (2004-05) 144 BC Studies 5.
[199] Katrysha Bracco, "Patriarchy and the Law of Adoption: Beneath the Best Interests of the Child" (1997) 35 Alta. L. Rev. 1035; Reeves, supra note 197.
[200] Bracco, ibid., at 1044-45.
[201] Reeves, supra note 197.
[202] Beauchesne, supra note 178 at 59.
[203] Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30 Osg. Hall L J 375; Dorothy Roberts, *Shattered Bonds: The Colour of Child Welfare* (New York: Basic Books, 2001); Naomi Cahn, "Race, Poverty, History, Adoption and Child Abuse: Connections" (2002) 36 L & Soc'y Rev 461 ["Race"] (reviewing *Shattered Bonds*).

children moving again to more socially and financially secure families.[204] As with surrogacy, any movement of children from lower to higher economic classes is considered wrong in most circumstances, by most commentators; it is understood that women would never give away their children if they had economic and social support.

Even where overt coercion does not occur, many feminists are disturbed by the erasure of the birth mother in the life of the child, including both the physical erasure in closed adoption and also the legal erasure in the severing of all ties to the child.[205] "A woman who has carried a baby in her body is a mother."[206] For this reason, many feminists advocate "open" adoption, where the birth and adoptive families maintain some contact with each other, sometimes even including regular visits.[207] However, this is occasionally presented as a last choice, when there is no other alternative to the adoption process.

Since historical study demonstrates a clear lack of choice for some birth mothers, but the work on exploitation in RT is more theoretical and speculative, it is not surprising that there are stronger dissents to these views on RT than there are on adoption. Numerous authors note that treating women using RT as unwitting victims of the patriarchy denies agency to all women.[208] While patriarchal values may influence decision making, they do not control it completely. As for the argument that RT helps men have genetically related children, critics wonder why it seems that women are far more interested in the processes than men?[209] Women are also more

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[204] Perry, supra note 177 at 114.

[205] Bracco, supra note 199 at 1044; Mary Lyndon Shanley, *Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption, and Same-Sex and Unwed Parents* (Boston: Beacon Press, 2001) at 23; Barbara Yngvesson, "Negotiating Motherhood: Identity and Difference in 'Open' Adoption" (1997) 31 L & Soc'y Rev 31; Rothman, supra note 180 at 81-84.

[206] Rothman, supra note 180 at 82.

[207] See explanation in Yngvesson, supra note 205.

[208] Cahn, "Issues", supra note 177 at 341-343; Stanworth, supra note 173 at 17; Berg, supra note 23 at 84-85.

[209] Lacey, supra note 192 at 168, citing several studies. Patricia Jennings' doctoral dissertation followed women connected to an American infertility group, and found that the majority of them were far more insistent on RT than their husbands, and that the men often refused to continue treatment before the women were ready to stop: Patricia K. Jennings, *Genetic Ties and Genetic "Others": Race, Class and Infertility* (PhD thesis, University of Kentucky Graduate School, 2000) [unpublished] at 90-92.

interested than men are in adoption;[210] perhaps women are actually just more interested in having children, not genetic children. RT provides at least some control over the process, as opposed to adoption, and it seems that is a factor driving the interest in using RT.[211] Critiques of surrogacy often ignore the fact that surrogacy is controversial exactly because it "raises questions about the naturalness of the mother-child bond"[212] that other feminists have raised in other instances. A few also note that, regardless of the source of the desire to have children through RT use, the desire is real and should not be so carelessly dismissed by feminists.[213]

Katarina Wegar questions the feminists who characterize RT users as impelled by the patriarchal genetic tie, but then exalt the biological connection between the birth mother and the adoptee.[214] Surely it is then easy to understand why a woman would go through gruelling IVF treatments in search of biological connection in this context. However, she thinks that society is far more impressed with genes than do some of the other feminists who base biological motherhood in gestation and child birth, which could explain this apparent inconsistency; Wegar does not give much weight to the gestational relationship either. Strangely, given the negative views on adoption in general, a few feminists insist that adoption is the best alternative to RT use, since parenting should be about caregiving, not genetic promulgation.[215] Rejection of RT is also inconsistent with most feminist positions on abortion and contraception; it is irrational for feminism to promote control of biology for women who want to avoid childbirth but to deny use of medical technology to those who wish to experience it.[216]

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[210] Stanworth, supra note 173 at 22; see also Berebitsky, supra note 179.
[211] Susan Frelich Appleton, "Adoption in the Age of Reproductive Technology" (2004) U Chi. Legal Forum 393.
[212] Juliette Zipper & Selma Sevenhuijsen, "Surrogacy: Feminist Notions of Motherhood Reconsidered" in Michelle Stanworth, ed., *Reproductive Technologies: Gender, Motherhood and Medicine* (Minneapolis: U of Minnesota Press, 1987) 118 at 120.
[213] Lacey, supra note 192 at 172.
[214] Katarina Wegar, *Adoption, Identity, and Kinship: The Debate over Sealed Birth Records* (New Haven: Yale U.P., 1997) ["Adoption"] at 129-130.
[215] Joan Mahoney, "Adoption as a Feminist Alternative to Reproductive Technology" in Joan C. Callahan, Ed., *Reproduction, Ethics, and the Law: Feminist Perspectives* (Bloomington, Indiana: Indiana UP, 1995) 35.
[216] McCormack, supra note 173 at 84.

In that vein, many authors have now noted that reproductive technologies permit "alternative families" to subvert the patriarchal nuclear family, bringing control to women.[217] Lesbian co-mothers can both have a biological connection to their child, if one mother provides an egg for the other to gestate.[218] Adoption also performs a transformative function, both by allowing non-traditional (i.e., single mother and gay and lesbian) families,[219] and by recognizing the birth mother in open adoption.[220] Even those who campaign strongly against aspects of RT admit that when used for the 'right' purposes, it can be acceptable;[221] they simply differ on how we all define 'right'.

It is still a much more radical step to celebrate adoption in the same way, however, given the almost doctrinal position on birth mother exploitation. Wegar points out that feminist analysis generally fails to consider whether some birth mothers might benefit from the adoption.[222] Some authors do postulate that not all birth mothers want to be mothers and that they may therefore experience adoption as a real choice.[223] Only one birth mother has come forward to provide legal and theoretical perspectives on adoption – Maureen Sweeney – and she strongly asserts that adoption can empower women, despite the pain she carries from the experience.[224] Adoption gave her the ability to stay out of a destructive relationship with the

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[217] Roxanne Mykitiuk, "Beyond Conception: Legal Determinations of Filiation in the Context of Reproductive Technologies" (2001) 39 Osg. Hall L J 771 at 772; Lisa C. Ikemoto, "The In/Fertile, the Too Fertile and the Dysfertile" (1996) 47 Hastings LJ 1007 at 1056-1057; Kate Harrison, "Fresh or Frozen: Lesbian Mothers, Sperm Donors, and Limited Fathers" in Martha A. Fineman and Isabel Karpin, eds, *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (New York: Columbia University Press, 1995) 167; Patricia M. Swerhone, *The "Artificial Family": Adoption, New Reproductive Technologies, and the Dominance of the Biologically-Based Family* (M.S.W. thesis, York University, 1998) [unpublished].

[218] Ryiah Lilith, "The G.I.F.T. of Two Biological and Legal Mothers" (2001) 9 Am. U. J Gender Soc. Pol'y & L 207.

[219] Appleton, supra note 211 at 443-444; Drucilla Cornell, "Reimagining Adoption and Family Law" in Julia E. Hanigsberg and Sara Ruddick, eds., *Mother Troubles: Rethinking Contemporary Maternal Dilemmas* (Boston: Beacon Press, 1999) 208.

[220] Alison Harvison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family" (1998) 6 Amer. U. J. Gender & L. 505.

[221] Callahan & Roberts, supra note 185 at 1221; Rothman, supra note 180 at 171.

[222] Wegar, "Adoption", supra note 214 at 127. She is an adoptee who has met her birth mother.

[223] Naomi Cahn & Jana Singer, "Adoption, Identity, and the Constitution: The Case for Opening Closed Records" (1999) 2 U. Penn. J. Const. L. 150 at 178; Perry, supra note 177 at 107; O'Donovan, supra note 181.

[224] Sweeney, supra note 177 at 332-335.

baby's father, and gave her son the life she thinks a child should have. She insists that adoption must always be available for women to have control over their own lives, although she proposes a far more open form of adoption than is currently practiced in North America.[225] Linda Lacey, who acknowledges the problems with adoption as practiced but takes other feminists to task for their harsher views, finds it ironic that Sweeney, as a birth mother, is more positive about the institution than so many other feminist commentators.[226]

Lacey, an adoptive mother, also notes that most other feminists either ignore or denigrate the adoptive mother, a strange way for feminists to treat a group of women.[227] It is not surprising to me that an adoptee – Katarina Wegar – is among the few feminists to examine the construction of the adoptive mother, including the stigma of infertility and the perception that they are less nurturing than women who have given birth.[228] However, since so many feminist commentators on adoption are adoptive mothers,[229] they may not feel comfortable complaining about what many others merely see as their privilege. Wegar has noted that any problems experienced by the adoptee are usually blamed on the adoptive mother,[230] and that feminists generally consider the adoptive mother in light of (her presumed higher) social class only.[231] The few other mentions of the adoptive mother remind us that we can respect both women without taking sides,[232] and that despite their relative privilege, adoptive mothers should not be criticized for wanting children.[233] However, this qualified treatment could still use a great deal more

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[225] Ibid., at 354-358.
[226] Lacey, supra note 192 at 180.
[227] Ibid., at 178-182.
[228] Wegar, "Bad Mothers", supra note 182 ; Wegar, "Adoption," supra note 214.
[229] See discussion in Cindy L. Baldassi, "The Quest to Access Closed Adoption Files in Canada: Understanding Social Context and Legal Resistance to Change" (2005) 21 Can. J. Fam. L 211 at note 17.
[230] Wegar "Bad Mothers", supra note 182 at 78-83.
[231] Wegar, "Adoption", supra note 214 at xiii.
[232] Cahn, "Birthing", supra note 198 at 197 (also citing Lacey).
[233] Perry, supra note 177 at 105-107.

analysis, along with more sympathetic consideration of women experiencing "infertility" than currently exists.[234]

II. Women in a "Pronatalist" Culture: Who is a Mother and Why?

As mentioned above, both RT and adoption are closely linked with the definition of mother, a topic of great interest to many feminists. Many who view RT as a patriarchal plot include as part of that plot the expectation that all women must become mothers, that women are mothers by definition. "Having no children is still perceived as a deficient condition"[235] whether it occurs by design, lifestyle or biological impediment. "Women have been carefully trained to want motherhood, to experience themselves and their womanhood, their very purpose in life, through motherhood. And that is wrong."[236] The medical profession does not help its own cause here, with many RT practitioners subscribing to some form of IVF pioneer Patrick Steptoe's comments that "[i]t is a fact that there is a biological drive to reproduce. Women who deny this drive, or in whom it is frustrated, show disturbances in other ways."[237] However, many women would agree that the inability to bear their own genetic child is a disability, and some feminists concur.[238]

The equation of womanhood with motherhood, and motherhood with biological motherhood, does appear to drive women who cannot conceive to try whatever is available to them, including RT. Interviews with women who are involuntarily infertile often emphasize that

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[234] Major exceptions being Berg, supra note 190; Lacey, supra note 192; Naomi Pfeffer, "Artificial Insemination, In-vitro Fertilization and the Stigma of Infertility" in Michelle Stanworth, ed., *Reproductive Technologies: Gender, Motherhood and Medicine* (Minneapolis: U of Minnesota Press, 1987) 81.

[235] Beauchesne, supra note 178 at 61.

[236] Rothman, supra note 180 at 94. She goes on to state that pronatalism is great so long as it is not coercive.

[237] Cited in Stanworth, supra note 173 at 15.

[238] Judith Mosoff, "Reproductive Technology and Disability: Searching for 'Rights' and Wrongs in Explanation" (1993) 16 Dalh. L J 98 provides a very thoughtful analysis of this question, pointing out the numerous ways that involuntarily childless women differ from women with "disabilities" which match the more traditional definition of the word. See also Rothman, supra note 180 at 95-101. Canadian courts have found that infertility is a disability, although not one that requires provincial health care plans to fund various RT procedures: *Cameron v. Nova Scotia (Attorney General)* (1999), 177 D.L.R. (4th) 611; aff'g (1999), 172 N.S.R. (2d) 227; leave to appeal refused [1999] S.C.C.A No. 531 (QL).

they feel left out of womanhood when they cannot discuss pregnancy, childbirth and child rearing with female co-workers, neighbours and family members.[239] These would-be mothers feel guilty about being unable to live up to the ideal,[240] internalizing the common misconception that infertility is a woman's problem.[241] The interview subjects, however, usually do not link their social predicament to male concepts of womanhood, but instead to other women.[242] Perhaps they have been internalizing the writings of certain maternal feminists who do in fact glorify physical maternity as the essence of womanhood.

In common usage, the word mother means both a woman who has given birth and a woman who performs the social parenting role,[243] but it is possible to distinguish legal motherhood from maternity; the linkage is not automatic in law in countries such as France.[244] While most feminist theorists allow that a woman can mother without having given birth, they are reluctant to remove the label mother from those that Katherine O'Donovan says have only experienced (physical) maternity.[245] Society in general seems to concur.[246] Linda Lacey takes particular exception to the concept that only pregnancy and childbirth confer real motherhood, concluding a rundown of Marie Ashe's work glorifying the primacy of biological motherhood

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[239] Maureen Baker, "Medically Assisted Conception: Revolutionizing Family or Perpetuating a Nuclear and Gendered Model?" (2005) 36 J Comparative Fam. Stud. 521; Letherby, supra note 189; Jennings, supra note 209. These studies were conducted in New Zealand, the United Kingdom and the United States respectively.

[240] Letherby, supra note 189 at 531-532.

[241] Berg, supra note 190 at 99. Conception difficulties are in fact equally shared by men and women.

[242] Jennings, supra note 209, notes this throughout her work but does not come to any conclusions as to what percentage of pronatalism is caused by patriarchal definitions of womanhood, and what is instead controlled by women themselves: at 188.

[243] M.M. Slaughter, "The Legal Construction of 'Mother'" in Martha A. Fineman and Isabel Karpin, eds., *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (New York: Columbia University Press, 1995) 73 at 73.

[244] O'Donovan, supra note 181 at 348.

[245] See Rothman, supra note 180 and accompanying text; Cahn & Singer, supra note 223 at 176-178, think that birth mother are mothers, even when they don't feel a bond toward the adoptee.

[246] Anne Marie Ambert, "The Negative Social Construction of Adoption: Its Effects on Children and Parents" (April 2003), online: <http://www.arts.yorku.ca/soci/ambert/writings/pdf/ADOPTION.pdf> at 2, notes that we live in a "birth culture" that defines family by the biological links.

with the statement: "Every time I try to summarize this theoretical nonsense, I feel an almost overwhelming sense of rage."[247]

Their rejection of social mothering, or at least the inability to carry it out due to outside pressures, is one reason birth mothers have felt dismissed by society and by some strains of feminism. Giving up a child is not what mothers are supposed to do in today's world, even though society thought differently not too long ago.[248] Birth mothers now suffer from "a double-edged stigma attached to being a birth mother, which marks us as women who both conceived a child outside of marriage and 'gave away' that child."[249] As North American adoption law and practice slowly move towards open adoption arrangements, the definition of mother is bound to be affected.[250]

Just as RT can create more than one mother through the use of egg donation, gestational surrogacy and embryo donation, where the egg provider and gestational mother are two different people,[251] the increasing recognition of birth mothers means adoption also subverts the definition of mother, opening it up to a greater number of women. On the other hand, a reduction in adoption and the use of RT would mean that far fewer women could become mothers, which would help separate women from the role of mother in the public mind.[252] Given the demand for RT and adoption at the moment, it appears unlikely that feminists will get the opportunity to do the latter any time soon, and it is unclear that denying motherhood to women who want it is the best way to accomplish the goal of reduced emphasis on the importance of motherhood to womanhood.

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[247] Lacey, supra note 192, at 186.
[248] Solinger, supra note 180 at 98; Cahn, "Birthing", supra note 198 at 163; Drucilla Cornell, "Adoption and Its Progeny: Rethinking Family Law, Gender, and Sexual Difference" in Sally Haslanger and Charlotte Witt, eds., *Adoption Matters: Philosophical and Feminist Essays* (Ithica: Cornell University Press, 2005) 19 at 24.
[249] Sweeney, supra note 177 at 340.
[250] Dowd, supra note 177 at 923; Yngvesson, supra note 205 at 32.
[251] Maggie Kirkman, "Egg and Embryo Donation and the Meaning of Motherhood" (2003) 38(2) Women & Health 1 at 2.
[252] Perry, supra note 177 at 163.

III. Genetic Essentialism: Not Just for Men

We have been told that genes are the male version of parenthood, the only way men can experience a physical link to their children.[253] Dorothy Roberts adds that obsessions with genes also reinforce racial boundaries, although genes are only decisive when the result protects the "purity" of the white race.[254] Genes are also not decisive in law when the marital presumption of paternity exists,[255] although the RT cases decided on intent of the parties do make the choices of the genetic providers primary.[256] There is no doubt that many people use RT because they want children with their genes, or with particular types of genes if using donated gametes.[257] Even proponents of "genes are male parenthood" position agree that genetic connection can be very important to individuals, but disagree on the level of importance that should be accorded.[258]

"Blood ties" are also very central to our cultural understanding of adoption. Resistance to formal adoption law in England largely flowed from a belief that children available for adoption were of second-rate blood, and would contaminate the superior middle-class blood lines.[259] Naomi Cahn looked at American cases regarding the legal effects of adoption in the 19th and 20th centuries and concluded that a belief in the importance of genetics still exists in law, even when inconsistently applied.[260] As mentioned above, Wegar thinks that the birth mother bond

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[253] Rothman, supra note 180 at 19-23; R. Alta Charo, "United States: Surrogacy" in Sheila A.M. McLean, ed., *Law Reform and Human Reproduction* (Aldershot, UK: Dartmouth, 1992) 223 at 262; Susan L. Oliff, "To Be Genetically Tied or Not to Be: A Dilemma Posed by the Use of Frozen Embryos" (1990) 12 Women's Rights L Rep 115 at 120; Leslie Bender, "Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law" (2003) 12 Colum. J Gender & L 1 at 44; Malina Coleman, "Gestation, Intent and the Seed: Defining Motherhood in the Era of Assisted Reproduction" (1996) 17 Cardozo L Rev. 497 at 517.

[254] Roberts, supra note 184 at 252, 260.

[255] Ibid., and Mykitiuk, supra note 217, at 793, discussing Canadian law. See the detailed analysis of legal paternity in Canada in Chapter 4, Part III a).

[256] Shanley, supra note 205 at 132; Mahoney, supra note 215 at 36, notes this reduces gametes (and the resulting children) to property. These ideas will be discussed further in Chapter 4.

[257] Stanworth, supra note 173 at 20; Joan C. Callahan, "Introduction: Reconsidering Parenthood" in Joan C. Callahan, Ed., *Reproduction, Ethics, and the Law: Feminist Perspectives* (Bloomington, Indiana: Indiana UP, 1995) 19 at 29 notes that this includes some women; Roberts, supra note 184 at 223, also notes that people should not be criticized for this desire, any more than we criticize people who are choosy about with whom they reproduce coitally.

[258] Rothman, supra note 180 at 19-23.

[259] Reeves, supra note 197 at 413-15.

[260] Naomi Cahn, "Perfect Substitutes or the Real Thing?" (2003) 52 Duke L.J. 1077 ["Perfect"] at 1147.

celebrated by some feminist authors is that of "patriarchal genetic kinship", and that genes are more important than class and gender in the public's general understanding of adoption.[261]

At the same time, it is obvious that adoption could not exist as a successful societal institution if at least some people did not believe that social parenting is also important and satisfying.[262] Many cultures do not place as much emphasis on genetic connection as Western culture does.[263] The use of gamete donation also contradicts the importance of genes in RT,[264] although admittedly the majority of RT scenarios involve the sperm and/or eggs of the intended parents. Again, adoption and RT open up the possibility of redefining family relationships in the dominant paradigm. Embryo donation may present unique opportunities to do so.

IV. Pregnancy and Childbirth as Feminist Battleground

Examples of this debate have already arisen in Parts I and II above. Since only women can be pregnant, gestation and childbirth are considered the unique indicia of motherhood, a literal "no man's land". On this basis alone, many feminists reject any formulation of motherhood that is not centred on parturition.[265] Michelle Pierce-Gealy argues that since the word parent is derived from the Latin *perere*, which means to give birth, parenting is more about gestation than genes.[266] Many authors are rightfully critical of literature and legal decisions that

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[261] Wegar, "Adoption", supra note 214 at 40 and 90.
[262] See Wegar, ibid., at 67, discussing social ambivalence about the relative importance of adoptive and biological kinship; Rothman, supra note 180, at 46, notes she has the same feelings for her adopted child as she does for the ones she gave birth to; see also Elizabeth Bartholet, *Family Bonds: Adoption, Infertility, and the New World of Child Production* (Boston: Beacon Press, 1999) at xi-xii on the same point.
[263] Katarina Wegar, "Adoption, Family Ideology, and Social Stigma: Bias in Community Attitudes, Adoption Research, and Practice" (2000) 49 Fam. Relations 363 at 368; see also discussion of aboriginal conceptions of family and adoption in Cindy L. Baldassi, "The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts and Convergences" (2006) UBC L Rev (forthcoming).
[264] Appleton, supra note 219 at 409 & 449; Stanworth, supra note 173 at 21.
[265] In addition to sources in Parts I and II, see also Michelle Pierce-Gealy, "'Are You My Mother?': Ohio's Crazy-Making Baby-Making Produces a New Definition of 'Mother'" (1995) 28 Akron L Rev. 535 at 571; Somer Brodribb, "Delivering Babies: Contracts and Contradictions" in Christine Overall, ed., *The Future of Human Reproduction* (Toronto: The Women's Press, 1989) 139 at 140, and discussions in Ambert, supra note 246 at ff3; Lacey, supra note 192 at 184-188.
[266] Pierce-Gealy, ibid., at 545.

diminish the importance of gestation while elevating the importance of genetic inheritance.[267] A lot of feminist criticism of RT pits genetic parenting against social parenting,[268] but gestation can also be characterized as a social relationship between the fetus and the woman.[269]

There is, of course, the dissenting opinion, which is most forcefully articulated by Linda Lacey.[270] She notes that not all pregnant women romanticize the condition. Women with both biological and adopted children note that, often to their surprise, they feel exactly the same way about all of their children, despite the additional "relationship" time spent with the ones they gave birth to.[271] The glorification of physical motherhood may very well be more common in middle-class women, who see the pregnancy as a break from their normal routines and an experience in itself, as compared with working class women who are more likely to view pregnancy as the inevitable forerunner of the real job: raising a child.[272] Others note that not all birth mothers bond with the children they carry,[273] and almost all surrogate mothers insist that they are not mothers despite physically producing a child, whether they use their own eggs or those of the intended mother or a donor.[274] Mothering is about raising a child, not physically producing one.

It is, of course, possible to value gestation and childbirth without defining all motherhood in these terms. Given the predominance of our culture's belief in the importance of genes, it is simply anti-woman to ignore that other part of biological parenthood. It is also wrong to elevate

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[267] Ikemoto, supra note 217 at 1041; Stanworth, supra note 173 at 26. See some of these Canadian decisions discussed in Chapter 4.
[268] Joan C. Callahan, "Editor's Introduction" in Joan C. Callahan, Ed., *Reproduction, Ethics, and the Law: Feminist Perspectives* (Bloomington, Indiana: Indiana UP, 1995) 1 at 11.
[269] Rothman, supra note 180 at 62.
[270] Supra note 247 and accompanying text.
[271] Supra note 262.
[272] Stanworth, supra note 173 at 18, discussing the work of Kristin Luker. I would have to say that this understanding of pregnancy and childbirth fits with my working class upbringing, but that may be skewed by the fact my mother nearly died during her only pregnancy. Still, I don't remember friends and neighbours glorifying the experience either.
[273] Cahn & Singer, supra note 223 at 178.
[274] Ragoné, supra note 191 at 75-78; they are adamant the child is not theirs, and perceive surrogacy as "a vocation": at 55.

either of the biological connections over social parenting, which quite a lot of the feminist adoption literature seems to do. As we will see in Chapter 5, some women value the experience of gestation at least as much as that of genetic connection, while others strongly emphasize that being a mother is about raising a child, not a particular biological connection to that child. However, the lack of weight given gestation in legal determinations of parenthood, as demonstrated in Chapter 4, can only be explained by the power of the male experience to define the female, meaning the power of genes still lurks in the minds of the judiciary.

CHAPTER 4: EMBRYO PROGENITORS AND LEGAL PARENTHOOD

As elaborated on in Chapter 2, many legal commentators feel that contracts between donors and recipients effectively transfer parental rights and responsibilities to the embryo recipients, while a few others who provide the most in-depth analysis of embryo donation warn that the issue might not be so easily resolved, especially in the absence of legislation.[275] The question of whether embryo donors are legal parents seems to assume that the embryo recipient/s – male[276]or female – are not automatically the legal parents of any baby resulting from the embryo. After all, Canadian law still only recognizes a maximum of two legal parents,[277] so for both donors to be declared parents in law, the recipients must lack legal parentage. The short answer is that the intended parents can easily acquire presumptive parenthood, but certain other people can just as easily challenge it. In a situation where a woman has already given birth, she can be identified as the mother on the birth registration, an act that leads to presumptive but not absolute legal parentage in all Canadian jurisdictions[278] with the possible exception of Québec, where birth appears to define legal maternity in all situations.[279] All provinces also have statutes governing the various ways of naming a second parent, including by birth registration and other presumptions.[280] Under current Canadian case law, it may even be possible for parties using a

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[275] See Chapter 2, Part III c) i).

[276] Although all reported embryo donation cases appear to involve a female recipient, alone or with a partner of either sex, it is also possible for a single man or gay male couple to receive an embryo and use a gestational surrogate mother to give birth. Even female recipients can employ a surrogate, of course, as appears to have occurred in *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 10 March 1998); see Chapter 2, footnote 131 and accompanying text.

[277] Alison Harvison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family" (1998) 6 Amer. U. J. Gender & L. 505 at 519; Roxanne Mykitiuk, "Beyond Conception: Legal Determinations of Filiation in the Context of Reproductive Technologies" (2001) 39 Osg. Hall L J 771 at 789; see further discussion of Canadian cases in Part III b) ii) infra.

[278] See further elaboration on this point in Part III, below.

[279] *Civil Code of Québec*, S.Q. 1991, c.64 [CCQ], art. 523 reads: "Paternal filiation and maternal filiation are proved by the act of birth, regardless of the circumstances of the child's birth" but later articles lay out the presumptions of paternity that apply to art. 523, so in fact paternal filiation is not absolutely proved by birth, but is presumptively "proven.'.

[280] See Part III, below.

surrogate mother (to gestate their donated embryo) to obtain declarations of parentage in their favour.[281]

Québec is also the only province that expressly states that any contributor of "genetic material" cannot establish bonds of filiation with the resulting child: "[t]he contribution of genetic material for the purposes of a third-party parental project does not create any bond of filiation between the contributor and the child born of the parental project."[282] The donor parentage question is therefore likely moot in Québec. At this time, we still lack judicial consideration of these codal provisions,[283] but most of the possible disputes in embryo donation cases appear to be precluded by the C.C.Q., as long as consent to donate is clear and unambiguous. In other jurisdictions, presumptive parenthood may be challenged in a variety of ways, including by the presumed parents themselves, leaving the possibility that people who donate supernumerary embryos to others could later ask or be asked to assume the privileges and responsibilities of parenthood. The question is, could such challenges be successful? With the exception of the pending case in Montréal, no Canadian gamete donor has ever gone to court to obtain legal parentage.

The *Assisted Human Reproduction Act*[284] (AHRA) does not address the question in any useful manner, but proposed *Regulations,*[285] not in effect at this time due to the recent change of government, might bring some clarity to the matter, although the federal government does not have the ability to legislate specifically on the issue of parentage.[286] The regulations would also

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[281] See Parts III & IV, below.
[282] CCQ, art. 538.2.
[283] Legal experts are awaiting the decision in *S.G. v. L.C*, [2004] Q.J. No. 6915 (Qc. Sup. Ct.), a case in which a man claims he should be the legal parent of a child born into a lesbian civil union through the use of his sperm. The definition and parameters of the term "parental project" in art. 538 may receive judicial interpretation in this case, since there is a dispute as to who initiated the parental project with the birth mother – the genetic father or the mother's former lesbian partner. There could also be questions regarding valid consent, as also occasionally arise in adoption.
[284] S.C. 2004, c.2. [AHRA].
[285] *Assisted Human Reproduction Act (Section 8) Regulations*, C. Gaz. 2005.I.3165 24 Sept. 2005 ("Regs.").
[286] These types of family law issues are within provincial jurisdiction, according to the *Constitution Act, 1867*, s.92(13), falling under the very broad definition of "property and civil rights."

only apply to embryo donations within Canada; it is therefore still possible for embryo creators to take possession of their embryos and ship them abroad for donation, as already occurred when Canadians used the services of Snowflakes.[287] Any resulting litigation would likely take place in the country where the donation was brokered, or in the country of the recipients, if that is different. Canadian law defining donations might not apply at all, except to the transfer procedures at the Canadian clinic holding the embryos; on the other hand, if the donation is declared invalid in the other country, courts might very well consider Canadian rules of filiation to determine the outcome on parentage. Questions of legal parenthood also might still arise in donations that occur before the regulations take effect (if ever), especially since there can be a substantial gap in time between donation and gestation. Although I will start by considering the proposed regulations, analysis of the issue must go further.

The more general legal parentage section begins with a discussion of the theory that genes traditionally result in legal parentage. If true, embryo donation does not in itself terminate parental rights, and embryo donors are legal parents until they surrender the child for adoption as currently understood in law. This will be followed by a more in-depth breakdown of legal paternity and maternity, in history and in the present day, including the limited number of Canadian cases dealing with reproductive technology (RT) issues. Due to the historical vagaries of the common and civil law definitions of paternity, the issue of male and female embryo progenitors must be considered separately. Relevant rulings and legislation in other jurisdictions will also be compared to the Canadian law where applicable.

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[287] Lisa Priest, "One couple's tough decision: after agonizing, Mississauga parents opt to offer others their gift of life" *Globe and Mail* (4 Mar. 2002) F1.

I. Proposed Regulations Governing Consent to Donation and the Definition of "Embryo Donor"

After many years of studies and public consultations, the federal government has begun to roll out legislation on RT,[288] but many key areas and even definitions were left to the regulations, none of which have become law. One of the definitions pending is that of an embryo donor; donors of sperm and eggs are defined in the Act.[289] Commentators have criticized leaving the definition of embryo donor to the Regulations, especially since the government is not required to put any regulations in place at any point,[290] meaning that 'embryo donor' would end up being defined by the courts if litigation ever gets that far.

The much awaited proposed definition reads:

> **11.** (1) In this Part, "donor" means the following persons for whose reproductive use an *in vitro* embryo was created or donated, as the case may be,
> (*a*) the individual who has no spouse or common-law partner at the time the *in vitro* embryo is created, regardless of the source of the human reproductive material used to create the *in vitro* embryo,
> (*b*) the couple who are spouses or common-law partners at the time the *in vitro* embryo is created, regardless of the source of the human reproductive material used to create the *in vitro* embryo; or
> (*c*) the third party who, at the time the *in vitro* embryo is donated, is
> (i) an individual who has no spouse or common-law partner, or
> (ii) a couple who are spouses or common-law partners.
>
> (2) For the purpose of this Part, if an *in vitro* embryo is donated for the reproductive use of a third party, the individual or couple who made the donation is no longer the donor in respect of the *in vitro* embryo after the donation.
>
> (3) If the donor is a couple, the consent of each spouse or common-law partner must be compatible in order for the consent of the donor to comply with the requirements of this Part.[291] [emphasis added]

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[288] For a review of the AHRA, supra note 284 see Alison Harvison Young, "Let's Try Again...This Time with Feeling: Bill C-6 and New Reproductive Technologies" (2005) 38 UBC L Rev. 123; for commentary on earlier draft bills and policy documents, see Francine Manseau, "Canada's Proposal for Legislation on Assisted Human Reproduction" in Jennifer Gunning and Helen Szoke, eds., *The Regulation of Assisted Reproductive Technology* (Hampshire, UK: Ashgate Publishing Ltd., 2003) 45; Roxanne Mykitiuk & Albert Wallrap, "Regulating Reproductive Technologies in Canada" in Jocelyn Downie, Timothy Caulfield, & Colleen Flood, eds., *Canadian Health law and Policy*, 2nd ed. (Markham, ON.: Butterworths Canada Ltd., 2002) 367 at 378-389; Alison Harvison Young & Angela Wasunna, "Wrestling with the Limits of Law: Regulating New Reproductive Technologies" (1998) 6 Health L J 239; Mike J. Ashwood-Smith, "Frozen Canadian Zygotes" (1995) 10 Human Repro. 3082.

[289] AHRA, s.3.

[290] Matthew Herder, "Donate a Definition" (2002) 11 Health L. Rev. 40.

[291] Regs, s.11, p.3184 Canada Gazette.

This definition, if enacted, would clarify two items of concern: that researchers and clinics cannot donate embryos to anyone under AHRA, but third party recipients who obtain embryos for their own use may subsequently donate them to someone else, or otherwise dispose of them according to the law, regardless of the interests of the original gamete providers. All embryo donors must be informed in writing that third-party recipients will gain control over embryo disposition in the future.[292]

Although original gamete providers would lose control of their embryos once a donation with informed consent takes place under the Act and these proposed regulations, the provisions do not necessarily mean that such a loss of control leads to the loss of parental rights and responsibilities. Indeed, under the Constitution, issues of parentage are provincial jurisdiction, so federal legislation cannot make such determinations. However, it is possible that a court considering a first impression case involving embryo donation gone wrong may rely on these consent provisions when attempting to determine who the legal parents are.

The lack of control over an embryo's final disposition might, in fact, lead to more litigation. One potential scenario involves a heterosexual couple donating their embryos to another heterosexual couple at the same clinic. Although the AHRA does not mandate donor choice of recipients, nothing precludes a clinic from facilitating this type of choice, which at least some embryo creators want[293] and which some programs currently provide.[294] There is also

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[292] Ibid., s.13.

[293] A Canadian study found that some people were more likely to donate to others couples if they could influence the choice of recipients and if the child would receive information about the genetic family. One quarter of respondents would only donate if they had some control in selecting the recipients through criteria: Christopher R. Newton, Ann McDermid, Francis Tekpetey, Ian S. Tummon, "Embryo donation: attitudes toward donation procedures and factors predicting willingness to donate" (2003) 18 Human Reprod. 878 at 883. Another study found that embryo creators were leery about donating to research without knowing what the research would entail; the authors propose that potential donors be given more control, if researchers want to increase the total number of donations: Catherine A. McMahon, Frances L. Gibson, Garth I. Leslie, Douglas M. Saunders, Katherine A. Porter & Christopher Tennant, "Embryo donation for medical research: attitudes and concerns of potential donors" (2003) 18 Human Reprod. 871 at 875-876. See further discussion on donor interests in Chapter 5.

[294] The best known example is Snowflakes but some clinics also offer this option. One survey found that 15% of U.S. clinics offered "directed donation" where donors get to select recipients: Sheryl A. Kingsberg, Linda D. Applegarth & Jeffrey W. Janata, "Embryo donation programs and policies in North America: survey results and implications for health and mental health professionals" (2000) 73 Fertility & Sterility 215. Some American clinics

nothing in the federal or provincial law precluding agreements for post-birth access and information sharing, so-called "open" embryo donation. If the recipient couple for any reason does not use all of the embryos, the AHRA and proposed regulations give them the full power to choose what happens to the embryos: donation for reproductive use by a third party, destruction, or donation for research. Any of these options may be repulsive to the original gamete providers, who in particular might not want their genetic offspring raised in a home they did not select. Claiming parental relationships with any resulting children would be a way of trying to get around the consent provisions, especially if the parties made a separate, non-statutory contractual agreement on subsequent embryo disposition.

We can also analogize to adoption law here, although it is unlikely the result will bring full parental rights. Despite the fact that post-adoption contact agreements between the birth and adoptive parents are not statutorily enforced in Canada,[295] courts have, on rare occasions, permitted continued birth parent access in part because of prior agreements now broken.[296] Of course, access is not legal parentage, and these adoption decisions are also in part premised on the best interests of the child test; continuation of important relationships is often deemed in the child's best interests. Likely, the embryo would have to become a live-born child before this comes into play.

In embryo donation, agreements such as use by a particular woman are made before a child even exists, and a federal regulation terminating dispositional rights is not the same as provincial legislation terminating parental rights. Still, it seems quite a stretch to say that

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also allow donors and recipients to have relinquishment agreements that state the embryos return to the control of the original donors if the recipients fail to use all of them: American Fertility Association, *Embryo Donation: Prospective Donors* (New York, American Fertility Association, 2006), online: <http://www.theafa.org/index.html> at 9. This would apparently not be legally binding in Canada if the proposed regulations are brought in.

[295] Richard Sullivan & Ellie Lathrop, "Openness in adoption: retrospective lessons and prospective choices" (2004) 26 Child. & Youth Services Rev. 393 at 398. British Columbia encourages such agreements but the legislation contains no enforcement mechanisms: *Adoption Act*, RSBC 1996 c.5, s. 59.

[296] *J.H. v. B.G.*, [1993] O.J. No. 1497 (Ont. CJ, Prov. Div.); *Geary v. Oulton*, [1995] O.J. No. 1712 (Ont. CJ (Prov. Div)), at para. 26.

conceding all future rights to control an embryo is the same as terminating parental rights and obligations. Historically, legal adoption did not always foreclose inheritance rights from the birth family to the child;[297] this required express legislative intent. Arguably, that same intent to surrender all parental rights and duties could be needed to terminate all embryo donors' legal obligations to any resulting children, since some people claim genetic parentage is the root of common law parental rights and obligations. That claim will be dissected next.

II. Genes and Parentage at Common Law: A Non-Existent Rule, but Also Unworkable

Although some embryo donors will not have a genetic link with their embryo, having created it using donated egg and/or sperm, the most common scenario in embryo donation involves surplus embryos made from the gametes of the donors. Therefore, we need to know if a genetic connection is the basis for the legal parent-child relationship. As is demonstrated in the subsequent sections on maternity and paternity, the law sometimes does rely on genes or "blood" connections to create legal connections, but this rule is not consistent and seems to have a poor basis when applied to maternity in particular.

Nevertheless, many commentators insist that genes have always been the foundation of common law parenthood.[298] Most proponents of this view provide no general citation or only point to half of the parental equation when supporting their views:

- "Traditionally, the blood tie has been regarded as the best and fundamental basis for parentage, but it may have a different meaning in different societies."[299] [no supporting citation]

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[297] See discussion in Chapter 2, Part III c) i) and Katrysha Bracco, "Patriarchy and the Law of Adoption: Beneath the Best Interests of the Child" (1997) 35 Alta. L. Rev. 1035 at 1040.

[298] Some writers also draw on civil law, but the majority of the English-language scholarship is about the common law only. Since Québec – Canada's only civil law jurisdiction – has already legislated on the parentage issue, it makes sense to focus most of the remainder of this chapter on common law rules.

[299] Chris Barton and Gillian Douglas, *Law and Parenthood* (London: Butterworths, 1995) at 53; the different interpretations referred to are whether the male or female genetic link is more important.

- "...in light of the view, held in South Africa and elsewhere, that consanguinity is the determining factor for legal parenthood."[300] [no citation]
- "Traditionally, the blood bond has determined [legal] parentage."[301] [citing blood tests to determine *paternity*]
- "...but for the common law it remained true that parentage concerned genetics...genetic factors alone determined the identity of a child's legal parents."[302] [citing paternity case]
- "...traditionally the law has taken the blood tie or genetic link as the test of parenthood."[303] [citing blood tests to determine paternity]
- "...[legislation on RT] overturns previous common law assumptions that the genetic link was determinative of parentage."[304] [no citation, but noting that maternity was formally identified by gestation, "whatever the theoretical common law position"]

If true, these assertions would mean that, where statutes or caselaw have not modified the common law, genetic parents would be legal parents until their rights are terminated as in adoption law. I demonstrate below that this assertion is at best an overly simplified interpretation of history regarding paternity, and almost certainly could not have been true in maternity. More importantly, modern scientific knowledge indicates that such a law might be impossible to apply in a few circumstances, especially if we also accept that Canadian law recognizes only two parents at a time.

Why is the genetic rule impossible to apply? Firstly, beyond a question addressed in this thesis as to whether gestation is equivalent to genetic links to a child in law, it is now possible to

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[300] Diederika Pretorius, *Surrogate Motherhood: A Worldwide View of the Issues* (Springfield, IL: Charles C. Thomas, 1994) at 132.
[301] Ilana Hurwitz, "Collaborative Reproduction: Finding the Child in the Legal Maze of Motherhood" (2000) 33 Conn. L. Rev. 127 at 150.
[302] Stephen Cretney, *Family Law in the Twentieth Century: A History* (Oxford: Oxford UP, 2003) at 540.
[303] P.M. Bromley and N.V. Lowe, *Family Law*, 8th ed. (London: Butterworths, 1992) at 260.
[304] Robert G. Lee & Derek Morgan, *Human Fertilisation & Embryology: Regulating the Reproductive Revolution* (London: Blackstone Press, 2001) at 217.

trifurcate biological maternity.[305] A human ova is comprised of two types of DNA: mitochondrial and nuclear. The DNA of popular parlance is the nuclear type – nDNA – which men also transmit to offspring. Almost all inheritable characteristics are carried in the nDNA, found in the nucleus of the egg. However, a tiny percentage of a person's genetic makeup is carried within the mitochondrial DNA – mtDNA – which is carried in the outer part of the egg, but is not inherited from the male progenitor. There are only 37 genes in mtDNA but one minor defect can impact every cell in the body.[306] If the pro-nuclei from a potentially-affected embryo are injected into the unfertilized egg of a woman who is not a carrier, a process called nuclear transfer, a resulting child will inherit nDNA from one woman and mtDNA from the non-carrier. This procedure is now approved for use in the United Kingdom in instances where a woman wants to avoid passing on an mtDNA-related disease.[307] A similar process can be used to rejuvenate the viability of ova, since part of the reduced reproductive success that comes with female aging is caused by the age-related degradation of the non-nuclear DNA portion of the egg.[308]

While some commentators call this having two mothers,[309] it is admittedly unlikely that a court would place an mtDNA contribution on an equal level with an nDNA one. The popular understanding of genetics does not include mtDNA, and the actual contribution is 37 genes,

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[305] It is actually technologically possible to separate biological maternity into four categories: gestation, breast-feeding, mitochondrial DNA and nuclear DNA: June Carbone & Naomi Cahn, "Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty" (2002-03) 11 Wm. & Mary Bill Rts J 1011 at 1048, but I really can't imagine a court or legislature awarding parental rights based only on breast feeding, especially given the historical prevalence of wet nurses in some societies.

[306] Sharon Hesterlee, "Mitochondrial Myopathy: An Energy Crisis in the Cells" (1999) 6:4 Quest, online: Muscular Dystrophy Association (USA) <http://www.mdausa.org/publications/Quest/q64mito.html>.

[307] "Embryo may be created from two women" *Associated Press* (9 Sept. 2005), online: Yahoo!, at <http://news.yahoo.com>. For more on mtDNA genetics and mitochondrial diseases, see Richard Boles & Terri Mason, "The Genetics of Mitochondrial Diseases", online: United Mitochondrial Disease Foundation, at <http://umdf.org/mito_info/genetics.aspx>.

[308] Jason A. Barritt, Carol A. Brenner, Henry E. Malter & Jacques Cohen, "Mitochondria in human offspring derived from ooplasmic transplantation" (2001) 16 Human Reprod. 513; Lois Rogers, "Eggs of two moms make one baby" *Calgary Herald* (16 May 1999) A1; Katheryn D. Katz, "Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation" (2003) 18 Wisc. Women's L J 179 at 213.

[309] Graeme Whitfield, "Are two mothers one too many?" *The Journal* (Teesside, UK) (10 Sept. 2005), online: <http://icteesside.icnetwork.co.uk>.

compared with approximately 50,000 genes from the nDNA providers.[310] But this is far from the only way to make a baby with more than two genetic parents. Scientists are experimenting with embryo fusion, where two separate embryos, possibly created with eggs and/or sperm from different people, can be fused into one, resulting in an embryo that has as many as four progenitors who contributed nDNA. This has been accomplished in veterinary medicine and is touted as a way for same sex couples to have children who share both parents' nDNA.[311] This latter process, along with nuclear transfer, is prohibited under the AHRA.[312] Canadians can travel to countries where the procedure is offered, however, as it inevitably will be. Scientifically, the procedure doesn't even have to be limited to just two embryos – it is also possible to combine higher numbers.[313]

When separate embryos fuse into one, or an embryo combines with an unfertilized egg, a chimera results. While knowingly creating a chimera is forbidden in Canada, they do occur in nature, albeit very rarely. There are documented cases of hermaphroditic children resulting from the fusion of male and female embryos *in utero*.[314] Researchers presume the actual incidence of chimerism is higher than reported, because chimeras created from embryos of the same sex are unlikely to be screened, and the overall numbers are believed to be increasing through the use of RT.[315] Documented chimeras have only two genetic parents, but it is obviously possible for the same procedure to occur with embryos made from different eggs and sperm. Although clinics sometimes avoid intentional implantation of different batches of embryos at the same time,[316] it

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[310] Ibid.
[311] Lee M. Silver & Susan Remis Silver, "Confused Heritage and the Absurdity of Genetic Ownership" (1998) 11 Harv. J L & Tech. 593 at 605-609.
[312] AHRA, s.3 (definition of chimera) and s.5(1)(i).
[313] Martin Johnson, "A Biomedical Perspective on Parenthood" in Andrew Bainham, Shelley Day Sclater and Martin Richards, eds., *What is a Parent? A Socio-Legal Analysis* (Oxford: Hart Publishing, 1999) 47 at 52.
[314] Lisa Strain, John C.S. Dean, Mark P.R. Hamilton, & David T. Bonthron, "A True Hermaphrodite Chimera Resulting from Embryo Amalgamation after In Vitro Fertilization" (1998) 338 N Engl. J Med. 166.
[315] Helen Pearson, "Dual Identities" (2002) 417 *Nature* 10 at 11. Hermaphrodites, created from embryos of both sexes, attract considerable medical attention and undergo numerous blood and genetic tests.
[316] Julinda Lee & Christine Yap, "Embryo donation: a review" (2003) 82 Acta Obstet. Gynecol. Scand. 991 at 994.

is practiced elsewhere,[317] and practitioners do make mistakes.[318] We are courting disaster if we presume that a child with three or four genetic parents is never going to be born – he or she likely already exists and has company coming.

Furthermore, fusion of full embryos is not the only way chimeras happen. While parthenogenesis (embryo creation without egg fertilization) does occur in humans, it cannot result in a live baby. An unfertilized dividing egg will not survive to term; however, regular fertilized embryos can combine with an unfertilized egg that has begun cell division.[319] In normal circumstances – and this is admittedly believed to be rare – the resulting child will be comprised of approximately 75% of mom's nDNA and only 25% of dad's. However, if the dividing egg and the embryo come from different women, there will be three genetic parents. This could occur in a clinic mix-up or if a woman who receives a donated egg or embryo ovulates at around the same time as embryo implantation. Women undergoing fertility treatment often ovulate and conceive naturally; the success rate is not much different than that of IVF.[320] Giving anti-ovulation drugs to the woman receiving the implantation will not necessarily prevent ovulation during the early stages of development, since we now know that some women ovulate

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[317] American Fertility Association, supra note 294; Jerome H. Check, Carrie Wilson, Joseph W. Krotec, Jung K. Choe & Ahmad Nazari, "The feasibility of embryo donation" (2004) 81 Fertility & Sterility 452 at 453.

[318] As documented in the various cases discussed in: Raizel Liebler, "Are You My Parent? Are You My Child? The Role of Genetics and Race in Defining Relationships after Reproductive Technological Mistakes" (2002) 5 De Paul J Health Care L 15; Alice M. Noble-Allgire, "Switched at the Fertility Clinic: Determining Maternal Rights When a Child is Born from Stolen or Misdelivered Genetic Material" (1999) 64 Mo. L Rev. 517; Leslie Bender, "Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law" (2003) 12 Colum. J Gender & L 1; see also the incident of mistaken implantation discussed in Chapter 2, at footnote 92. Such mistakes are likely far more common than the known incidents.

[319] Pearson, supra note 315 at 11.

[320] J.A. Collins & T.C. Rowe, "Age of the female partner is a prognostic factor in prolonged unexplained infertility: a multicenter study" (1989) 52 Fertility & Sterility 15, found that women who had unsuccessfully been trying to conceive for three years had a 28% chance of conceiving without medical assistance in the next two years provided that neither partner had a specific sterility problem diagnosed, although these rates drop each year after the age of 31. In an Australian study of women who had given birth to an IVF child, a five-year followup found that more than 30% had subsequently conceived "naturally" and had another child: Catherine A. McMahon, Frances Gibson, Jennifer Cohen, Garth Leslie, Christopher Tennant & Douglas Saunders, "Mothers Conceiving Through In Vitro Fertilization: Siblings, Setbacks, and Embryo Dilemmas After Five Years" (2000) 10 Repro. Tech. 131 at 131. An early study reported that 35% of couples who were medically defined as infertile went on to conceive without RT, medications or surgery: Joan C. Callahan & Dorothy E. Roberts, "A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory" (1995-96) 84 Kentucky L J 1197 at 1229.

more than once a month, and not necessarily at the peak time of their cycle.[321] An egg could appear a week after embryo transfer and still have an impact.

All rare circumstances, yes – but rare circumstances add up. As our lives become increasingly "geneticized", even more people will undergo DNA tests and more of these mistakes and anomalies will be found. If a rule assigning legal parentage to the genetic contributors did exist in the past, it cannot solve the types of disputes we are going to see in the future, where a child could have four or more genetic parents. Fortunately for the law, the "legal parentage flows from genes" rule never really existed.

III. The Real Rules on Legal Parentage

a) Paternity: Lip-Service to Blood Relationships

i) History

The history of paternity in common law is linked to the concept of legitimacy. Legal parenthood was only bestowed upon men who were married to the mother, although the father of a bastard could be forced to contribute financially to the child's upkeep.[322] Since it was impossible to "prove" biological paternity, most unmarried fathers had no child support obligations.[323] "The main end and design of marriage therefore being to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong" and to ensure the transmission of property.[324] Although oft cited as a common law rule, the Latin maxim "*pater est quem nuptiae demonstrant*" (the father is

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[321] Angela R. Baerwald, Gregg P. Adams & Roger A. Pierson, "A new model for ovarian follicular development during the human menstrual cycle" (2003) 80 Fertility & Sterility 116.
[322] William Blackstone, *Commentaries on the Laws of England* 14th Ed. by Edward Christian (London: A Strahan, 1803) at 446 & 458.
[323] Carol Smart, "'There is of course the distinction dictated by nature': Law and the Problem of Paternity" in Michelle Stanworth, ed., *Reproductive Technologies: Gender, Motherhood and Medicine* (Minneapolis: U of Minnesota Press, 1987) 98 at 102-103.
[324] Blackstone, supra note 322 at 455.

demonstrated by marriage) actually comes from the civil law and Justinian's *Corpus Juris Civilis*, and was never officially adopted by the common law.[325] One historical difference between the common law and civilian systems in this area is the timing of the wedding: civil law and canon law permitted the parents to bestow legitimacy on their child by marrying after the birth, but early common law required pre-birth nuptials.[326]

It was possible to rebut this presumption of paternity, but the evidence accepted was rather extreme: proof that the mother's husband had no sexual access to her during the possible times of conception, most commonly that he was out of the country for the *entire nine months* before the birth.[327] Proof needed to be beyond a reasonable doubt, and only the husband or wife could bring this type of case to court.[328] If they chose not to challenge the attribution of legitimacy, then no one could, no matter how well known the "biological facts" might be in the community, nor how much the biological father wanted to assert his paternity. However, despite the stringent rules, when real cases arrived in court wealthy men were far more likely to be successful in rebutting paternity than those who had little property to bequeath to their offspring.[329] In the United States, a white man married to a white woman could also disavow paternity if the child appeared to have black ancestry.[330]

For these reasons, many authors note that assigning legal fatherhood was really about saving paternal property for the children that the men "contracted to sire,"[331] and also about promoting marriage as a social norm.[332] Courts preferred to uphold the status of legitimacy

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[325] Blackstone, supra note 322 at 446; George Blaxland, *Codex Legum Anglicanarum: or, A Digest of Principles of English Law, Arranged in the Order of the Code Napoleon* (London: Henry Butterworth, 1903) at 292; *The Digest of Justinian*, Mommsen & Kruger, eds., English trans. ed. by Watson, (Philadelphia, 1985) at I, p44.
[326] Blackstone, supra note 322 at 454-455.
[327] Ibid., at 457.
[328] Mykitiuk, supra note 277 at 780.
[329] Smart, supra note 323 at 104.
[330] Dorothy E. Roberts, "The Genetic Tie" (1995) 62 U. Chi. L Rev. 209 at 260.
[331] R. Alta Charo, "Biological Determinism in Legal Decision Making: The Parent Trap" (1994) 3 Tex J Women & L 265 (Charo "Biological") at 284.
[332] Sherrie-Lynne Russell-Brown, "Parental Rights and Gestational Surrogacy: An Argument Against the Genetic Standard" (1991-92) 23 Colum. Hum Rts. L Rev. 525 at 538.

wherever possible,[333] noting that "bastardizing" a child ran counter to public policy.[334] Biology, then, was often ignored when it would produce an unpalatable outcome for society;[335] "there is only a loose legal relationship between legally recognized fatherhood and genetic consanguinity."[336] Rather than following biological fact, the law permitted men to "choose" whether they would be legal parents, through the nature of their legal relationship with the child's mother;[337] women, of course, had no such choice.[338] The genes of unmarried fathers simply didn't matter when determining legal parenthood, and the genes of married fathers were not always present in their legal children.

Based on the history and the continuing existence of presumptions, many of which are still quite difficult to rebut,[339] genes are not the ultimate test for legal paternity.[340] Still, some commentators insist that the legal rules of paternity are not social constructs but merely the easiest way to make a legal determination about something that was unknowable until relatively

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[333] Cretney, supra note 302 at 533.

[334] Barton and Douglas, supra note 299 at 56. The legal detriments of illegitimacy ran far beyond being unable to inherit, and included restrictions on holding public office, and on proper burial, as well as general social stigma: Harold Alexander Ovsiowitz, *The Metamorphosis of Adoption: A Study of Selected Multidisciplinary Approaches to the Evolution of Secrecy in the Adoptive Process* (LL.M. Thesis, Queen's University, Faculty of Law, 1986) [unpublished] at 70-73.

[335] Katherine Arnup & Susan B. Boyd, "Familial Disputes? Sperm Donors, Lesbian Mothers and Legal Parenthood" in Didi Herman & Carl Stychin, eds., *Legal Inversions: Lesbians, Gay Men, and the Politics of Law* (Philadelphia: Temple UP, 1995) 77 at 88; Mykitiuk, supra note 277 at 776-781; Smart, supra note 323 at 101.

[336] John Lawrence Hill, "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) NYUL Rev. 353 at 372.

[337] Janet L. Dolgin, *Defining the Family: Law, Technology and Reproduction in an Uneasy Age* (New York: New York UP, 1997) [Dolgin "Defining"] at 97; Roberts, supra note 330 at 254.

[338] In a few jurisdictions, mostly civilian, women could (and can still) abandon a child or otherwise give birth without penalty and without ever legally becoming a parent: Katherine O'Donovan, "'Real' Mothers for Abandoned Children" (2002) 36 L & Soc'y Rev 347.

[339] The presumption is still irrebuttable in some U.S. states: Hill, supra note 336 at 373.

[340] Janet Dolgin still sees the American cases as defining fathers through mothers: Janet. L. Dolgin, "Choice, Tradition and the New Genetics: The Fragmentation of the Ideology of the Family" (2000) 32 Conn. L Rev 532 [Dolgin "Genetics"] at 533, and Margrit Eichler & Marnie McCall, "Clarifying the Legal Dimensions of Fatherhood" (1993) 11 Can J Fam. L 197, found that the relationship with the mother was the most common way man could become a father in 1993: at 202. In reproductive technology law, intent regulates fatherhood in the United States: Katz, supra note 308 at 214. Chris Barton and Gillian Douglas think that intent is now becoming the main test in the U.K.: Barton & Douglas, supra note 299 at 51.

recently.[341] They would argue the presumption was based on biology, not social policy. At least one Canadian court has agreed:

> "... the presumption of paternity... like other rebuttable presumptions, ... made certain assumptions about ordinary human behaviour in circumstances where direct proof was difficult. It assumed that a man and woman cohabiting at a child's conception or birth were engaging in sexual intercourse from which procreation might inevitably result. The presumption could be discharged upon a preponderance of evidence that the man had not engaged in sexual intercourse with the mother at or around the time of conception, or had no biological connection with the child, or had not assumed a parental relationship with the child. In the days before DNA testing it was simply a method of facilitating proof at a time before science and technology intervened with more reliable standards. The Court cannot aspire to affect the fundamentals of biology that underlie the presumption purely in the interests of equal treatment before the law."[342]

Even those who dispute that genes are the absolute rule admit that genes are important in the law, but state that they are just not "of overriding importance."[343] The key, I think, is that even in today's age of genetic certainty the presumptions of paternity, now expanded to include the unwed, have not been repealed, and it appears that Canadian judges are not ordering highly reliable DNA tests any more frequently than they ordered the less useful blood tests of the past.[344] If biology was the only reason for the presumption of paternity, why haven't we given up the presumption, or at least moved in that direction legislatively?[345] As demonstrated below, presumptions of paternity – based on social rather than biological assumptions – are alive and well, although the belief that genetics were always the real rule is creeping into jurisprudence.

ii) Canadian Law

The presumption of paternity, with modifications, also exists in Canadian civil and common law. Generally, the presumption includes men who are married to the mother at the

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[341] Brenda Almond, "Parenthood – social construct or fact of nature?" in Derek Morgan & Gillian Douglas, eds., *Constituting Families: A Study in Governance* (Stuttgart: F. Steiner, 1994) 98 at 100.
[342] *P.C. v. S.L.*, 2005 SKQB 502, at para. 20. See further discussion of this case Part III b) ii) infra.
[343] Smart, supra note 323 at 101; see also Dolgin, "Genetics", supra note 340 at 528.
[344] Timothy Caulfield, "Canadian Family Law and the Genetic Revolution: A Survey of Cases Involving Paternity Testing" (2000) 26 Queen's LJ 67.
[345] Other countries are also sticking with marital and cohabitation presumptions: see Dolgin "Genetics", supra note 340 at 531-2.

time of birth or were married at some point in the 300 days leading up to the birth.[346] More recently, cohabitation was included as an equivalent of marriage in most jurisdictions, although some of the rules vary.[347] Depending on who brings a case to court and the specifics of the jurisdiction, these presumptions can still be quite difficult to rebut.[348] Men can also be listed on the birth registration or file an acknowledgment of paternity, although the rules and procedures differ between jurisdictions, and birth registration law is in a bit of a flux since *Trociuk v. British Columbia (Attorney General).*[349] Finally, men can become legal fathers when a court issues an order to that effect.[350]

Most means of acquiring legal fatherhood do not involve DNA or blood tests, except where a party goes to court to prove or rebut a presumption, and even then, tests are not necessarily ordered or admissible. Courts always have discretion in how they apply a laundry list of criteria derived from statutes and jurisprudence.[351] Although concerns about illegitimacy no longer apply in law, many judges are still reluctant to disrupt functioning family units, but some do think the child's need for genetic certainty will be more important than protecting the existing psychological and social parenting arrangement.[352] Timothy Caulfield's study of Canadian paternity cases from 1992 to 1998, however, found no increase in the number of court-ordered biological paternity tests in the years following the availability of DNA analysis. Most cases that invoke the 'best interests of the child' test when refusing to order DNA samples involve potential

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[346] E. Sloss & R. Mykitiuk, "The Challenge of the New Reproductive Technologies to Family Law" in *Research Studies of the Royal Commission on New Reproductive Technologies, Vol. IV: Legal and Ethical Issues in New Reproductive Technologies: Pregnancy and Parenthood* (Ottawa: Minister of Supply and Services Canada, 1993) 339 at 351-352. On these two points, Québec law matches the rest of the country.

[347] Eichler & McCall, supra note 340 at 202-203. The "time of birth" and "300 days" rules may not necessarily apply for cohabitation. A common term is "in a relationship of some permanence": see, for example, *Children's Law Reform Act,* R.S.O. 1990, c. C.12 [CLRA], s. 8(1)4; *Children's Act*, R.S.Y. 2002 c. 31, s.12(1)(d).

[348] Sloss & Mykitiuk, supra note 346 at 353.

[349] [2003] 1 S.C.R. 835 [*Trociuk*].

[350] Sloss & Mykitiuk, supra note 347 at 351.

[351] See a review of mostly Ontario cases in Mary Jane Mossman, *Families and the Law in Canada: Cases and Commentary* (Toronto: Emond Montgomery, 2004) at 742-746; for Québec, see Michelle Giroux, "Test d'AND et filiation à la lumière des développements récents: dilemmes et paradoxes" (2002) 32 R.D.G. 865.

[352] Giroux, ibid., and Caulfield, supra note 344.

destabilization of the pre-existing household, i.e., a nuclear heterosexual family unit, the family form promoted by the historical presumption of paternity.[353] These types of decisions point to the continuing substantial significance of non-biological factors in determinations of legal parentage.

Statutes and caselaw dealing with donor insemination (DI) present another example of law overruling biology. While other jurisdictions have passed laws declaring that the husband of a woman who undergoes DI is the legal father provided he consented to the procedure,[354] in Canada, so far only Québec (with its complete regulation of parentage in gamete and embryo donation), the Yukon, Newfoundland and Alberta have enacted family law statutory provisions.[355] Paternity of this nature is irrebuttable, based solely on the intent to be a father.[356] Manitoba's *Vital Statistics Act* (VSA) also states that when children are born after DI, the birth registration "shall be completed" showing the woman's common law partner or husband as the other parent, along with an attached consent to DI from the husband or common law partner.[357] This, however, would still be rebuttable under section 23 of the *Family Maintenance Act*.[358]

Strangely, although federal immigration legislation defines "son" or "daughter" as the biological or adopted child of an adult,[359] and despite the fact that Citizenship and Immigration Canada (CIC) often requires DNA testing to demonstrate filiation, CIC policy documents instruct immigration officers to allow men to sponsor DI children based on the presumption of paternity, provided the immigrating parents can provide proof of medically-assisted DI.[360] The

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[353] Caulfield, supra note 344 at 83-84.
[354] For example, Bromley & Lowe, supra note 303 at 264 describe the situation in the U.K.; Dolgin "Defining", supra note 337 at 9, notes the slow progression to this position in the United States.
[355] C.C.Q., arts. 538-542; *Children's Act*, supra note 347 at s.13; *Children's Law Act*, R.S.N. 1990, c.C-13, s.12; *Family Law Act*, S.A. 2003, c.F-4.5, s.13(2)(b). All of the Canadian statutes allow the presumption for cohabiting couples as well.
[356] Sloss & Mykitiuk, supra note 346 at 364.
[357] *Vital Statistics Act*, C.C.S.M. c. V60, s. 3(6).
[358] C.C.S.M. c. F20; there is a presumption of paternity "[u]nless the contrary is proved on the balance of probabilities."
[359] *Immigration and Refugee Protection Regulations,* SOR/2002-227, s.2, "dependent son" and "dependent daughter."
[360] Citizenship and Immigration Canada, *OP 2: Processing Members of the Family Class*, online:

presumption of paternity is not available to immigrants from poor countries where birth registration is spotty or non-existent, but the DI child is processed under the category of "biological child." Here, apparently, biological doesn't mean genes at all. CIC's selective use of biological testing and family law presumptions is a classic example of the tension that exists between genetic and social parenting, one that plays out in the existing jurisprudence on DI.

Inevitably, a province without DI legislation saw litigation. In both *Low v. Low*[361] and *Zegota v. Zegota-Rzegocinski*,[362] married couples broke up around the time the wife gave birth to a DI-conceived child. Both wives tried to have the husband excluded as the father; both husbands insisted they were legal fathers, based on their consent to the insemination. Neither man had a chance to develop a parental relationship with the baby before litigation began. Despite this lack of previous relationship, both men were declared legal fathers; however, the courts relied on section 5 of the CLRA (Ontario) to make a declaration of parentage, not the usual presumption of paternity flowing from marriage.[363] Section 5 reads:

> 5.(1) Where there is no person recognized in law under section 8 to be the father of a child, any person may apply to the court for a declaration that a male person is his or her father, or any male person may apply to the court for a declaration that a person is his child."

Section 8 contains the presumptions of paternity described earlier. Ferrier J. expressly notes that the *Low* decision does not decide whether DI rebuts the presumption of paternity, and the *Zegota* decision adopts the *Low* reasoning.[364] It is unlikely an Ontario court will overrule these cases unless there is a truly egregious fact scenario. The existence of section 5, and the courts' willingness to use it, however, indicates that biology and adoption are not intended to be the only two ways to become a legal parent.

<http://www.cic.gc.ca/manuals-guides/english/op/op02e.pdf> at 5.14. See discussion in Cindy L. Baldassi, "DNA, Discrimination and the Definition of Family Class: *M.A.O. v. Canada (Minister of Citizenship and Immigration)*" (2006) J. of L. & Soc. Pol'y (forthcoming).

[361] (1994), 4 RFL (4th) 103 (Ont. Gen. Div.) [*Low*].

[362] [1995] O.J. No. 204 (OCJ – Gen. Div.) [*Zegota*].

[363] CLRA, supra note 347.

[364] *Low*, supra note 361 at 716; *Zegota*, supra note 362 at para. 49.

Getting one's name on the birth registration is now perhaps the easiest way to become a legal father,[365] although it is not as permanent as an adoption order or other court order – people can challenge the presumption of parentage embodied in a birth registration. While this method was always available to heterosexual couples, with the exception of a mother's ability to exclude the biological father in some circumstances,[366] it is only since the turn of this century that same sex couples can register the birth and attain parenthood status. While Québec did this through its civil union legislation,[367] change elsewhere came from the British Columbia human rights decision, *Gill v. Murray*.[368] In this case, two lesbian couples brought complaints when the Vital Statistics department refused to allow each mother to put her name on the birth registration, informing the couples that the co-mother (i.e., the woman who did not give birth) would have to adopt the child. One refused, since "she did not perceive herself as adopting someone else's child,"[369] while the other co-mother objected to "jumping through hoops" for same-sex couple adoption when she wanted to use the birth registration instead.[370] Both couples argued that the birth certificate based on birth registration was a "primary identity document" for the child, not a register of biological fact.

Vital Statistics claimed that the registration process was for biological parents only, and that everyone else must use adoption procedures to become parents. However, testimony revealed that the agency did not research any birth declarations that were made by heterosexual couples, and simply assumed that those parties were biologically related to the child.[371] The tribunal found that the purpose of Vital Statistics is not "to collect biological or genetic

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[365] I am sure many women might say it is easier than giving birth!
[366] See discussion immediately below.
[367] *An Act Instituting Civil Unions and Establishing New Rules of Filiation*, 2002 S.Q. c.6, originally tabled in November 2001. It appears, however, that a gay male couple can only access this method of legal parentage once the woman who gave birth gives up her parental rights, so there is a distinction between male and female same sex couples.
[368] 2001 BCHRT 34 [*Gill*].
[369] Ibid., at para. 17.
[370] Ibid., at para. 12.
[371] Ibid., at paras. 23-32.

information about the parents of a child."[372] While birth certificates are rebuttable, they provide primary proof of the parent-child relationship and are required for numerous legal and social activities. Since in practice the agency only questioned applicants in same sex relationships about their biological link to the child, the scheme is prima facie discriminatory. A similar human rights case brought the same result in New Brunswick.[373] Both governments were forced to offer same sex birth registrations, taking presumptive parentage another step away from biology. The provinces of Manitoba[374] and Québec[375] also allow same sex parents to register births. Ontario allows the same in very limited circumstances where one woman has donated an egg to her partner to gestate, when a (woman's) gender-neutral name is entered for the father, and through court order;[376] a constitutional challenge is now under way to obtain full birth registration rights without the need of a court order.[377]

Since *Gill* was decided, same sex marriage became legal in all of Canada, and provinces that were otherwise footdragging should have to acknowledge the right of same sex couples to be equal legal parents to their children. However, traditionally all birth registrations in Canada required the name of the mother,[378] while the father might be optional if unknown or unacknowledged by the mother. Only in 2004 did a man obtain the right to be a sole legal parent through the initial birth registration method. In *K.G.D. v. C.A.P.*,[379] a gay man hired a surrogate mother to gestate a donated egg so that he could be a single father, and he wanted the birth registration to reflect this fact. The Registrar General's office told the father he could only

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[372] Ibid., at para. 74.
[373] *A.A. v. New Brunswick (Department of Family and Community Services),* [2004] NBHRBID No. 4.
[374] Supra notes 357 & 358 and accompanying text.
[375] CCQ, arts. 538-540.
[376] Joanna Radbord & Martha McCarthy, "Applicants' Factum" (in *Rutherford and Solomon et al v. Ontario (Deputy Registrar General and Attorney General)*, January 2006, Court File 05-FA-13357 (Ont. SCJ – Family), at paras. 78, 80, & 83. Ontario also allows a co-mother to give her child her surname on the birth registration, even if the co-mother cannot register as a parent on the registration: "Birth Registration" (undated), online, City of Toronto, <http://www.toronto.ca/registry-services/birth.htm>.
[377] Radbord & McCarthy, ibid.
[378] See discussion in Part III b) ii) below regarding the birth registration definition of mother.
[379] [2004] O.J. No. 3508 (Ont. Sup Ct J) [*K.G.D.*].

become a sole parent through adoption legislation.[380] The motion for a lone father birth certificate was uncontested; the Deputy Registrar General of Ontario had no real objection to the order except that the statute did not allow it. Combined with the reasoning in *Gill*, this decision demonstrates how co-fathers can obtain legal recognition through birth registrations, without the process of adoption. It is unknown how many provinces will allow this end result.

Birth registrations, however, can also exclude biological fathers from legal paternity. Although vital statistics legislation is a little different in each province and territory, in each one there is always some way for some women to fill out the birth registration without declaring a father.[381] For example, in Manitoba, an unmarried woman is not required to name a father, and in fact can only do so with the man's written consent.[382] This rule is a continuation of the common law rules on legitimacy; remember that only the mother was legally responsible for the child of unwed parents. In contrast, any Ontario woman can omit mention of a father "if he is incapable or is unacknowledged by or unknown to the mother."[383] This same wording in British Columbia was behind the litigation in *Trociuk*, a case that may be swinging the paternity pendulum back towards recognizing biological claims as the basis of parenthood, particularly paternity.[384]

Rene Ernst and Darrell Wayne Trociuk had an ongoing relationship but were no longer cohabiting at the time of the birth of triplets in January 1996. They disagreed on the issue of the children's surnames; Trociuk said Ernst agreed to acknowledge him on the birth certificate and give the children hyphenated last names, but Ernst claimed Trociuk insisted that the children have his surname only.[385] Ernst then registered the children's births, leaving Trociuk

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[380] Joyce Thian, "Single dad wins half-price court case" (30 Sept. 2004), online: Aids Vancouver Island <http://avi.org/men/node/view/766>. After the Court granted the birth registration order, the father brought an action for costs, and the province was forced to pay half his legal costs, a total of $4000.
[381] For an overview, see Mossman, supra note 351 at 136.
[382] VSA, supra note 357 at s.3(2), (7) and (8).
[383] VSA, s.9(2) and (3).
[384] Supra note 349.
[385] *Trociuk v. British Columbia (Attorney General)* (2001), 200 DLR (4th) 685 (BCCA)[*Trociuk* BCCA], paras. 15-17.

unacknowledged, and giving the boys "Ernst" as their sole surname. Trociuk went to court to get access and guardianship rights, began paying child support, and challenged the VSA provisions as constituting discrimination under s.15 of the *Charter* on the basis of sex, since a father did not have the same right as a mother to be listed on the birth registration or name the children.

Lower courts upheld the legislation, but the Supreme Court of Canada ruled for Trociuk in a short 9-0 decision. Focussing on the "arbitrary" nature of a woman's decision to leave a father unacknowledged,[386] Madam Justice Deschamps found that the legislation harms a man's dignity, since when he is unacknowledged he is lumped in with rapists, perpetrators of incest, and unknown fathers, the other groups of men who are unlisted on birth registrations. While there may very well be good reason to allow women to leave some men off of the registration, doing so without giving a biological father any recourse is unconstitutional. The Court also described the purpose of birth registrations:

> A birth registration is not only an instrument of prompt recording. It evidences the biological ties between parent and child, and including one's particulars on the registration is a means of affirming these ties. Such ties do not exhaustively define the parent-child relationship. However, they are a significant feature of that relationship for many in our society, and affirming them is a significant means by which some parents participate in a child's life.[387]

One reading of the case is that legislatures may restrict legal fatherhood, but only if men have some avenue to challenge a mother's decision to exclude them.[388] Another reading is that the Supreme Court reduced male parentage to genetics while failing to note historical reasons for giving women latitude in the matter.[389] Both positions are valid; the reasons can be technically

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[386] In relation to a mother's possible decision, the words 'arbitrary' and 'arbitrarily' are used 11 times in just 47 paragraphs, and the possibility of having "no reason" for the exclusion was mentioned three times: *Trociuk*, supra note 349.

[387] Ibid., at para. 16.

[388] Theodore G. Giesbrecht, "Adoption" in Nicholas Bala, Michael Kim Zapf, R. James Williams, Robin Vogl & Joseph P. Hornick, eds., *Canadian Child Welfare Law: Children, Families and the State* (Toronto: Thompson Educational Publishing, 2004) 155 at 181; *D.C. v. W.A.* (2003), 48 RFL (5th) 21 (Ont. CJ) at paras. 11-14.

[389] Hester Lessard, "Mothers, Fathers and Naming: Reflections of the *Law* Equality Framework and *Trociuk v. British Columbia (Attorney General)*" (2004) 16 Can. J. Women & L 168. See *Trociuk* (BCCA), supra note 385 for an excellent review of the historical reasons women had control of birth registrations when unmarried.

correct while completely ignoring the context that led lower courts to rule against Trociuk.[390] Certainly the Court's position on birth registrations is entirely at odds with decisions like *Gill*, reissued adoptee birth registrations showing the adoptive parents as the biological ones, the history of the registration process and of paternity determinations.[391] This decision does seem to increase the rights of genetic fathers, at least in terms of legal parentage.

Since unmarried men used to lack parental rights, they also had no right to interfere when a child was placed for adoption; only the mother's consent was required.[392] This system began changing in Canada in the 1980s, with some unmarried men gaining recognition as father and therefore gaining the ability to refuse consent to the adoption,[393] although men who had no involvement with the mother or the child were usually shut out.[394] As with much parentage law, the ability to refuse consent varies from province to province. The *Trociuk* decision may allow even more men to be recognized as legal parents and therefore contest adoptions, given the importance the Supreme Court placed on all but criminally-inclined biological fathers getting the right to be on a registration. Giesbrecht states that "[t]he *Trociuk* decision makes clear that a man who is aware that he is the father of a child and wants to attempt to establish a relationship with the child cannot have a permanent termination of his relationship through wardship or adoption without the right to qualifying for notice and a hearing,"[395] a position supported by some of the early jurisprudence following the case.[396]

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[390] Carol J. Rogerson, "Developments in Family Law: The 2002-2003 Term" (2003) 22 SCLR (2d) 273.
[391] Lessard, supra note 389 at 189-190.
[392] Giesbrecht, supra note 388 at 179.
[393] *MacVicar v. British Columbia Superintendent of Family and Child Services* (1986) 34 D.L.R. (4th) 488 (BCSC) was an early *Charter* challenge in the area; the Court found that automatically excluding such men was unconstitutional under s.15.
[394] The classic case of the genre is *Re Attorney General of Ontario and Nevins* (1988), 64 OR (2d) 311 (Ont. Div. Ct.), where the man who impregnates a woman but fails to follow up and find out she is having a baby is termed a "casual fornicator" undeserving of parental status. See discussion of men's increasing rights to refuse consent to adoption in Mossman, supra note 351 at 155-158; Giesbrecht, supra note 388 at 179-182.
[395] Giesbrecht, supra note 388 at 181.
[396] For example, in *L.L.J. (Re)*, 2003 ABQB 962, Lee J. stated: "Trociuk also stands for the proposition that some rights of birth father's must be respected irregardless [sic] of the wishes of the birth mother, and that those interests of the birth father are not necessarily contrary to the best interests of the child." (para. 31).

A recent decision in Ontario, while not applying *Trociuk* due to slight statutory differences, still found that a man who knew of the birth and the adoptions plans but had made no attempt to have himself declared a legal father must be given legal notice of adoption proceedings.[397] Using the *Family Law Rules*,[398] Justice Wolder found that any party whose rights would be affected by a motion must be named a party to the case, and therefore must be served notice of the proceedings.[399] In effect, this means that any time a woman in Ontario admits she knows the father, even if he is not listed on the birth registration, she will be forced to serve him notice of the adoption, unless she can demonstrate to the court that notice should be dispensed with. Men who have not attempted to become legal parents may still get one more shot at it.

In summary, legal paternity in Canada is far more complex than a strand of DNA. While there are numerous examples of ways in which men become parents despite blood ties,[400] sometimes those ties are very important to the final outcome. It appears that in some circumstances, biology will carry increasing weight in parentage determinations. Despite ample evidence that fatherhood in law was never just about genetic connection, and in fact often refused to acknowledge biological links, "there is a growing presumption that law should follow biology and a belief that the biological relationship between 'fathers' and children is and always has been sacrosanct."[401] Nadine Lefaucheur suggests that the trend to "demarriage" – where fewer people get married and stay married, and more children are raised outside of two-parent

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[397] *D.C. v. W.A.*, supra note 388 [*D.C.*]. In the first decision in this case, *C.(D.G.) v. Y. (R.H.G.)* (2003) 65 OR (3d) 563 (Ont. CJ), Justice Wolder decided that the Ontario statute was so similar to the one in B.C. that it was also unconstitutional, and therefore held the father needed to receive notice of the adoption hearing, based on the reasoning in *Trociuk*. He released a preliminary ruling to that effect on June 27, 2003, after which the parties filed additional material pointing out the since men in Ontario had legal recourse when omitted from the birth certificate, which was not true in B.C., *Trociuk* did not apply.

[398] O.Reg. 114 99.

[399] *D.C.*, supra note 388 at para. 26. See discussion in Giesbrecht, supra note 388 at 181-182; the author was counsel for the adoption agency in the case.

[400] See discussion of this variety in the U.K. in Sally Sheldon, "Fragmenting Fatherhood: The Regulation of Reproductive Technologies" (2005) Mod. L Rev. 523. I would argue that Canadian courts have not gone as far in recognizing genetic fathers alongside social father as she claims has occurred in the U.K. For one, Canadian law does not mandate identity disclosure in adoption and donor gamete scenarios.

[401] Smart, supra note 323 at 101.

heterosexual households – is slowly increasing the focus on genetic determinations of fatherhood.[402] It seems that as men have less control over women through marriage, they can continue to control women by laying claim to the children.[403] I will consider these developments in relation to embryo donation in the final section of this chapter, after analyzing legal maternity.

b) Maternity: False Latin Maxims and Ignoring Historical Fact

i) History

While we can today create a baby with three biological mothers,[404] prior to the 1980s only one woman could have a biological connection to each child. Furthermore, that connection could be proven in events – pregnancy and birth – that are usually more public than a father's contribution, and therefore so much easier to prove in a court of law.[405] The civil law maxim *mater semper certa est* (the mother is certain) perhaps says it best.[406] But, like the *pater est* presumption,[407] *mater semper* never found its way into the common law,[408] despite several commentators citing it as such.[409] It is also singularly unhelpful in determining legal maternity in instances such as embryo donation. Perhaps the common law could provide some answers?

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[402] Nadine Lefaucheur, "Fatherless Children and *Accouchement Sous X*, from Marriage to Demarriage: A Paradigmatic Approach" (2003) J Fam. Hist. 161 at 173. See also June Carbone, *From Parents to Partners: The Second Revolution in Family Law* (New York: Columbia University Press, 2000).

[403] Smart, supra note 323 at 114. For an analysis of this trend in Canadian child custody law, see Susan B. Boyd, *Child Custody, Law, and Women's Work* (Don Mills, Ont.: Oxford UP, 2003) at 130-157.

[404] Supra notes 305 to 308 and accompanying text.

[405] The rare common law cases on disputed maternity understandably involve tales of faked pregnancy and parturition: Cretney, supra note 302 at 529-530.

[406] Another creation of Justinian, Mommsen & Kruger supra note 325.

[407] See supra note 325 and accompanying text.

[408] Blaxland, supra note 325 at 292.

[409] These authors never cite a source for the maxim in common law, and I have not found one, but instead have only located common law authors referring to it as the civil law rule: see Blaxland, ibid. For some citations claiming a common law basis but not providing historical evidence, see Pretorius, supra note 300 at 134; Hurwitz, supra note 301 at 156; Law Commission (New Zealand), *New Issues in Legal Parenthood* (Wellington: Law Commission, 2005) at 15-16; Anne Reichman Schiff, "Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity" (1995) 80 Iowa L Rev. 265 at 274; Katherine O'Donovan, " A Right to Know One's Parentage" (1988) 2 Int'l J L & Fam 27 at 36.

The short answer to that question is "not really, if you like clear answers" but the journey through common law claims about maternity does reward us with a great deal of insight into biases and assumptions in law and in general society. Authors make numerous assertions about the nature of common law maternity, and some ignore the question entirely. Family law texts rarely touch on the question.[410] A few hint that no legal rule[411] existed, since genetics and gestation were one: "[n]othing else was biologically possible, or therefore legally necessary."[412] The numerous omissions of the topic, as well as the conspicuous absence of a rule in Blackstone, may indicate that this is the closest we will come to the truth.

But many writers insist the rule exists, and it is very possible they are correct, even if the rule was unwritten. Explaining the various interpretations of the maternity presumption presents a quandary, however: many of the categories bleed into each other, making it difficult to determine how exactly one might apply any particular formulation of the rule to modern realities of biological motherhood. Some say the presumption was birth, others say it was blood, many say it was certainty, but these terms do not come with the obvious definitions one would hope. It is important to pay attention to what authors choose to call the presumption, however, because naming is itself important, even if other parts of the same works seem to indicate that two positions largely mean the same thing, for example, that birth was obvious and certain.

As mentioned, some commentators say the civil law rule about the mother being certain is the common law rule, and others talk about certainty without citing *mater semper certa est*.[413]

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[410] Richard F. Storrow, "Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage" (2002) 53 Hast. L.J. 597 at 634.

[411] As explained below, the actual content of any such rule or presumption is highly contested; it is completely unclear whether a presumption was rebuttable, for example. Therefore, this section will use the terms "rule" and "presumption" interchangeably, even though the words can mean different things in different contexts.

[412] Stuart Bridge, "Assisted Reproduction and the Legal Definition of Parentage" in Andrew Bainham, Shelley Day Sclater and Martin Richards, eds., *What is a Parent? A Socio-Legal Analysis* (Oxford: Hart Publishing, 1999) 73 at 75. Andrea Stumpf says that the presumption of birth equalling motherhood "is not articulated in the legal field, for the presumption has been so absolute as to have generated no controversy": Andrea E. Stumpf, "Redefining Mother: A Legal Matrix for New Reproductive Technologies" (1986) 96 Yale L J 187 at 187.

[413] Somer Brodribb, citing *mater semper* as her source, refers to maternity as "historically certain" in the Western legal tradition: "Delivering Babies: Contracts and Contradictions" in Christine Overall, ed., *The Future of Human*

We could probably also count the people who state there was no rule in the same group, no rule being needed, of course, because the result is certain.[414] To some extent, this could also apply to everyone who insists that the common rule was gestation and birth, since maternity could only be considered certain when birth was witnessed. There can be a distinction, however, between those who say birth itself is the legal rule, as opposed to those who say that birth made the mother certain. It is not always clear whether these people believe that birth made the genetics certain, or indeed whether they think that birth might very well be an equivalent of the genetic tie, both of which added up to full legal maternity. Authors make a few claims for each position, but many do not elaborate at all.

Are pregnancy and birth what the common law intended to reinforce as indicia of maternity? The "birth" campaigners say that pregnancy and delivery are the full definition of legal maternity,[415] paralleling themselves with authors who insist that genes, or relationships with the mother, or responsibility towards the child are the real rules of paternity. These authors are often not explicit feminists,[416] some of whom, given the feminist work on the importance of pregnancy to motherhood,[417] might be expected to hold this definition. While a few are extremely clear that birth itself is all that matters – Michelle Pierce-Gealy even notes that the word parent comes from the Latin word *perere*, meaning "to give birth"[418] – most rarely bother

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Reproduction (Toronto: The Women's Press, 1989) 139 at 141. Eichler & McCall, supra note 340, also call *mater semper* a legal rule, attributing maternity to biology and birth: at 198. William Pinder Eversley notes, "for as the maternity is capable of satisfactory proof, she is marked out by nature as [the child's] proper custodian" when discussing why the mother is the sole legal parent of a bastard: *The Law of the Domestic Relations, Including Husband and Wife: Parent and Child: Guardian and Ward: Infants: and Master and Servant* (London: Stevens & Haynes, 1885) at 616.

[414] Supra note 412 and accompanying text.

[415] For example, George J. Annas, "Redefining Parenthood and Protecting Embryos: Why We Need New Laws" (1984) 14 Hastings Center Report 50 at 51; Russell-Brown, "supra note 332 at 530; Michelle Pierce-Gealy, "'Are You My Mother?': Ohio's Crazy-Making Baby-Making Produces a New Definition of 'Mother'" (1995) 28 Akron L Rev. 535 at 540; Casey Chisick & Darren Bacchus, "Not Just a Human Incubator: Legal Problems in Gestational Surrogate Motherhood" (1997) 25 Man LJ 49 at 67.

[416] Two exceptions would be Roberts, supra note 330 at 253 and R. Alta Charo, "Legislative Approaches to Surrogate Motherhood" in Larry Gostin, ed., *Surrogate Motherhood: Politics and Privacy* (Bloomington, IN: Indiana UP, 1990) 88 (Charo "Legislative") at 104.

[417] See Chapter 3 Part IV above.

[418] Pierce-Gealy, supra note 415 at 545.

to elaborate on whether or not they think legal maternity also included the blood or genetic connection to the child.

John Lawrence Hill is widely quoted on this latter point and a full excerpt is necessary:

> The "presumption of biology" manifests the once monolithic and still pervasive legal principle that the mother of the child is the woman who bears the child. This principle reflects the ancient dictum *mater est quam gestation* [sic] *demonstrat* (by gestation the mother is demonstrated). This phrase, by its use of the word "demonstrated," has always reflected an ambiguity in the meaning of the presumption. It is arguable that, while gestation may demonstrate maternal status, it is not the sine qua non of motherhood. Rather, it is possible that the common law viewed genetic consanguinity as the basis for maternal rights. Under this latter interpretation, gestation simply would be irrefutable evidence of the more fundamental genetic relationship.[419] [citations omitted; emphasis added]

In order to assess his statements, we first need to look at the Latin phrase *mater est quam gestatio demonstrat*. It pops up frequently in these articles,[420] in case law[421] and in policy documents.[422] Unlike *mater semper* and *pater est*, however, I could not locate any historical use of *gestatio*. Many authors do not provide a citation for it, or cite other recent works or even *Johnson v. Calvert*.[423] By tediously connecting the dots, I determined that most American works

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[419] Hill, supra note 336 at 370.

[420] William Joseph Wagner, "The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique" (1990) 41 Case W Res. L Rev. 1 at 78; Noble-Allgire, supra note 318 at 521; William J. Keough, "All in the family: a child welfare perspective on human reproductive cloning" (2003) 11 Health L J 71 at 71; Anne Goodwin, "Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements" (1992) Fam L Q 275 at 277; Derek Morgan, "The Bleak House of Surrogacy: *Broidy v. St. Helen's and Knowsley Health Authority*" (2001) 9 Feminist Legal Studies 57 at 60; Bartha M. Knoppers, "Reproductive Technology and International Mechanisms of Protection of the Human Person" (1987) 32 McGill L J 336 at 340; Margaret Friedlander Brinig, "A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's *Surrogacy: The Case for Full Contractual Enforcement*" (1995) 81 Va. L Rev. 2377 at 2383; Malina Coleman, "Gestation, Intent and the Seed: Defining Motherhood in the Era of Assisted Reproduction" (1996) 17 Cardozo L Rev. 497 at 502; Victoria L. Fergus, "An Interpretation of Ohio Law on Maternal Status in Gestational Surrogacy Disputes: *Belsito v. Clark*" (1995) 21 U of Dayton L Rev. 229 at 237; Bernard M. Dickens, "Artificial Reproduction and Child Custody" (1987) 66 Can. Bar Rev. 49 at 69; Rebecca S. Snyder, "Reproductive Technology and Stolen Ova: Who is the Mother?" (1998) 16 L & Ineq. 289; Pierce-Gealy, supra note 415; Sloss & Mykitiuk, supra note 346 at 350; Barton and Douglas, supra note 299 at 54; Roberts, supra note 330 at 253; Charo "Legislative", supra note 416 at 104; Russell-Brown, supra note 332 at 530; Mykitiuk, supra note 277 at 786; Bromley and Lowe, supra note 303 at 269.

[421] *Barabas v. Rogers*, 868 S.W. 2d 283 (Tenn. App. 1993), and most famously in the Supreme Court of California's decision in the gestational surrogacy case *Johnson v. Calvert*, 851 P.2d 776 (Cal. Sup Ct. 20 May 1993), aff'g 12 Cal. App. 4th 977 (8 Oct. 1991), aff'g X-663190, Sup. Ct. Orange County, 22 Oct. 1990. The majority reasons quote Hill extensively, although they find that California statutes allow motherhood to be proven through both birth and blood tests.

[422] Law Commission (New Zealand), supra note 409 at 15-16.

[423] Supra note 421.

that mention *gestatio* can be traced back to the widely cited 1988 U.S. government report on reproductive technologies, *Infertility: Medical and Social Choices.*[424] It comments, "[f]or many years, a woman who bore a child was clearly the mother of that child, a doctrine recently expressed in classical fashion as *mater est quam gestatio demonstrate* [sic] ('the mother is demonstrated by gestation')."[425] [emphasis added]

They credit this "recently expressed" phrase to Mason and McCall Smith's second edition of *Law and Medical Ethics.*[426] In a chapter on reproductive technologies, those authors give their opinion on what the law should be in regards to things such as embryo donation:

> [Embryo transfer and surrogate motherhood,] taken together, can give rise to a bewildering array of genetic permutations and, consequently, of legalistic interpretations which are complicated by the '*pater est quem nuptiae demonstrant*' doctrine. ...The potentials for alleviating female infertility strongly argue for some additional concept of '*mater est quam gestatio demonstrat*'; we believe that it should be an irrebuttable presumption that a woman who has carried a child and given birth to it is its mother – no genetic niceties should obscure the fact that these are the essential features of motherhood.[427] [emphasis added, no citations omitted]

I can find no earlier source of this Latin maxim than the first edition of Mason and McCall Smith,[428] and the above quote may explain why: apparently they made it up! The wording in both quotes above, the subtleties of which seem to have escaped many other readers (many of whom likely never read Mason and McCall Smith but take *gestatio* from a later writer) indicates that the presumption as phrased in Latin never really existed in the common law. A few other commentators cite the phrase but do not try to pass it off as a classical term,[429] while many citations are ambiguous.[430] Some, however, follow Hill and refer to *gestatio* as an "ancient

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[424] US Congress, Office of Technology Assessment, *Infertility: Medical and Social Choices* (Washington, D.C.: Government Printing Office, 1988) [OTA Report].
[425] Ibid., at 262.
[426] J.K. Mason and R.A. McCall Smith, 2nd ed., *Law and Medical Ethics* (London: Butterworths, 1987) at 57.
[427] Ibid., at 57.
[428] J.K. Mason and R.A. McCall Smith, 1st ed., *Law and Medical Ethics* (London: Butterworths, 1983) at 46.
[429] Dickens, supra note 420.
[430] For example, Alta Charo does not claim it is the historical common law definition of motherhood: "For years, a woman who bore a child was clearly the mother of that child: '*mater est quam gestatio demonstrat.*'" (cited to Mason & McCall Smith): Charo "Legislative", supra note 416 at 104. In this use, it could merely be support for adopting the maxim, rather than a claim that *gestatio* itself was the ancient rule.

dictum" or some other musty legal rule from the past.[431] While I suspect I may have stumbled upon a secret plot by supporters of Mason and McCall Smith's intent to make birth the written definition of common law motherhood, it is clear that some authors think the maxim was the real thing.

Many people who refer to *gestatio*, or a birth rule in general, apparently do not agree that the common law is all about the "more fundamental genetic relationship," as Hill put it, but they do choose to acknowledge the possibility.[432] Others believe that the birth rule was meant to encompass both gestation and genetics.[433] While Janet Dolgin provides no official authority for her assertion that both biological indices of maternity were "paramount and decisive," [434] she does also note that the American cases on unwed paternity minimize the importance of genes in men's parental claims, and might similarly be expected to scale down the importance of the female genetic tie as well.[435] Roxanne Mykitiuk also calls biology, in which she includes genes and parturition, "paramount and decisive" in historical determinations of legal motherhood.[436]

Then, of course, there are still those people who insist that genetics were the main determining factor for legal parentage, motherhood included.[437] After examining the paternity cases and history, it is difficult to maintain this position for men, and even less easy for women.[438] While some parts of society, perhaps in particular the male part of it, may believe that

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[431] For example, Fergus, supra note 420; Noble-Allgire, supra note 318. Barton & Douglas, supra note 299, noting *obiter* in a 1977 U.K. case, *Ampthill Peerage*, [1977] AC 547 at 577: "Motherhood...is based on a fact, being proved demonstrably by parturition" state that this finding "derived from the saying, *mater est quam gestatio demonstrat*" which is of course impossible because *gestatio* is pre-dated by *Ampthill*! At least they spelled the maxim correctly.

[432] See for example, Coleman, supra note 420 at 501 (she thinks the common law presumption might have embodied both genes and pregnancy); Sloss & Mykitiuk, supra note 346 at 367, fn 132 (they decide that birth is the common law presumption).

[433] For example, Law Commission (New Zealand), supra note 409 at 15-16.

[434] Janet L. Dolgin, "Just a Gene: Judicial Assumptions About Parenthood" (1993) 40 UCLA L Rev 637 at 644.

[435] Ibid., at 678.

[436] Mykitiuk, supra note 277 at 786.

[437] Supra notes 298 to 304 and accompanying text.

[438] Russell-Brown, supra note 332 at 530, notes that if genes aren't the rule for men, why would they be the rule for women?

blood relationships are the only real family relationships,[439] the law has not agreed. Genes are not the sole test for motherhood in law.

This obsession about the primacy of genes has been subject to a great deal of feminist criticism, frequently in the context of RT. It is almost doctrine for many feminists that a focus on genetic links is inherently a patriarchal concept.[440] An oft-quoted proponent of this belief is Barbara Katz Rothman, although she admits that she too places at least some value on the genetic link she has with some family members.[441] While some people may define patriarchy as any male-dominated system, Rothman specifies that she is talking about a system in which all children and women are defined by their fathers/husbands, and all kinship flows through the male line.[442] Western family law has privileged the male seed over the female "growing of children"[443] although the full recognition of the existence of human ova means that women are now also recognized as seed-bearers. "Valuing the seed of women...extends to women some of the privileges of patriarchy"[444] while at the same it also removes the unique experiences of maternity – gestation, birth and breast-feeding – from the conversation. The flip side of pushing the importance of the gene is to ignore the biological and the social relationship between a pregnant woman and her fetus regardless of the genetic tie.[445]

The historical connection between legitimacy and inheritance is said to define and drive the male obsession with his genetic link to the children he acknowledges and supports financially. Alta Charo describes the "cynical explanation" for the importance of the genetic link as ensuring that men will only support and pass their estates to the children who biologically

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[439] See further discussion about popular notions of genetic inheritance and family relationships in Chapter 5.
[440] See also the discussion in Chapter 3, Part III, above.
[441] Barbara Katz Rothman, *Recreating Motherhood* (New Brunswick, NJ: Rutgers UP, 2000) [Rothman "Motherhood"] at 22. See also Barbara Katz Rothman, "Daddy Plants a Seed: Personhood under Patriarchy" (1996) 47 Hastings L J 1241 [Rothman "Daddy"].
[442] Rothman "Daddy", ibid. at 1243-1244.
[443] Ibid. at 1245.
[444] Rothman "Motherhood" supra note 441 at 20.
[445] Ibid., at 62.

belong to them; the definition of biological relationships, for many men, "may well begin and end with...DNA."[446] Dorothy Roberts has aptly exposed how this patriarchal power also intersects with race when it comes to the importance of the genetic tie.[447] While the presumption of paternity and unwed father cases from the United States demonstrate that courts and legislatures are more interested in protecting the patriarchal nuclear family than in affirming true genetic links when assigning legal fatherhood, the law will ignore the usual rules when dealing with children of mixed racial heritage. The presumption of paternity has been ignored when the white married father is faced with an obviously racialized child born of his white wife, while white men (often slave owners) who impregnated black women disconnected from their genetic contribution, thereby "maintaining the purity of the white race."[448]

However, it must be noted that some feminists show at least some support for recognizing the significance of genes to most people. Some adoptees have long clamoured for more information about their genetic roots,[449] (although they may also be looking for personal stories and the gestational tie)[450] and open adoption is touted as a way in which adoptees can receive the care and support they need while still being connected to their biological (genetic and gestational) histories.[451] Clearly, the problem some feminists point out is not in placing any importance on genetic ties, but in placing most or all of the importance there, especially when the law itself has not followed the gene rule, for example in certain cases involving race.

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[446] Charo "Biological", supra note 331 at 284 and 293.
[447] Roberts, supra note 330.
[448] Ibid., at 257-269. See also Lisa C. Ikemoto, "The In/Fertile, the Too Fertile and the Dysfertile" (1996) 47 Hastings LJ 1007 at 1024-1027.
[449] See for example, Katheryn D. Katz, "Ghost Mothers: Human Egg Donation and the Legacy of the Past" (1994) Alb. L Rev. 733 (Katz "Ghost") at 758-763; Naomi Cahn and Jana Singer, "Adoption, Identity, and the Constitution: The Case for Opening Closed Records" (1999) 2 U. Penn. J. Const. L. 150. Many feminist authors who write about adoption support ending closed adoption records for this reason.
[450] Barbara Melosh, *Strangers and Kin: The American Way of Adoption* (Cambridge, MA: Harvard UP, 2002) at 245. See additional data on this issue in the Conclusions to this thesis, infra footnotes 663 to 666 and accompanying text.
[451] Rothman "Motherhood", supra note 441 at 81-92.

As detailed in Chapter 3, feminist critiques of reproductive technology and surrogacy contracts also focus on the supposed patriarchal nature of these matters. Some see the popularity of these processes as being driven by the man's need to perpetuate himself genetically, often at the expense of a woman's health.[452] Other scholars have taken such feminists to task for their insensitivity to women who truly want children for their own sake, not to fulfil the desires of their male partners, and who may not be able, for a variety of reasons, to access adoption.[453] Still others celebrate the possibility of breaking new ground through recognizing alternative family formation, further destabilizing the problematic heterosexual nuclear and genetic family.[454]

My (and others') argument that there is a general societal bias towards genes that is not truly representative of the law is bolstered by the numerous people who cite *gestatio* but claim it may include not just gestation but also genes, perhaps with the latter even being the main component of legal maternity. Mason and McCall Smith invented *gestatio* to push their position that the woman who gives birth is always the legal mother, regardless of the source of the gametes. No ambiguity was intended; unlike ancient authors, we have a clear record of their purpose. Yet, on one hand we have people who claim that the presumption of paternity was really only about genes, despite the fact the civil law maxim attributes paternity to marriage, and on the other hand we have people who claim the fake common law maxim of maternity is about genes, even though it is actually about birth. The hegemony of blood ties in some people's minds leads to misinterpretations of the law, and Mason and McCall Smith's little experiment demonstrates this beyond a doubt.

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[452] See generally Callahan & Roberts, supra note 320; on surrogacy, see Rothman "Motherhood", supra note 441 at 158ff, and Brodribb, supra note 413.

[453] Linda J. Lacey, "'O Wind, Remind Him that I Have No Child': Infertility and Feminist Jurisprudence" (1998) 5 Mich. J of Gender & L 163. See also Laura Purdy, *Reproducing Persons: Issues in Feminist Bioethics* (Ithica, NY: Cornell UP, 1996).

[454] Mykitiuk, supra note 277 at 815; Young, supra note 277.

Furthermore, we have other historical evidence on the topic of maternity that points us in the opposite direction. While it is certainly true that the common law relied in part on blood relationships to decide legitimacy and paternity cases, it is unlikely that it intended to put the same emphasis on the woman's genetic relationship to her child, in part because the parental equality of the "blood" contributions was unknown and unrecognized for most of history. As noted by both Rothman[455] and Brodribb,[456] Western thinkers have not always believed that women made equal contributions to the children they bore – the focus was on the planting of the male seed and the seed's development inside the woman. A 17th century scientist insisted he saw "tiny preformed human beings" through his microscope when viewing semen, and although some early scientists speculated that human females produced eggs, the female mammalian reproductive system remained somewhat of a mystery until ova were isolated in 1827.[457] The relative contribution of the two sexes was hotly debated, and even those who assured women that they added something to their offspring might admit that the female involvement was lesser than male.[458] Women were not scientifically understood to make an equal inheritable contribution to a baby until the mid-twentieth century.[459]

Given that blood relationships were never the be-all and end-all of legal fatherhood at common law, the fact that women supposedly had less of a blood connection to their children completely rules out genetics as the sole basis for common law maternity. We cannot entrench the historical legal status of something widely believed to be non-existent throughout history.

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[455] Rothman "Motherhood" supra note 441 at 15-21.
[456] Supra note 413 at 140-141.
[457] Lawrence J. Kaplan & Rosemarie Tong, *Controlling our Reproductive Destiny: A Technological and Philosophical Perspective* (Cambridge, Mass.: MIT Press, 1996) at 5.
[458] Laura Gowing, *Common Bodies: Women, Touch and Power in Seventeenth Century England* (New Haven: Yale UP, 2003) at 113.
[459] Carol Delaney, "The Meaning of Paternity and the Virgin Birth Debate" (1986) 21 Man 494 at 508-509. She states that the "folk theory" that men were the creative force behind children and women merely the nurturers was (and perhaps is?) widely held in Western cultures.

This does not, however, rule out the possibility that practitioners and judges thought biological inheritance of characteristics played some factor.

Despite the apparent falsity of the *gestatio* maxim, I do think that the act of birth itself must have been a component of any common law rule of maternity. More than one source discusses the need for the birth to be witnessed.[460] While the actual meaning of birth itself is arguable, save that it could not have been solely about genes, it is inconceivable that motherhood would not be defined by the one major "fact" that separates men from women in relation to their common children. All of the above leads me to believe that, if pressed to elaborate on a possible rule of maternity, Blackstone would have found legal significance in both the act of gestation and the transmission of blood relationships. However, some of the new Canadian jurisprudence hints that gestation is less a part of the test in some situations.

ii) Canadian Law

Prior to the RT era, Canada had little reason to consider the question of legal maternity. Family law statutes, home to presumptions of paternity, did not provide a presumption of maternity. Canadian vital statistics legislation, however, generally describes the mother as the person who gives birth.[461] Most statutes define "birth" similarly to the British Columbia VSA:

> "birth" means the complete expulsion or extraction from its mother, irrespective of the duration of the pregnancy, of a product of conception in which, after the expulsion or extraction, there is
> (a) breathing,
> (b) beating of the heart,
> (c) pulsation of the umbilical cord, or
> (d) unmistakable movement of voluntary muscle,
> whether or not the umbilical cord has been cut or the placenta attached;[462]

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[460] Stumpf, supra note 412 at 187; Cretney, supra note 302 at 529.
[461] Sloss & Mykitiuk, supra note 346 at 350.
[462] RSBC 1996, Chapter 479, s.1.

But, of course, the woman who gives birth is not always the genetic mother these days, in egg and embryo donation, nor even the intended mother in surrogacy situations.

Some of the relevant statutes and jurisprudence were covered in the above section on Canadian paternity. There is no longer any question about legal maternity in Québec; when donor gametes are used, the woman who gives birth is still the mother, and surrogacy agreements are null, meaning the woman who gives birth cannot voluntarily give away her legal maternity by contract.[463] Any questions on the definition of "parental project" in the RT provisions of the CCQ may be answered in the forthcoming lesbian co-mother versus sperm donor case.[464]

Other cases covered earlier also deal with maternity issues. For example, the human rights decisions on allowing a non-biological co-mother to sign the birth registration are actually all about legal motherhood and how to obtain it; my earlier analysis only described how men could potentially access these arguments as well. A narrower challenge of DI provisions that allow male partners of women who conceive using DI to be registered as the legal father recently granted legal maternity to a co-mother in Alberta.[465] In very sparse reasoning, perhaps because the respondents made no submissions on the constitutionality question, Clarke J. declared that provisions allowing this type of parentage to male partners only were discriminatory under section 15 of the *Charter*[466] and could not be saved by s.1. The Court opted to "write-in" a gender-neutral change to s.13(2), meaning that either men or women could use the section to obtain parentage orders.[467] Coupled with the following gestational surrogacy cases, *Gill,*[468]

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[463] CCQ, arts. 523, 538.1, and 541.
[464] Supra notes 282 and 283 and accompanying text.
[465] *Fraess v. Alberta (Minister of Justice and Attorney General)*, 2005 ABQB 889 [*Fraess*].
[466] *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.
[467] *Fraess,* supra note 465 at para. 16. The government argued that the appropriate remedy was to strike down the entire section on DI parentage.
[468] Supra note 368.

K.G.D.[469] and *Fraess*[470] can assist other women in obtaining legal motherhood without giving birth or adopting.

In *Rypkema v. British Columbia*,[471] a married couple used their own gametes to create embryos, which were then gestated by a surrogate mother. The genetic mother, Terri Rypkema, brought an action to have herself named as legal mother on the birth certificate. The surrogate consented, but the *Vital Statistics Act* defined birth by describing "mother" as the person who gave birth.[472] Interestingly, the province did not submit a position on the application, indicating the government was not really against such registration although the legislation had not yet been amended to reflect that position. The Court granted the order at the hearing but took a further five months to release reasons.

Gray J. cites three other Canadian gestational surrogacy cases,[473] the earliest of which apparently did not allow the order,[474] and several American cases,[475] most of which were not directly on point. Without commenting on any of the reasoning in the other jurisprudence, Gray J. notes that all of the potential parents involved consent to the order, and that a court can make binding declarations of paternity in British Columbia, so she must have jurisdiction to grant a similar order for maternity. She then comments:

> Including the petitioners' particulars on the birth registration is an important means for the petitioners to participate in their child's life and for affirming the parent-child relationship. It will enable the petitioners to have the presumptive proof of their relationship to their child without the trouble and expense of the adoption process. It will enable them to register the child in school, obtain airline tickets and passports for him, and assert his rights under laws including the B.C. Benefits (Child Care) Act, and the Young Offenders (British Columbia) Act.

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[469] Supra note 379.
[470] Supra note 465.
[471] (2003), 233 D.L.R. (4th) 760 (BCSC) [*Rypkema*].
[472] Supra note 462.
[473] *J.C. v. Manitoba* (2000), 12 RFL (5th) 274 (Man. Ct. QB); *L.v.P,* (No. 0101-22025, Queen's Bench of Alberta, February 15, 2002); *J.R. v. L.H.*, [2002] OTC 764 (Ont. Sup. Ct. J).
[474] *J.C.*; see further discussion immediately below.
[475] *J.R. v. Utah*, 261 F. Supp. (2d) 1268 (D. Utah 2003); *Soos v. Superior Court ex rel. County of Maricopa*, 182 Ariz. 470 (Ct. App. 1994); *Johnson v. Calvert*, supra note 421.

> In these circumstances, it was appropriate to declare that the petitioners are respectively the father and mother of the child, and that the birth registration maintained by the Vital Statistics Agency reflects that information.[476]

Other interesting tidbits include the use of the word biological to mean only genetic and not gestational,[477] and with one exception, the use of passive language to describe the birth but active language to describe the surrogate mother terminating her parental rights.[478] While Ms. Rypkema is always the genetic mother, the surrogate is never the "gestational mother"; the word surrogate is always used, only occasionally in conjunction with the word mother. Finally, Gray J. cites the Supreme Court of Canada's decision in *Trociuk* as the authority for the importance of the birth certificate, including the paragraph cited above[479] regarding biological ties between parent and child. The only similarities between Mr. Trociuk and Ms. Rypkema were that they were genetic parents. Although there is no express legal reasoning given for granting the order, other than the fact everyone seemed to want it, it does seem that the genetic tie carried value for Madam Justice Gray, seemingly more than did gestation.

The gestational surrogacy cases from Alberta and Ontario were decided the same way, although the Alberta judge did concede that the decision might be different if the gestational mother had contested the case.[480] Alberta has now codified the ability of a gestation mother to apply for legal maternity in these circumstances, provided the gestational mother consents.[481] In *J.R. v. L.H.*, Kiteley J. has some of the same problems with the difference between biological and genetic, but the reasons are more balanced, language-wise, and the judge even states that under vital statistics legislation "L.H. is clearly the mother." She is also referred to as the birth

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[476] *Rypkema*, at paras. 31 and 32.
[477] Ibid., at paras. 24 and 26, in three separate instances. This error is also found in *Gill*, at para. 81.
[478] Ibid., at para. 13: "the parentage of a child born of a gestational surrogate mother"; at paras. 6, 10, 30: "the intended surrogate mother expressly consented", "further agreed", "consented", "consents".
[479] Supra note 387.
[480] As described in *Rypkema* at para. 20; the case is otherwise unpublished.
[481] *Family Law Act* supra note 355, s. 12.

mother.[482] Kiteley J. obviously accepts that both women are mothers and could be legal mothers, and also makes her order based on the fact everyone consented to it. While the genetic mother "won", the decision seems less biased toward genes than *Rypkema.*

The first published Canadian gestational surrogacy case, *J.C.*,[483] differs from the subsequent ones. First, the Manitoba vital statistics people opposed an order in favour of the genetic mother, and made submissions on the issue, which did not happen in the other three. The case went to court before the birth, and the surrogate mother was actually the genetic father's sister. The government argued it did not oppose an application for a declaration of parentage after the birth, but it is not really clear from the wording of the decision whether the declaration would be part of an adoption procedure, or a straightforward order. The judge finds it curious that the genetic parents want a pre-birth declaration of parentage while they are still calling the surrogate "the birth mother."[484] The reasons conclude:

> I would be prepared to give a declaration of paternity in favour of J.C. at this point, but the applicants do not want J.C. named as father on the same birth registration that shows his sister as the birth mother. This is completely understandable. Therefore, rather than making that declaration of paternity, and not being prepared to make a declaration of maternity before a child is born and before the registration of birth shows the birth mother as S.J.L., the application for relief will be dismissed.[485]

Media reports after the decision but before the birth said that the genetic mother would be forced to resort to adoption procedures, not just a simple court order.[486] Given the more recent cases in other Canadian jurisdictions, and the Manitoba changes to the VSA which allow a co-mother to be named as legal mother on a birth certificate,[487] it is possible this decision would not withstand appellate scrutiny in the province if re-argued today. It is hard to believe a co-mother could be

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[482] *J.R.,,* supra note 473 at para. 15.
[483] Supra note 473.
[484] *J.C.*, at para. 9.
[485] Ibid., at para. 10.
[486] "Couple forced to adopt unborn child carried by husband's sister, judge rules" *Canadian Press Newswire*, (27 Oct. 2000).
[487] Supra notes 357 and 358 and accompanying text.

listed on a birth certificate but that the genetic mother must apply for court orders for the same result. The world has changed rather rapidly in this area.

If we combine the reasoning behind *Gill* with the results from the recent surrogacy cases, a lesbian couple where one woman provides an egg but a gestational surrogate mother actually bears the baby may be able to have the co-mother declared a legal mother, especially if the sperm donor is anonymous. British Columbia, Manitoba and Nova Scotia allow birth mothers and co-mothers to be listed on the birth certificate, so this result should occur in those two provinces at a minimum. Also, a heterosexual woman who uses a gestational surrogate mother, an egg donor and her partner's sperm should also be entitled to registration as a legal mother, despite having no biological connection to the child, since this can occur with lesbian couples, provided the other partner has a genetic or gestational link to the baby. It is less clear whether the use of a traditional surrogate who gestates her own egg, instead of an egg donor, would provide the same result, since in *K.D.G., Gill* and *Fraess* the other genetic parent is unknown. It is more likely that courts will consider this last scenario a full adoption situation, given the deference shown to known genetic parents in general.[488]

All of the above assumes that courts will carry forward the reasoning to different fact scenarios, and ignores that not all provinces have adopted procedures to allow for a woman who did not give birth to register as a mother. Other cases have already highlighted these distinctions.

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[488] See further analysis of the genetic trends in these cases in the Conclusion to this chapter. Canada's first judicial decision on a disputed traditional surrogacy case is currently being heard in Vancouver, according a preliminary motion in the case: *H.L.W. and T.H.W.*, 2005 BCSC 1679. The genetic and gestational mother, the surrogate, has refused to consent to the adoption after the parties had a falling out about access visits. There were apparently no written agreements. Disturbingly, the mother was not given interim access since the trial was supposed to be set for a date just two months after the interim motion, in January 2006, despite the fact the Master stated that both sets of parents would do an excellent job of raising the child. It is unclear why a perfectly fit mother was denied access to her child, other than Master Donaldson's statement that he did not want to disrupt the child's life, and the lives of the surrogate mother's other children, by allowing access until it was clear that the surrogate's family would get access or custody.

For one, it appears that at least some provinces will only allow two legal parents at a time, although that may be changing.[489]

A.(A.) v. B.(B.)[490] involved a lesbian couple who conceived using a known donor, B.B., who is listed as father on the birth registration. He and C.C., the birth mother, consent to A.A. being named a parent of the child. Aston J. was "prepared to make the declaration sought if there is jurisdiction to do so."[491] The problem was how to do so. "Settled intent" parenthood is available but limited to certain rights and obligations under the *Family Law Act*[492] and does not grant the full legal status requested. Adoption would terminate B.B.'s parental status. Joint custody and guardianship under Part III of the *CLRA*[493] only last until the child is an adult, and are not even permanent during childhood, but can instead be altered at any time. Courts can make a declaration under the *CLRA* but Aston J. was concerned with the wording.

> 4(1) Any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child.
>
> . . . . .
>
> (3) Where the court finds on the balance of probabilities that the relationship of mother and child has been established, the court may make a declaratory order to that effect. [emphasis added]

Even though a child can have two mothers or two fathers through adoption by a same sex partner, and even though jurisprudence allows non-biological parents to be named other than by adoption, Aston J. found that the definite article in this particular section was chosen by design, limiting a child to one of each parent under this statute. The Court also noted that even when same sex couples adopt, there can be no more than two legal parents for any child. This is not a

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[489] Ontario's Deputy Registrar has stated that the VSA might allow for three parents, when one woman gives an egg to another with the intent that both women will be parents, and when a known sperm provider is used. This apparently has not happened yet: Radbord & McCarthy, supra note 376 at para. 84.
[490] (2003), 225 D.L.R. (4th) 371. (Ont. SCJ, Fam. Ct.) [*A.A. v. B.B.*, not be confused with *A.A v. New Brunswick*, supra note 373].
[491] *A.A. v. B.B.* at para. 9.
[492] R.S.O. 1990, c. F.3.
[493] Supra note 347.

legislative gap that can be corrected through the court's *parens patriae* jurisdiction. There is also a worry that opening the door to three parents may have no limits, and that floods of custody and access litigation might ensue. Finally, the parties did not issue a constitutional challenge, so no decision could be made on those grounds. It seems that truly alternative families that involve both genetic parents and another person are not permitted, even when they reflect the social reality of a child's life.

In *P.C. v. S.L.*,[494] P.C. brought an action asking that the presumption of paternity be extended to women cohabiting with a woman who gives birth, since the existing presumption discriminates against same sex couples under s.15 of the *Charter*. P.C. and S.L. were "in a same-sex spousal relationship" from 1999 to the beginning of 2005. L. gave birth on July 3, 2002; she says the baby was accidentally conceived but C. alleges mutual intent to have a child of their relationship. C. argued that since the presumption of paternity in the *Children's Law Act*[495] only applies to men, this particular provision is discriminatory. The court noted that the presumption is rebuttable and that men must prove a biological or existing parental relationship to fend off a rebuttal.

Furthermore, other than adoption, there is no provision in the Saskatchewan legislation that would allow for two mothers. Wilkinson J. canvassed the decision in *A.A. v. B.B.* and decided that it also applied to the current situation, since the structure of the two statutes is similar. As for discrimination in the cohabitation presumption of paternity, the Attorney General of Saskatchewan argued that the presumption could not be extended to a woman "simply because a woman could not have provided the seed."[496] When birth mothers declare that another man was the biological father, a husband or cohabiting male also must go beyond the presumption to claim legal parentage, usually through adoption. The judge capped off the reasoning with the

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[494] Supra note 342.
[495] 1997, S.S. 1997, c. C-8.2, s.45(1)(a).
[496] *P.C.*, at para. 17.

statement about the biological basis for the presumption of paternity that was cited earlier.[497] There is a hopeful note, however, since the judge hinted that a constitutional challenge to the larger statutory scheme, rather than just to the presumption based on cohabitation, could provide a different result. It is not, perhaps, any specific provision that is discriminatory, but instead the lack of provisions for same sex couples to become legal parents with relative ease.

In essence, this case is the failed version of *Gill* and *A.A. v. New Brunswick,* brought as a constitutional challenge to family law rather than a human rights complaint against the vital statistics agency. The Alberta legislation struck down in *Fraess* is distinguished because it limits the presumption of paternity to DI situations rather than all spousal and partnership situations, when the partner has consented to DI. There is no written evidence that C. consented to the coital conception; the point is actually in dispute. The fact *P.C.* is being brought after the relationship dissolved instead of with the support of the biological mother is probably the real key, but the difference in the understanding of presumptions and biology is striking. As demonstrated in this chapter, Madam Justice Wilkinson's assertions about the biological basis of the paternity rules are well disputed. The case indicates that family law seems to be much more welcoming to justifications based on "natural status" such as genetics than does the human rights realm (e.g., *Gill*). Genetics are again presented as real parentage - note the reference to the male "seed" – and biological "facts" are the true reason behind the presumption. Admittedly, the argument might look different if the putative co-mother challenged the wider scope of the legislation as discriminatory. On the other hand, this case may be another example of the jurisprudential turn to genetics.

IV. Parental Status of Embryo Donors in Canadian Law

This examination of the parentage case law raises numerous issues regarding adoption and embryo donation, especially as they relate to each other. I am struck in several of these

[497] Supra note 342 and accompanying text.

decisions by the fact that so many people do not want to go through adoption procedures when their effect would be a non-rebuttable birth registration showing the preferred names, a more secure legal relationship with the child than normal birth registrations. Adoption can be expensive and invasive when it involves criteria such as home studies, yet the step-parent adoption provisions in British Columbia do not require the usual standards, and were available to the couples in *Gill* and to Ms. Rypkema. While a human rights challenge is funded by the human rights commission except for basic costs like filing fees, and therefore is relatively cheap, I cannot imagine that the litigation costs in *Rypkema* were less than the step-parent filing fees. Ditto for K.G.D., although he did recoup 50 percent of his legal costs.[498] It seems that these people have another problem with relying on adoption law. One exception is the media coverage of *Fraess.* Kate Fraess, the co-mother, is an adoptee, and takes pains to note that she doesn't believe biology makes one a parent, although she does stress the couple's mutual intent to have a child.[499] They brought the case to ensure that "the Alberta government be held accountable for ushering in a law that was discriminatory"[500] and also because adoption is both expensive and uncertain – unlike the DI presumption.

No doubt other litigants feel the same way about the potentially discriminatory impacts of the impugned legislation, especially in the gay and lesbian cases. Comments on the reasons for bringing these cases, however, do not stop at expense and discrimination, but instead imply that adoption is not a preferred method of family formation. The denigration of adoption as an option is not just about "jumping through hoops." It is about a belief that it is abnormal to give birth and then give the child away, and then also abnormal to take in "someone else's child."[501] Judges

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[498] Supra note 379. That still means he was forced to pay $4000, on top of all of the fees associated with surrogacy and egg donation.
[499] Paula Simons, "Legal father issue up in the air" *Edmonton Journal* (1 Dec. 2005) B1.
[500] Ibid.
[501] See also Morgan, supra note 420, who quotes a lawyer representing a couple who used a surrogate mother and then asked for a statutory declaration of parentage: "This procedure is much less time-consuming than adoption. Adoption also tended to emphasise that a couple was in some way out of the ordinary.": at 59 [emphasis added].

seem to agree when they accept these comments wholesale.[502] Regardless of the statutory law, it is clear that the intent to parent, as evidenced by pre-conception contracts and DI decisions, is usually considered to be the normal way to become a parent by intended parents and judges alike, despite the fact that most pregnancies are unplanned and a significant percentage of human beings do not come into the world as the product of pre-conception intent to have a baby. However, since an adoptee is not usually conceived with the intent to surrender in mind, the parentage arrangements of adoption are considered abnormal.[503]

In fact, the marital and cohabiting presumptions of paternity can be viewed as "intent to parent" legal regimes.[504] In some provinces such as Alberta, it is not possible for a married woman who lived with her husband at the time of conception to omit his name from the birth certificate without going to court; the *Vital Statistics Act* only permits another father to be named on the birth registration if the mother signs a statutory declaration that the couple was living apart when the baby was born.[505] In effect, marriage means you intend to be a legal parent of any child born into the relationship, although I doubt that most Albertans think like this.

The very fact that people reject adoption as an option in many of these RT cases calls into question whether embryo adoption would ever be embraced as a legal framework by recipient/intended parents, who apparently want to avoid the appearance of adoption where possible. As always, however, people may accept rules if they believe there is no other way to become parents. On their face, however, most of these cases indicate there are options beyond

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[502] In another case, where a lesbian co-mother in a now ended relationship tries to apply for adoption without the consent of the birth mother, the judge erroneously states that the relevant sections of the *Family Relations Act*, R.S.B.C. 1986, c. 128, refer to "the" mother and that the drafters meant the "biological" mother. Clearly, the *Act* refers to the already legally acknowledged mother; while in this circumstance it is the birth mother, it might also be an adoptive mother in cases where the adoption has already been completed. The case is actually about adoption yet the judge fails to recognize that adoptive mothers have equal legal status to other legal mothers. *K.G.T. v. P.D.*, 2005 BCSC 1659 at paras. 45 & 48.

[503] O'Donovan, supra note 338 at 359; Cindy L. Baldassi, "Social and Legal Construction of the Women Known as Birth Mothers" (April 2002) [unpublished manuscript on file with the author].

[504] Lori B. Andrews, "Surrogate Motherhood: Should the Adoption Model Apply?" (1986) 7 Child. Legal Rts. J 13 at 19.

[505] RSA 2000, c. V-4, S.3(5), (6) and (8).

adoption and that they are available to many different types of people who want to become legal parents.

How does all of this law apply to potential "embryo adoption" disputes? Analysis of the history of legal parentage law demonstrates that blood ties were not the full test for paternity and were even less of a factor in maternity, given that women were not known to pass along the same type of biological inheritance as men until relatively recent times. In those recent times, statutory law and jurisprudence have opened a wide variety of ways for a person to become a full legal parent without a genetic link to the child. However, recent trends, coupled with a lack of statutory guidance that allows cultural biases to emerge, are seeing some lawmakers "revert" to a genetic basis of the law that never actually existed.[506]

One of the only ways to get the results in all of the Canadian RT parentage cases to line up is to say that known genetic parents have the right to name other parents, or to be named a parent, as long as there are only two parents in total. In many ways, this is a continuation of the traditional right of biological parents (including women who gave birth) and is therefore not particularly progressive, especially since it fails to include women who give birth without a genetic tie – it is formal gender equality based on genetics. Darrell Trociuk demanded legal recognition as a genetic parent, as did all of the women in the gestational surrogacy cases. *Gill* saw the birth/genetic mothers assenting to the addition of a second mother while excluding the genetic father through the use of anonymous donation, while K.G.D., a genetic father and lone social parent, was allowed to exclude the gestational mother and the genetic mother (through his choice of anonymous egg donation). When the biological mother in *P.C.* refused access to the child, P.C. had no way of being named a parent, despite the fact she apparently lived in a

[506] This trend is also occurring elsewhere: see quote from Carol Smart at supra note 343 and accompanying text; also, Joan Mahoney, "Adoption as a Feminist Alternative to Reproductive Technology" in Joan C. Callahan, Ed., *Reproduction, Ethics, and the Law: Feminist Perspectives* (Bloomington, Indiana: Indiana UP, 1995) 35 at 36.

conjugal relationship with S.L. for the first two and a half years of the child's life, and believed she was the intended social parent at the time of conception.

This would seem to indicate that intent to parent is the acting legal test in Canada, *provided that intent is viewed from the position of the known genetic parents.* An existing acknowledged genetic parent calls the shots; having the intent to parent is not enough if someone else is already there. This also lines up with a larger trend in family law, the *in loco parentis* cases, where a person who never attained legal parentage becomes financially responsible for the child of their partner even after the couple splits up. The custodial parent allowed the intentional parent access to involvement with the child, and the intentional parent proceeded to hold out the child as theirs, which leads to future support obligations and access rights.[507] As Bastarache J. said in *Chartier*,[508] "[i]ntention will not only be expressed formally."[509] Mary Lyndon Shanley does comment that intent-based parentage is linked to genes because "they both assume that individuals should be able to control the use of their genetic material"[510] but she failed to note that it also grants control over who else has access to the result of one's genetic material.

However, intent to parent may not necessarily be applied in potential embryo donation disputes. While Canadian genetic parents have largely been able to obtain legal parentage in these new fact scenarios discussed above, and designate who else will become a parent, none of the cases were *contested* by another person who could claim a biological relationship with the child. Many of the genetic parents were unknown (the sperm donors in *Gill*, the egg donor in *K.G.D.*) and all of the birth mothers signed consent judgments. When a donated embryo has already resulted in a child, usually the intended mother was also the gestational mother, giving

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[507] Gillian Douglas notes that while intent as used in RT cases is not traditionally important in family law, it is not that much different than the increased recognition of social parents that has been occurring over the last few decades: "The Intention to be a Parent and the Making of Mothers" (1994) Modern L. Rev. 636 at 638 (case comment on *Johnson v Calvert*).

[508] *Chartier v. Chartier*, [1999] 1 SCR 242.

[509] Ibid. at para. 39.

[510] Mary Lyndon Shanley, *Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption, and Same-Sex and Unwed Parents* (Boston: Beacon Press, 2001) at 132.

her the default presumption of parentage in the vital statistics legislation, and a biological link to the baby. That will almost always give her de facto custody, meaning the child will begin to bond with her and any other intended parent in the household. In all of the above RT cases, the intended parent lived with the child.

The trend to diminish pregnancy in the gestational surrogacy cases, however, might very well swing the pendulum back towards the genetic providers in embryo donation scenarios, especially if the birth has not yet occurred. If "real" parentage is genetic in the minds of many judges, a unique fact scenario for Canadian law might very well result in full parental status for the genetic parents, at least at first instance. As mentioned earlier, decisions might turn on the issue of valid consent to donate the embryo; if the donors appear to have been wronged, it may be simpler for a court to find that they cannot give up their legal parental rights without express consent. I find it difficult to believe that courts will grant legal parenthood to donors once a child is born unless significant fraud is proven.

It will likely be easier for donors to reverse the donation if embryos have not yet been implanted. In American cases where couples split up and then argue over the disposition of their previously frozen embryos, courts always permit the person who doesn't want them implanted in someone else to maintain control over the embryos, which is often referred to as the right not to be a parent.[511] Many of the cases are decided on contract principles. Janet Dolgin notes that American courts are most willing to stray from family law mainstays such as the best interests of the child and from traditional concepts of maternity when some potential family members are

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[511] Cases include: *Davis v. Davis*, 842 S.W.2d 588 (1992 Tenn. SC), *Kass v. Kass*, 91 N.Y. 2d 554 (1998, CA), *J.B. v. M.B.*, 331 N.J. Super. 223 (2000), *A.Z. v. B.Z.*, 431 Mass. 150 (2000, Sup. Jud. Ct.). For commentary, see Ellen Waldman, "The Parent Trap: Uncovering the Myth of 'Coerced Parenthood' in Frozen Embryo Disputes" (2004) 53 Am. U. L Rev. 1021, Susan L. Oliff, "To Be Genetically Tied or Not to Be: A Dilemma Posed by the Use of Frozen Embryos" (1990) 12 Women's Rights L Rep 115, Christine Overall, "Frozen Embryos and 'Father's Rights': Parenthood and Decision-Making in the Cryopreservation of Embryos" in Joan C. Callahan, Ed., *Reproduction, Ethics, and the Law: Feminist Perspectives* (Bloomington, Indiana: Indiana UP, 1995) 178, George J. Annas, "Ulysses and the Fate of Frozen Embryos – Reproduction, Research, or Destruction?" (2000) 343 N Eng J of Med 373, Joseph Russell Falasco, "Frozen Embryos and Gamete Providers' Rights: A Suggested Model for Embryo Disposition" (2005) 45 Jurimetrics 273.

still in the freezer.[512] Even if federal legislation and regulations indicate that the donors have relinquished control, courts may more be willing to ignore that when there is no child whose fate must be decided.

Another possible scenario has occurred in other countries, which could lead to parental rights for donors. Occasionally, when a lesbian couple uses a known sperm donor to conceive, that donor will later try to claim parental rights the two women insist they did not agree to before conception. Most of the early cases resulted in parental rights for the genetic father, an outcome described as "inserting" a father into a family where one was not planned.[513]

Attempts to "insert" men into families without fathers could still occur in an embryo donation situation. A single woman or lesbian couple could receive an embryo from a heterosexual couple, and the donors could later split up or otherwise disagree on the donation. If the man alone tried to assert parentage rights, the situation would not be much different than sperm donation scenarios, where men do sometimes obtain legal fatherhood and its trappings, such as visitation. A man making the claim alone makes the difference; it seems unlikely that a court would be willing to name a third mother, the genetic one, in such situations where lesbian co-mothers already exist, given judges' (and others) historical distaste for allowing two mothers. But a man challenging the donation alone might have a better shot, if there is no other father he would be competing with.

Co-mother recipients would still be subject to the same challenges discussed above for other couples, of course, but a lone claim by a male donor may well have a better chance of succeeding, given deep-seated prejudices in favour of families with both male and female parents. The fact that Canada legalized same-sex marriage in 2005,[514] and that most Canadian

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[512] Janet. L. Dolgin, "An Emerging Consensus: Reproductive Technology and the Law" (1998) 23 Vt. L Rev. 225.
[513] Arnup & Boyd, supra note 335; 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; Shanley, supra note 510 at 124-147.
[514] *Civil Marriage Act*, S.C. 2005, c. 33.

jurisdictions explicitly permit same sex adoptions and same sex birth registrations, might mean that two-parent homes without men are a little more likely to survive this type of challenge than they were in other jurisdictions.

All in all, it appears there is no defensible way embryo donors could later attempt to be named parents, provided consent was obtained in law and no fraud occurred. Written consent, and written expectations in general, are likely keys to this outcome. All of the legal parentage principles discussed above could still apply where the fact scenario is disputed and intent to donate is unclear. The length of time recipients have the embryo or resulting child may be the key – the longer the better for the recipients.[515] If the embryo is not yet implanted, disputed consent may simply be revoked, and parentage law will not apply at all.

Finally, we should note that almost all of the Canadian cases, except *Trociuk*, come from courts of first instance. It is very likely that appellate courts may rule differently on some issues, or at least be more careful to explain their reasoning, especially if future cases are fully contested. Having two opposed sides may result in more completely argued cases, which should include the true history of maternity and paternity discussed above.

Even if an embryo donor is not a full legal parent, could any legal rights or responsibilities accrue to these people? In family law, a person can have access to the child, or even custody, without being a legal parent. Persons "of interest" or who are deemed to stand in the place of a parent may get some rights and responsibilities in law.[516] It may be possible for an embryo donor, even if statutorily barred from full legal parentage, to demonstrate a sufficient connection to at least obtain standing in a court battle. Proving social parentage is one such

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[515] In American switched baby cases, if the mistake is caught early the children are returned to their genetic parents, but this is far less likely to happen if they have lived with their new parents for some time: Bender, supra note 318 at 20-21.

[516] This usually applies to de facto parents who lived with the legal parent for a period of time in a spousal relationship. However, the category was recently extended to a man who had no conjugal relationship with the biological mother and had even refused to be the sperm donor: *G.E.S. v. D.L.C.*, 2005 SKQB 246. See also *K.G.T. v. P.D*, supra note 502, where a lesbian co-mother was denied adoption after the relationship split up, but was granted legal guardianship along with the birth mother.

method. How the general public thinks of gene providers in terms of parental relationship will be covered in more detail in Chapter 5.

CHAPTER 5: UNDERSTANDING SOCIAL AND PSYCHOLOGICAL (NON-LEGAL) PARENTHOOD IN EMBRYO DONATION

Embryo donors may not be legal parents, but that likely makes little difference to the way people feel about their embryos. Despite the fact that embryos are not children and therefore do not fall under adoption law, the legal question on parentage arises because as we have seen above in Chapter 4, at least some people think that genes create "real" family ties. It is this belief that drives the legal recognition of the genetic family, both in statute (as in the vital statistics legislation that is incorrectly purported to represent biological fact,) and in jurisprudence (as demonstrated in the Canadian parentage determinations). People who believe that they are the parents of their embryos would also seem likely to think embryo donation is about adoption, since they are viewing the embryo as a child. The use of adoption terminology could not persist unless at least some members of the general public make the intellectual jump from an embryo to a child, and the use of the word "adoption" in many embryo donation articles that are not about Snowflakes[517] indicates that the leap continues to be made.[518] An examination of how people think of their embryos, and progenitors' interest in donation to another woman, helps illuminate the policy questions involved in dealing with embryo donation and the concept of adoption. It also sheds light on the source of the legal errors described in Chapter 4, as well as some of the most interesting feminist disputes discussed in Chapter 3, including the relative importance of genes and gestation.

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[517] See discussion in Chapter 2, Part II.

[518] Snowflakes opened in 1997: "Snowflakes Program", online: Nightlight Christian Adoptions, <http://www.nightlight.org/snowflakeadoption.htm>, but pre-Snowflakes mentions of "embryo adoption" include the very early one described in Chapter 2, supra note 58; Marcia Joy Wurmbrand, "Frozen Embryos: Moral, Social, and Legal Implications" (1986) 59 S. Cal. L Rev. 1079 at 1080; John A. Robertson, "Ethical and legal issues in human embryo donation" (1995) 64 Fertility & Sterility 885 (throughout article).

There is no question that many people think genetic connections are the essence of family connections, the foundation of social (as opposed to legal) kinship. Voluminous sources support this point.[519] Dorothy Nelkin and Susan Lindee explain the frequent Western perception of the importance of the gene:

> The notion of the molecular [i.e., genetic] family is based on the cultural expectation that a biological entity can determine emotional connections and social bonds – that genetics can link us to each other and somehow preserve a reliable model for a family. Since it is beyond culture, outside of time, DNA seems to be of durable and permanent significance. Genetic ties seem to ground family relationships in a stable and well-defined unit, providing the individual with indisputable roots more reliable than the ephemeral ties of love, friendship, marital vows or shared values.[520]

This chapter does not attempt to summarize this sort of material, but to apply the general concept of the family as based in blood ties to the specifics of embryo donation. One goal is to speculate on why and how some gamete providers seem to believe that they are parents when no child exists or is likely to exist from any particular embryo, ova or sperm, (given the RT odds of failure) yet others have no such feelings. A belief in genetic connection may not be the only reason that embryo creators usually refuse to give the embryos to another woman, although it appears that more research is needed in this fairly new area before we can make definitive statements. Many gamete providers seem to think they are more like other bodily parts donors than parents, yet they too show some interesting and possibly "parental" behaviour in some circumstances.

Some recipients are pretty certain, on the other hand, that they are parents, but they don't always speak in absolute terms, frequently using the qualified language explained above in the

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[519] Some embryo donation and gamete donation examples will be given below in Part I. In law, the "embryo divorce" cases and commentary, where some embryo creators protest they have "the right not be a parent" and therefore want to prevent their former partner from using the embryos, provide the best examples: supra Chapter 2, footnote 98. For a general discussion, especially in the context of RT, see Marilyn Strathern, *Reproducing the Future: Anthropology, Kinship and the New Reproductive Technologies* (New York: Routledge, 1992), especially Chapters 1 & 2; James Lindemann Nelson, "Genetic Narratives: Biology, Stories and the Definition of Family" (1992) 2 Health Matrix 71; Dorothy E. Roberts, "The Genetic Tie" (1995) 62 U. Chi. L Rev. 209 at 214-223.

[520] Dorothy Nelkin & M. Susan Lindee, *The DNA Mystique: The Gene as a Cultural Icon* (Ann Arbor, MI: University of Michigan Press, 2004) at 60.

Introduction: genetic parent, social parent etc. Very few studies have looked at the women and their partners who acquire supernumerary embryos, except for the pregnancy success rates. The fact that demand outstrips supply tells us little, given the extremely low numbers of available embryos. Media reports are unfortunately also not as good a source of information as they might otherwise be, since most flow from the publicity machine of Snowflakes, the Christian adoption agency.[521] The agency and its clients have a particular point of view that tends to skew the numbers: a pro-life agenda that insists that embryos are children. There are some other sources, however, and we can take a few points from them, as well as from material on gamete recipients, which appears a little more conflicted regarding parentage than the limited data on embryo recipients.

While explanations of why embryo creators rarely donate might be incomplete, researchers have spent even less time studying the possibilities of gender difference in embryo disposition. One project that asked questions about possible disposition in the event of a relationship breakup is questionable since other research demonstrates people frequently change their minds when faced with the actual decision, but it does indicate that there are gender differences in this area.[522] It appears no one has looked at possible variations in male and female responses to being a recipient parent, other than their feelings about information disclosure from and to the donors.[523] Therefore, the limited available material on gendered behaviour in gamete donors and recipients will also be reviewed in this chapter, to provide some comparisons.

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[521] See discussion in Chapter 2, Part II above.
[522] Sigal Klipstein, Richard H. Reindollar, Meredith M. Regan & Michael M. Alper, "Gender bias in the disposition of frozen embryos" (2001) 76 Fertility & Sterility 1181; see more discussion in Part I below.
[523] Viveca Söderström-Antilla, Tuija Foudila, Ulla-Riitta Ripatti & Rita Siegberg, "Embryo donation: outcome and attitudes among embryo donors and recipients" (2001) 16 Human Reprod. 1120.

I. Embryo Donors: Is it Just about Genes?

It is well documented that few people with leftover embryos after RT procedures want to give them to other women to gestate. A literature review in 2003 put the international average donation rate at 10 percent.[524] However, this figure is skewed by a few very high numbers; donation rates were below six percent in more than half of the studies,[525] with the two highest ones coming from European countries and not the United States, where most embryo donation (and studies of) seems to occur. Most embryo creators faced with leftovers simply destroyed the embryos, and, where it was legally possible, some people donated embryos for research of various types, including for RT procedures and for stem cell extraction. In most places where both research and donation to another woman are allowed, more people opted for research, although there are exceptions [526]

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[524] Julinda Lee & Christine Yap, "Embryo donation: a review" (2003) 82 Acta Obstet. Gynecol. Scand. 991 at 992.

[525] Actual reported donation rates are as follows: 0.2 per cent, Neroli Darlington & Phillip Matson, " The fate of cryopreserved human embryos approaching their legal limit of storage within a West Australian in-vitro fertilization clinic" (1999) 14 Human Reprod. 2343 (from an unpublished study in France, the Australian rate was 5.9); 1.8%, Douglas M. Saunders, Mark C. Bowman, Alexandra Grierson, & Felicity Garner, "Frozen embryos: too cold to touch? The dilemma ten years on" (1995) 10 Human Reprod. 3081 (U.S.); 2, David I. Hoffman, Gail L. Zellman, C. Christine Fair, Jacob F. Mayer, Joyce G. Zeitz, William E. Gibbons & Thomas G. Turner, "Cryopreserved embryos in the United States and their availability for research" (2003) 79 Fertility & Sterility 1063; 2.4%, Susan Cooper, "The Destiny of Supernumerary Embryos?" (1996) 65 Fertility & Sterility 205 (U.S.); 2.6%, Peter R. Brinsden, Susan M. Avery, Samuel F. Marcus & Michael C. MacNamee, "Frozen embryos: decision time in the UK" (1995) 10 Human Reprod. 3083; 4.1%, Catherine V. Hounshell & Ryszard J. Chetkowski, "Donation of frozen embryos after in vitro fertilization is uncommon" (1996) 66 Fertility & Sterility 837 (U.S.); 6%, Peter J Burton & Katherine Sanders, "Patient attitudes to donation of embryos for research in Western Australia" (2004) 180 Med. J Australia 559; 6%, M. Cattoli, A. Borini & M.A. Bonu, "Fate of stored embryos: our 10 years experience" (2004) 115S Eur. J Obstet. & Gyn & Reprod. Biology S16 (Italy); 9.2%, Grégoire Moutel, Edna Gregg, Jean Paul Meningaud & Christian Hervé, "Developments in the Storage of Embryos in France and the limitations of the Laws of Bioethics" (2002) 21 Med Law 587; 10.5%, Gabor T. Kovacs, Sue E. Breheny & Melinda J. Dear, "Embryo donation at an Australian university in-vitro fertilisation clinic: issues and outcomes" (2003) 178 Med J Australia 127; 12%, Catherine A. McMahon, Frances Gibson, Jennifer Cohen, Garth Leslie, Christopher Tennant, & Douglas Saunders, "Mothers Conceiving Through In Vitro Fertilization: Siblings, Setbacks, and Embryo Dilemmas After Five Years" (2000) 10 Repro. Tech. 131 ["Mothers"]; 12%, Bradley J. Van Voorhis, Dan M. Grinstead, Amy E. T. Sparks, Janice L. Gerard & Robert F. Weir, "Establishment of a successful donor embryo program: medical, ethical and policy issues" (1999) 71 Fertility & Sterility 604; 13%, Susan C. Klock, Sandra Sheinin & Ralph R. Kazer, "The Disposition of Unused Frozen Embryos" (2001) 345 N. Engl. J. Med. 69 (U.S.); 16.6%, J. Lornage, H. Chorier, D. Boulieu, C. Mathieu & J.C. Czyba, "Six year follow-up of cryopreserved human embryos" (1995) 10 Human Reprod. 2610 (France); 18%, Söderström-Antilla et al, supra note 523 (Finland).

[526] See Burton & Sanders, ibid, where research outnumbered procreation 2-1; Cooper, ibid., more than 2-1; Saunders et al, ibid, gave a slight edge to research. But see Klock et al, ibid, where 13% chose "another couple" over the 10% who opted for research, and Van Voorhis et al, ibid., where research lost 10% to 12%.

Two interesting facts jump out from the various surveys. First, when couples with embryos are first asked how they might like to deal with any extras, they are far more likely to say donation to another woman than the actual donation numbers quoted above. These studies report numbers starting at 15 per cent and rocketing as high as 39 per cent of people who might end up with surplus embryos and who are not making their final decision at the moment they are questioned.[527] Practitioners and lawyers anecdotally report the same circumstances, albeit without solid numbers.[528] The would-be donors back out for a variety of factors, many of which will be discussed below, but it seems that most think donation sounds like a great idea until they learn more about all of the possible implications.[529] This appears to be an unanticipated drawback to the Bush administration's "embryo adoption" promotion plans;[530] public education might increase awareness and therefore demand, but it is actually likely to be decreasing the supply. However, RT clinicians express concern about how few progenitors are actually willing to donate,[531] and many of these studies were commissioned to help find ways to increase the donation rate. American government funding to do the same might be seen as a form of state coercion similar to the pressure exerted on birth mothers in the past[532] if the trend to "promote" embryo donation continues.[533]

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[527] Saunders et al, supra note 525 report that only 8 of 39 couples who initially wanted to donate went through with it; Burton & Sanders, supra note 525 said 15% of couples were willing to donate to others when first asked, but fewer than half actually did so; Klock et al, supra note 525 indicated that only two of the nine couples who initially chose donation did not alter their plans; Hounshell et al, supra note 525, reported that 35.3% of couples surveyed who liked donation at first changed their minds before the final transfer. Chantal Laruelle & Yvon Englert, "Psychological study of in vitro fertilization-embryo transfer participants' attitudes toward the destiny of their supernumerary embryos" (1995) 63 Fertility & Sterility 1047 had a 39% intended donation rate but do not report actual numbers, as some final decisions were still pending at the time of the study, and many of those people actually ended up using all of their embryos themselves.

[528] Susan L. Crockin, "Embryo 'adoption': a limited option" (2001) 3 Reprod. Biomed. Online 162. Crockin is a lawyer who draws up RT-related contracts.

[529] Crockin, ibid., and American Fertility Association, *Embryo Donation: Prospective Donors* (New York, American Fertility Association, 2006), online: <http://www.theafa.org/index.html> at 4.

[530] See discussion in Chapter 2, Part II above.

[531] For example, Kovacs at al, supra note 525 at 129, refer to embryos as "a valuable resource" being destroyed.

[532] See discussion in Chapter 3, Part I above.

[533] A few academic commentators have also chided embryo owners for their reluctance to share their wealth with those who cannot get pregnant using other methods: Giuliana Fuscaldo & Julian Savalescu, "Spare embryos: 3000 reasons to rethink the significance of genetic relatedness" (2005) 10 Reprod. Biomed. Online 164.

Second, people whose embryos were created using some donor gametes are far more likely to donate than couples whose embryos are entirely genetically related to them.[534] Although these people hold only a small percentage of supernumerary embryos, they appear to be skewing the numbers, and in fact are not always separately reported.[535] At least a few writers suggest that such embryo creators might be more willing to donate since someone else has generously donated to them,[536] but there is also a strong indication that beliefs about genetic inheritance and the nature of family play a role in the difference. In one study, respondents were also asked if they thought parental bonding was defined by genetics, education ("nurture") or both. Those who donated were most likely to answer "education" and the couples who themselves had used donor gametes were most likely to respond in this way.[537] Maggie Kirkman interviewed a woman who created embryos using donor sperm, who explained that parental bonds in their own family were based in relationships, not genes, "saying that her husband's 'enjoyment and love does not change at all because they are not his biological children.'"[538] The experience of non-genetic parenting may therefore encourage couples to let go of embryos that may become full genetic siblings to their own children, since that genetic tie is not the basis of family to them. It is, of course, also possible that it is simply easier to give away someone else's genes than it is to give

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[534] S. Bangsbøll, A. Pinborg, C. Yding Andersen & A. Nyboe Andersen, "Patients' attitudes towards donation of surplus cryopreserved embryos for treatment or research" (2004) 19 Human Reprod 2415 at 2419, found people whose embryos were created with donor sperm were more likely to want to donate; only two of the nine said no (although embryo donation was not legal in Denmark at the time, making the results merely hypothetical); Laruelle & Englert, supra note 527 found that the majority of their respondents who used donor gametes were willing to provide the embryos for another woman's use (exact numbers not given), higher than the 39% of all embryo possessors who expressed initial interest in donation; Söderström-Antilla et al, supra note 523, report that 39% of donor couples had used donor gametes; Saunders et al supra note 525 noted that people who used donated eggs or sperm to create embryos displayed "less anxiety" than those who used their own gametes when discussing the ramifications of donation.

[535] For example, Saunders et al, supra note 525, state that some of the sample used donor gametes but do not provide any numbers; many other surveys, including some very large ones, make no distinctions between patients making decisions about their own genes and those dealing with donor gametes, e.g., Klipstein et al, supra note 522 at 1184, comment that most couples surveyed both contributed to their embryos, implying that at least a few did not, but the source of the original gametes was not used to separate out those responses.

[536] Bangsbøll et al, supra note 534 at 2419.

[537] Laruelle & Englert, supra note 527 at 1050.

[538] Maggie Kirkman, "Egg and Embryo Donation and the Meaning of Motherhood" (2003) 38(2) Women & Health 1 at 12.

away one's own, a thought no researcher seems to have put in writing. It appears, however, that not everyone pins parentage on genes exclusively; further examples arise below.

There are a few surveys attempting to correlate various social attitudes with donation for use, but most deal with hypothetical donation rather than people who have made their final choices for embryo disposition; this unfortunately includes the only Canadian study of the question.[539] Despite limitations and a general lack of systematic but open-ended interviews, some themes crop up repeatedly. I review the major themes involving parentage below.

a) Children, Potential Children, or Just Cells?

Not surprisingly, one study reports that a third of couples surveyed thought of the embryo as a child.[540] Two others from Australia show much higher numbers of possible donors consider the embryo to be a "potential child"[541] and a "potential person."[542] The first Australian study incorrectly considers the words "child" and "potential child" to be interchangeable, and does not separate the two types of responses in the data;[543] it appears likely the second, conducted by the same principal author, relied on the same premise. The authors state that the higher number of respondents using "potential child" when compared to the Belgian study was due to the fact most of the Australians had already conceived through IVF. I propose instead that there is a fundamental difference between the two, since in the right circumstances, an embryo can "potentially" become an indisputable child, but no one can claim that zygotes are physical children yet (whatever their presumed moral status).

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[539] Christopher R. Newton, Ann McDermid, Francis Tekpetey, Ian S. Tummon, "Embryo donation: attitudes toward donation procedures and factors predicting willingness to donate" (2003) 18 Human Reprod. 878. The study involved a clinic in London, Ontario, which did not even offer embryo donation at the time.
[540] Laruelle & Englert, supra note 527 at 1049-1050.
[541] Catherine A. McMahon, Frances L. Gibson, Garth I. Leslie, Douglas M. Saunders, Katherine A. Porter & Christopher Tennant, "Embryo donation for medical research: attitudes and concerns of potential donors" (2003) 18 Human Reprod. 871 ["Embryo"] at 874: 80% thought the embryos were potential children, or actual children.
[542] McMahon et al, "Mothers", supra note 525 at 133: 90% said potential person or person.
[543] McMahon et al, "Embryo", supra note 541: the chart of responses on 875 categorizes respondents who referred to child or potential child as being the same for statistical purposes.

Still, the link between not donating embryos and thinking of them as children, not just potential children, is quite apparent in other comments from reluctant donors.

> "Having my child living somewhere else is not acceptable. It's not like I am donating an egg. ...It's not like my egg or P.'s sperm. It's our child."[544]
>
> "We see the embryo as very much our own child. To us it would be like giving up a child for adoption, very hard to do as we tried so hard for so long."[545]
>
> "Couldn't cope with someone else raising our child."[546]
>
> "We could not bear the thought of our child being mistreated."[547]

Note that people who assert that the embryos are their children are just as likely to destroy them as those who do not,[548] meaning we cannot explain all embryo disposition based on the question of perceived parentage. The authors of the only study that asked directly about whether progenitors thought of the embryos as children do note that parents would obviously not kill a real child and that therefore the comments should be viewed with some suspicion. Potentially, some of these people might conceive of children as their property to some extent,[549] a position that makes sense in light of these findings on embryo disposition. Parental feelings are directly associated with decreased donation to research, however.[550]

Some studies demonstrate that people who already have children are less likely to donate; the authors postulate that "couples who have already had the experience of raising a child prefer not to delegate this task to others."[551] However, some research has shown no relationship

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[544] Ibid.
[545] Ibid.
[546] Guiliana Fuscaldo, "Stored Embryos and the Value of Genetic Ties" in Jennifer Gunning & Helen Szoke, eds., *The Regulation of Assisted Reproductive Technology* (Hampshire, UK: Ashgate Publishing Ltd., 2003) 177 at 180.
[547] Ibid.
[548] Laruelle & Englert, supra note 527 at 1049.
[549] See Joan Mahoney, "Adoption as a Feminist Alternative to Reproductive Technology" in Joan C. Callahan, Ed., *Reproduction, Ethics, and the Law: Feminist Perspectives* (Bloomington, Indiana: Indiana UP, 1995) 35 at 43 for more on parentage as ownership in the RT context.
[550] Lee & Yap, supra note 524 at 993.
[551] Klipstien et al, supra note 522 at 1184; Bangsbøll et al, supra note 534 at 2419 speculate this is in part about the donated "child" being a full genetic sibling to the donor's existing children.

between the number of children born from IVF and likelihood of donation to another woman.[552] For many of these people, then, using the descriptor "child" is not linked to the ones they already have. It may instead be that the genetic connection by itself carries weight.

Some men and women who actually donated, on the other hand, make it clear that the resulting child is not their child, implying (or even stating) that they never thought of the embryo as their child either.[553]

> "My attitude about embryo donation is the same as if I would have donated blood or some other organ to another human being....The relationship between the mother and the child-to-be-born grows and becomes deeper during life experienced together."[554]

> "I could well think of meeting a child born from my cells. Still, I would never feel her/him to be my own, because he/she was born by another mother and brought up by other parents."[555]

This corresponds with studies of egg donors, who are generally quite emphatic about the fact that motherhood is about nurture, including pregnancy.[556] Sperm donors, however, have rarely been asked whether they think of themselves as parents or not. Many early studies only concerned motivation for donating, giving the men just two reply options: financial compensation or altruism.[557] When multiple responses are available, at least a few men report that they donated "to procreate" (although it may not be their primary reason), and some studies came up with fairly high numbers selecting this response.[558] Procreation does mean children, even if they are

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[552] Lornage et al, supra note 525; Laruelle & Englert, supra note 527; Newton et al, supra note 539 at 882.
[553] Kirkman, supra note 538, comments than none of the donors in her study thought of the embryo as the same as "their own" children.
[554] Söderström-Antilla et al, supra note 523 at 1125.
[555] Ibid.
[556] Claire Snowdon, "What makes a Mother? Interviews With Women Involved in Egg Donation and Surrogacy" (1994) 21 Birth 77 at 80; Kirkman, supra note 538 at 7; at 11, she describes a woman who donated eggs to her sister and actually forgot about it later when discussing the child's left-handedness, a trait she shares with the baby but the gestational and social mother does not.
[557] Pia Broderick & Iain Walker, "Information access and donated gametes: how much do we know about who wants to know?" (1995) 10 Human Repro. 3338 at 3339.
[558] Ken Daniels, "The semen providers" in Ken Daniels & Erica Haimes, eds., *Donor Insemination: International Social Science Perspectives* (Cambridge: Cambridge University Press, 1998) 76 at 84-88. The number was as high as 49% in one study.

not going to be considered equal to the ones you raise. That would lead us to think that some of these men therefore do think of themselves as parents, in at least a qualified way.

When sperm donors are asked about how they feel about information disclosure to any resulting children, the responses tend to split depending on their reasons for donating in the first place. Those who place more emphasis on altruism are usual older and are much more receptive to information exchange and even identity disclosure once the child reaches adulthood; those who cite financial motivations tend to be younger and relatively unreceptive to any further involvement.[559] When donor anonymity was abolished in Sweden in the mid-1980s, donations dropped for a while, but previous levels were re-established within a few years, the donors now generally being older men who already had families of their own.[560] Anonymity "shields the donor from parenthood;"[561] it is possible that donors who are motivated by personal reasons rather than charitable ones may be more likely to think of themselves as parents but don't want to deal with this reality. It is just as likely, however, that some don't want any further contact because they experience a lack of connection with the product of their donation.

Egg donors, on the other hand, generally insist they are not parents and that their motives are all about wanting to help others conceive their own child.[562] Women also seem far less interested in donor anonymity than men,[563] even in embryo donation scenarios. Both female embryo donors and recipients were more positive about various levels of openness and identity disclosure than were male donors and recipients in a study that interviewed both halves of

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[559] Ibid., at 94.
[560] A. Lalos, K. Daniels, C. Gottlieb & O. Lalos, "Recruitment and motivation of semen providers in Sweden" (2003) 18 Human Reprod. 212 at 212.
[561] K. Vanfraussen, I. Ponjaert-Kristoffersen & A. Brewaeys, "An attempt to reconstruct children's donor concept: a comparison between children's and lesbian parents' attitudes towards donor anonymity" (2001) 16 Human Reprod. 2019 at 2020.
[562] Snowdon, supra note 556 at 80; Kirkman, supra note 538 at 7; V. Söderström-Antilla, "Follow-up study of Finnish volunteer oocyte donors concerning their attitudes to oocyte donation" (1995) 10 Human Reprod. 3073.
[563] L.R. Schover, S.A. Rothmann & R.L. Collins, "The personality and motivation of semen donors: a comparison with oocyte donors" (1992) 7 Hum. Repro. 575 at 576.

couples donating and receiving.[564] In one Australian study, of the three women who had donated embryos, two still wondered about the results of the donation, in particular the gender of the child, and one still questioned if donating had been the correct thing to do.[565] The authors do not report if these two women had any parental or "potential" parental feelings for those potential children, but it is worth noting that this study, of women only, said 90 per cent considered the embryo a potential child/child,[566] while the other Australian study involving both men and women reported totals of only 80 per cent for the same question.[567] Since "potential child" and "child" are two different things, we do not know what percentage of that 90 per cent of the women felt like parents, but the difference between the two results is significant; men may be less likely to think of an embryo as a "potential child".

So, women might be more likely to believe that their embryos are children than male donors, yet egg donors do not report they are donating to procreate, unlike some men. Women are also more receptive to long-term information exchange and even meeting the final product of their donation once s/he is an adult, although some men (and all current Swedish sperm donors) also fall into this group. It may be that women are less interested in avoiding the potential consequences of the donation, which does not preclude them thinking of the embryo as a child. Kirkman states that "maternal feelings" for embryos can explain both donation and destruction, with some women feeling the embryos deserve a chance to live just like their existing children, but others find themselves unable to cope with the reality of knowing those children are being raised by someone else,[568] the latter position being well represented in the group of embryo donors discussed earlier.[569] The example she gives for a woman who donated but had maternal

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[564] Söderström-Antilla et al, supra note 523 at 1124.
[565] McMahon et al, "Mothers," supra note 525 at 133.
[566] Ibid.
[567] McMahon et al, "Embryo" supra note 541 at 874.
[568] Kirkman, supra note 538 at 10.
[569] Supra notes 544 to 547.

feelings involved anonymous donation for that very reason;[570] she could not face seeing the child in another family. This woman also believed that giving the embryos away produced the same results as adoption.

The Canadian study did find that the number of potential donors who would want closer contact with resulting children was equal to those who did not think this was preferable, and that the people most likely to donate were those who wanted open, directed donation programs rather than anonymous ones.[571] Again, this research was based on hypothetical donations since the clinic did not yet offer the procedure. It is however worth noting that there was no variance in response by gender in the information disclosure part of the survey.[572] It is also possible that some donors want to avoid possible contact with donor offspring precisely because they do not think of themselves as parents and are worried that the offspring might disagree, an idea discussed below.[573] Avoidance of any resulting child does not automatically mean you think you are a parent.

Only one study directly concerned gender difference in embryo disposition, and it unfortunately involves a chart review of how couples wanted to deal with any excess embryos before they were even beginning RT, rather than actual final decisions, which, as we have seen above, can be quite different. Couples were asked to decide what should happen in the event one or both of them dies, and if they were to divorce or separate.[574] The majority opted to let the woman implant the embryos if the man were to die, but to discard them if the woman passed on.[575] Although all scenarios presented invoked at least a few couples willing to donate to others, the highest numbers (35 per cent) involved the "death of both partners" question. Couples were

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[570] Ibid. at 9-10.
[571] Newton et al, supra note 542 at 883.
[572] Ibid., at 881.
[573] In Part I b).
[574] Klipstein et al, supra note 522 at 1182.
[575] Ibid. at 1183.

also more likely to donate embryos than give them to the man if the woman died.[576] The majority opted for destruction upon relationship breakup, but implantation in the woman outpaced donation to another couple by 22 percent to 17.[577] Interestingly, there were no gender differences in how the couples would prefer excess eggs or sperm should be dealt with.[578] The authors believe that while the parties think the gametes are just gametes, they are far more likely to treat embryos according to "established societal gender patterns."[579]

> Women seem to be given more say in the disposition of these embryos. This occurs even though at the time of their formation, the genetic makeup of these embryos is most often a contribution of both partners....[The study] likely reflects the tendency in our society for mothers to raise children....Perhaps women see embryos as babies, and men see them more as gametes. It is also possible that women bond sooner to embryos than do men.[580] [emphasis added]

They also consider the possibility that the relatively infrequent use of surrogacy to produce children for single men might have an impact on the results. What they fail to consider is the possibility that women have an interest in gestation that men cannot,[581] leading them to demand implantation more often than men demand possession. The authors also fail to note that that men have less of a time limit on gamete production than do women. Although there were no significant differences in response based on age, the average age of the women was 36; studies show that a woman's fertility decreases significantly at this age, and many clinics set age limits of only a few years more when considering female IVF candidates.[582] The speculation that women are more likely to think of embryos as babies, however, has only limited support in the other research, which does not of course mean it is incorrect. This conflicting data means it is

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[576] Ibid. at 1182.
[577] Ibid. at 1183.
[578] Ibid.
[579] Ibid.
[580] Ibid. at 1184.
[581] Discussed further in Part II below.
[582] Success rates drop after the mid-30s: Paul Recer, "Study Links Age to Lab Fertility Success" *Associated Press* (7 Jan. 2005), online: Yahoo! at <http://news.yahoo.com>. Some doctors refuse to treat women over a certain age, for example 43 at one clinic in Toronto: Marina Jiménez, "Forty is the new 40" *Globe and Mail* (22 Jan. 2005) F6. See also Karla Gale, "Assisted reproduction 'reasonable' until age 44" Reuters (22 Aug. 2005), online: Yahoo! at <http://news.yahoo.com>.

impossible to say whether women or men are more likely to think of themselves as parents of their embryos, and how they would best want to deal with that feeling through embryo disposition, although there is some indication that women may feel more parental than men. It appears that a variety of responses, some opposed to each other, is the most likely finding if and when a solidly-constructed study is ever done.

Embryo disposition requires further gender-differentiated investigations. While some women clearly feel the embryo is their child, they do not seem to be the majority, and some men would also agree with them. One possible explanation for discrepancies between embryo and gamete donors is the fact that donated eggs and sperm are usually generated for that purpose, while donated embryos were originally created for use by the donors themselves.[583] While some men may donate sperm with the intent to procreate, everyone produces these embryos with the initial intent to procreate and to raise the resulting children. It may be more difficult to avoid having a personal attachment in these situations, while gamete donors are better able to let go of their genes because that was the whole purpose of the exercise; people who can't do so don't bother volunteering to give gametes to others in the first place. If sperm donors do think of themselves as parents more often than egg and embryo donors, that would seem to confirm that men place more emphasis on genetic connection. The effect of having had other children through IVF is reported by only a small number of people and some studies found that this has no impact on the average likelihood to donate;[584] it may be a factor in some decisions but apparently not enough of one to skew the overall results in most cases.

Additional unresearched factors include that IVF in general seems to be more stressful for women, in part because women do invest far more physically than do men.[585] Women's

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[583] Kirkman, supra note 538 at 15.
[584] Supra notes 551 & 552 and accompanying text.
[585] Agneta Skoog Svanberg, Jacky Boivin, & Torbjörn Bergh, "Factors influencing the decision to use or discard cryopreserved embryos" (2001) 80 Acta Obstet Gyneol Scand. 849 at 854, noting numerous studies. See also discussion in Chapter 2, Part I above.

perceptions of the products of RT treatment may therefore be different. Also, the relatively low numbers of eggs available from a woman compared to the astronomical total for sperm production might cause women to think more altruistically and to think carefully about all the future ramifications of donation when compared to men.[586] In summary, there may numerous ways in which embryo disposition decisions differ between men and women, especially in regards to the status of the embryo, but we have little to go on at this time. The only thing we know for certain is that some people have the idea that the embryo is a child, and others do not. Perhaps some are not sure.

Admittedly, donation decisions may not always flow from parental feelings for the embryos, a belief in genes equalling real parenthood. For one, it may be possible to believe the embryo is a child but not think of it as belonging to you, or to anyone until a pregnancy takes hold. This position is different from the people who think that donation is analogous to other types of medical donations, who do not believe the embryo is a child until after it is implanted and begins to develop. Barbara Katz Rothman insists that women decide when a baby exists; they may choose to abort after conception or choose to have a child, and that no baby exists until the decision is made.[587] The idea applies to embryo creation and implantation far more obviously than to discovering you are pregnant. It is also possible to act based on other people's anticipated reactions to the situation, rather than one's own, another factor that seems to reduce the donation rate, as discussed below.

b) When Former Embryos Come Calling...

In at least some studies and interviews, progenitors who refuse to donate excess embryos do not directly refer to their parental or quasi-parental feelings about the embryo and the possible

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[586] Melanie Roberts, "Children by Donation: Do They Have a Claim to Their Genetic Parentage?" in Jo Bridgeman & Daniel Monk, eds., *Feminist Perspectives on Child Law* (London: Cavendish Publishing Limited, 2000) 47 at 58.
[587] Barbara Katz Rothman, *Recreating Motherhood* (New Brunswick, NJ: Rutgers UP, 2000) at 79-80.

resulting children. They instead express concern about what might occur in the future, events over which they would have no control. This includes the embryo-offspring searching for them, and perhaps placing demands on them.

> "[the offspring] may be able to access our details to seek us out for any sort of emotional or financial support"[588]

> "[I didn't donate because of] the possibility of someone in twenty years time knocking on the door saying 'I'm your son/daughter!'"[589]

While other researchers did not include direct quotes from the subjects, they refer to people being concerned about legal ramifications down the road,[590] the lack of clarity regarding legal parentage,[591] and the possibility of any resulting children attempting to claim an inheritance from them.[592] The "knock on the door" quote comes up more than once.[593] At least some researchers characterize this as a concern about donating one's children or potential children,[594] or simply as a concern with legal issues.[595]

This characterization seems to miss the point – some people are saying they do not want to be subject to parental duties and obligations, legal or otherwise, because they do not think of themselves as parents to the embryo. They are afraid of the donor offspring imposing this role upon them. A husband of a woman who opted for anonymous donation in Kirkman's study provides the perfect example. "Her husband initially rejected donation because he feared demands being made by any offspring as adults; in contrast, Wilma wondered whether she would 'always ache for them if I knew they were out there somewhere.'"[596] [emphasis added] When Kirkman says these two points of view are in contrast, she does not go on to elaborate on the

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[588] Fuscaldo, supra note 546 at 181.
[589] Ibid.
[590] Burton & Sanders, supra note 525 at 560.
[591] Saunders et al, supra note 525 at 3081.
[592] McMahon et al, supra note 525 at 133.
[593] Ibid.
[594] Ibid.
[595] Fuscaldo, supra note 546 at 181. A concern with legal implications seems quite valid when considered in light of the messy status of Canadian parentage law described in Chapter 4.

man's point of view; her paper is about motherhood. This omission is unfortunate, because she seems to be the only researcher to understand that the husband is not acting like a parent, but instead like someone with no parental feelings at all. Wilma goes on to explain that "emotionally, any children will always be part of me."[597] The contrast, then, is between someone who thinks of the embryos as children and someone who does not.

Obviously, these people only express these concerns because it may be possible for the offspring to track them down. If anonymity were absolute and guaranteed, they may feel differently about donating. I am not trying to assert that everyone who rejects identity disclosure is doing so because they reject the idea that they are parents; I in fact argued above that sperm donors who prefer anonymity may be trying to avoid facing up to the fact they feel like parents or that they intended to procreate.[598] Gamete donors too speak of the fear that resulting children may one day knock on their doors.[599] Yes, it is true that some may be avoiding disclosure because having contact with the resulting child would be too painful, but I also think it is possible that potential donors may shy away from providing the embryos to another couple not because contact would be emotional but instead because of an unwanted imposition of parental status. This hypothesis is supported by the number of people who decide not to donate embryos despite their original intent to do so.[600] The change of mind usually occurs after counselling and paperwork draw their attention to potential issues with the resulting children, including how the embryo creators would feel about them, and how the offspring might feel towards the progenitors.[601] Likely, some had not originally considered the possibility that someone might "knock on the door" two decades later, and this realization leads to a change of heart.

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[596] Kirkman, supra note 538 at 9.
[597] Ibid.
[598] Supra note 561 and accompanying text.
[599] Schover et al, supra note 563 at 577, where 24 per cent of anonymous sperm donors worried about the disclosure laws changing.
[600] Supra notes 527 to 529 and accompanying text.
[601] Saunders et al, supra note 525 at 3081; Pam Belluck, "It's Not So Easy to Adopt an Embryo" *New York Times* (12 June 2005) 4.5.

It is striking that no one else interprets these types of comments in this way. If women in France can give birth anonymously and believe they are not mothers,[602] and if egg donors can claim the same, why is it hard to believe that at least a few gamete providers believe they are not parents?[603] It may be an example of research bias: the scientists and interviewers expect that people not donating are doing so because of a familial connection they feel with their genes in the embryo, rather than because they feel no connection at all but fear one being asserted upon them.

Either way, all of the above material demonstrates that 1) we need more research, and 2) some donors believe they are parents, some think the embryos are potential children (making them potential parents?) and others do not give these responses at all, instead insisting that embryo donation is no different from donating blood or an organ. Obviously, not everyone believes that their frozen united genes make them a parent, and some of the people who feel this way still donate to others,[604] so parental feelings do not entirely explain the low donation rate. Multiple, intersecting beliefs and interests are inevitable here. It is not surprising that we then see some similar mixed patterns in the material on embryo and gamete recipients.

II. Embryo Recipients: Gestational Parenthood, Intentional Parenthood, Multiple Parenthoods

Sadly, there are even fewer studies that address the parental status of recipients, although some of the gamete donation literature offers insights that may be applicable. We can also draw on the flurry of media articles which have accompanied the interest in embryo donation,

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[602] Katherine O'Donovan, "'Real' Mothers for Abandoned Children" (2002) 36 L & Soc'y Rev 347.

[603] When I have presented this material in the past, there have been a few questioning looks from people who do not seem to be able to get their heads around this idea. Apparently, in some minds, if the donors are referring to offspring-like behaviour in their embryo donation, it is because they actually believe that the embryo is their offspring.

[604] One Snowflakes participant said that her decision to donate through Snowflakes "goes beyond my religious convictions" and was also about her "parental attachment" to the embryos: Chris Emery, "Embryo adoption: New twist to infertility treatment generates kids, controversy" *Capital* (MD) (13 April 2006), online: <http://www.hometownannapolis.com>.

although there are also inherent limitations there due to non-representative samples, most of the interviewees having participated in the Snowflakes program. Finally, we can also return to the concept of adoption and wider research on non-genetic families to try to explain the answers given by some embryo and gamete recipients.

a) The Desire for Pregnancy

There are no published reports statistically detailing the reasons some people pursue embryo donation as a method of family formation, although commentators and researchers emphasize what they believe to be the reasons for demand, usually without directly quoting the women (or their partners) themselves.[605] These include inability to produce their own eggs, lack of a male partner to become pregnant by, relatively low costs compared to other ways of acquiring children non-coitally, and of course, the experience of gestation and birth. This last reason is such an obvious bonus to most writers that they do not see a need to ask research subjects about it, but instead state it as a general benefit of the practice.[606] Legal authors also stress it as one of the plusses of embryo donation.[607]

While media reports rarely discuss determinations of parentage for children born of embryo donation, the recipient parents sometimes stress the importance of experiencing pregnancy, even mentioning it as a chance to bond with the baby.[608] A few do quote laws that

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[605] See discussion in Chapter 2, Part I.

[606] Lee & Yap, supra note 524 at 992; Newton et al, supra note 539 at 879; Jerome H. Check, Carrie Wilson, Joseph W. Krotec, Jung K. Choe & Ahmad Nazari, "The feasibility of embryo donation" (2004) 81 Fertility & Sterility 452 at 453.

[607] Paul C. Redman & Lauren Fielder Redman, "Seeking a Better Solution for the Disposition of Frozen Embryos: Is Embryo Adoption the Answer?" (2000) 35 Tulsa L J 583 at 587-589; Katheryn D. Katz, "Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation" (2003) 18 Wisc. Women's L J 179 at 226-229; Olga Batsedis, "Embryo Adoption: A Science Fiction or an Alternative to Traditional Adoption?" (2003) 41 Fam. Ct. Rev. 565 at 572-573.

[608] Paul McKeague, "Born into a Legal Limbo" *Edmonton Journal* (29 May 1999) H3; Robyn Taylor, "At long Last, a Family" *Winchester Star* (VA) (14 January 2005), online: <http://www.winchesterstar.com/>; Gary Roedemeier, "Family celebrates the arrival of 'miracle baby'" WHAS TV 11 (Louisville, KY) (22 December 2005), online: <http://www.whas11.com/>.

assign legal maternity to the woman who gives birth,[609] although as we saw in Chapter 4, that result is far from certain in every jurisdiction. But none of this suggests that women who gestate a donated embryo perceive themselves as parents because of parturition.

The only egg donation study to cover the question reveals that at least some women do stress that the act of carrying a pregnancy makes them the mother. "She developed inside me. That's more important than genetics," states one egg recipient.[610] Another angrily responded to the opinion that she was merely a "receptacle":

> If you are a surrogate mother that might be how you think of yourself, but I definitely don't think of myself that way. When it is in here, it is my child; it might not be my genetic child, but it is my child.[611]

Note that this view corresponds with both the general opinions of the egg donors, who believe that gestation and rearing create maternity,[612] and the opinions of the surrogates in the same study.[613] The intent to be the parent of the resulting baby is what is key in their minds. The issue of maternity in surrogacy will be discussed below.[614]

Some research shows that women are interested in RT not just because they want to raise a genetic child, or any child, but also for the chance to experience pregnancy, seen by most as key to their integration in the world of womanhood.[615] Nevertheless, women appear to be split on the topic of whether genes or gestation are the most important component of biological motherhood, while men do favour genes by a substantial margin. Law and genetics feminist scholar Mary Mahowald interviewed women and men on whether they had a preference for

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[609] Andrea Cambern, "Adopt an Embryo" WBNS – 10TV (Columbus, OH) (23 Nov. 2005), online: <http://www.10tv.com>; Mindy Blake, "Embryo Adoption" KOLD News 13 (Tucson, AZ) (27 Sept. 2005), online: <http://www.kold.com/>.
[610] Snowdon, supra note 556 at 79.
[611] Ibid. at 78.
[612] Supra note 562 and accompanying text.
[613] Snowdon, supra note 556 at 82-83. Most of these women were gestational surrogates, using the eggs of the intended mothers. At least one used the word incubator to describe herself.
[614] In Part II b).
[615] See discussion in Chapter 3, Parts II & IV, above.

genetics or gestation in their own lives.[616] Respondents were asked, if it were impossible for you (if asking a woman) or your partner (if asking a man) to have both a genetic and a gestational link to your child, would you choose to have your egg gestated by another woman or would you choose to acquire another woman's egg with which to be impregnated? (The men would always use their own sperm). While 73.5 % of men expressing a choice chose the genetic tie, a slim majority of the women – 51.4 % – would instead opt to become pregnant and give birth.[617] While this demonstrates strong gender difference, it is actually only weak support for the idea that women don't like genes all that much and desire the pregnancy experience as a bigger part of being a parent. After all, if half of women disagree, we cannot claim that women generally assign less value to genes than to gestation. Whether these women have been unduly influenced by patriarchal thinking that glorifies the genetic tie, as discussed in Chapter 3, cannot be determined from this data alone.

I was surprised not to see more emphasis on gestational motherhood in the media reports, since egg recipients and many commentators raise the topic. I then realized that the overwhelming majority of embryo donation articles that actually interview recipients came from the Snowflakes' media machine, despite the fact the agency represents a fraction of a percent of world wide embryo donations. There is a real danger to their ideological argument if they stress the biological parentage of the recipient mother at the expense of the embryo donors. If, as they argue, embryos are children as soon as they are created, they must have parents when they are created. Adoption implies that both children and initial parents exist. Snowflakes is not interested in promoting a world where people can unite gametes without parental responsibility; that would imply approval for abortion, exactly the opposite of the goal they have in mind. Hence, Snowflakes must emphasize that there are two families involved, even if there will only be two

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[616] Mary Briody Mahowald, *Genes, Women, Equality* (New York: Oxford UP, 2000), Chapter 7.
[617] Ibid., at 132.

legal parents in the end. This appears to preclude any of the recipient mothers from claiming that gestation is what makes her a mother, although some do express great pleasure at being able to experience pregnancy and childbirth.[618] Parentage is instead obtained by "adoption" alone. The lack of emphasis on gestation, however, demonstrates a lack of focus on the female experience, perhaps not surprising coming from an organization that wishes to criminalize reproductive choice. Snowflakes' support for the concept of open adoption, which acknowledges two families, also makes the story of the donors equally important to their media image. Multiple parents and families will be discussed further below.[619]

b) Genes, Intent, and Moving beyond the Exclusive Family

Given all of the discussion in this thesis regarding how many people treat genes as the basis of family, one would expect that embryo recipients might have some trouble thinking of themselves as the parents, or at least as the sole parents, of the resulting baby. In some ways, this mirrors the issues adoptive parents have always had to face in our society: stigmatization for failing to reproduce the heterosexual biological family norm that is held up as the ideal.[620] If it's not a genetic family, it's not a "real" family in the minds of many.[621] Embryo and gamete recipients no doubt face some of the same challenges,[622] although it is easier to hide the fact of genetic donation from the general public and the child if you want to do so. Many apparently do,[623] although a scant majority of embryo recipients surveyed said they would tell the child about her background in one study.[624]

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[618] Supra note 608 and accompanying text.
[619] In Part II b).
[620] Karen March & Charlene Miall, "Adoption as a Family Form" (2000) 49 Fam. Relations 359 at 359-360, reviewing the research in this area.
[621] Ibid.; Nelkin & Lindee, supra note 520 at 59.
[622] One of Snowdon's respondents angrily recounted the fact that one of her friends told her that having a baby via egg donation meant she could never be "the real mother": Snowdon, supra note 556 at 84.
[623] S. Golombok, A. Brewaeys, M.T. Giavazzi, D. Guerra, F. MacCallum & J. Rust, "The European study of assisted reproduction families" (2002) 17 Human Reprod. 830 reports that only 8.6% of DI children knew about their families' use of DI. Almost all DI studies involving heterosexual rearing parents find that the majority do not tell

However, another common characteristic of adoptive families is the belief that it is the rearing environment that defines family, not genetic connections.[625] The recognition of the quality of social/psychological parenting in adoption has been growing, with the majority of Canadians now accepting that adoptive parents can feel the same way towards adoptive children as they would for their genetic ones.[626] Beyond adoption, numerous legal commentators have supported law reform proposals suggesting that "intent" to parent should define legal parentage in RT disputes where statutory guidance is absent.[627] Reliance on intent tests is not much different than acknowledging social parenting,[628] or the old presumption of paternity, and the donor insemination legislation in a few Canadian provinces rests on this principle: if you commit to being the parent of a resulting child, then you are the legal parent.[629] Many women who serve as surrogates also emphatically declare they are not really mothers, despite the nine months or so of direct physical involvement with the fetus.[630] They reserve that role for the intentional mother (usually the wife of the genetic father); one noted that she thought "[the intentional mother] was emotionally pregnant and I was just physically pregnant."[631]

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their children about the use of RT: A. Brewaeys, S. Golombok, N. Naaktgeboren, J.K de Bruyn & E. Van Hall, "Donor insemination: Dutch parents' opinions about confidentiality and donor anonymity and the emotional adjustment of their children" (1997) 12 Human Reprod. 1591. In one early study, only 3 out of 57 parents with a DI child intended to tell her: Kurt W. Back & Robert Snowden, "The anonymity of the gamete donor" (1988) 9 J Psychosomatic Obstet. & Gyn. 191 at 196.

[624] Söderström-Antilla et al, supra note 523 at 1124.

[625] See discussion in Chapter 3, footnotes 262 to 264 and accompanying text.

[626] Charlene Miall & Karen March, *Social Support for Adoption in Canada: Preliminary Findings of a Canada-wide Survey* (Hamilton, ON: McMaster University, 2002), online: <http://socserv2.mcmaster.ca/sociology/faculty/ Miall-News.pdf> at 3.

[627] Marjorie Maguire Shultz, "Reproductive Technologies and Intent-Based Parenthood: An Opportunity for Gender Neutrality" (1990) Wisc. L Rev. 297; John Lawrence Hill, "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) NYUL Rev. 353; Richard F. Storrow, "Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage" (2002) 53 Hast. L.J. 597. This approach is now enshrined in California jurisprudence as Johnson v. Calvert, 851 P.2d 776 (Cal. Sup Ct. 20 May 1993), aff'g 12 Cal. App. 4th 977 (8 Oct. 1991), aff'g X-663190, Sup. Ct. Orange County, 22 Oct. 1990. See also the discussion on intentional parenthood in Chapter 4 Part IV.

[628] Gillian Douglas, "The Intention to be a Parent and the Making of Mothers" (1994) Modern L. Rev. 636.

[629] See discussion in Chapter 4, Part III a) ii).

[630] Helena Ragoné, *Surrogate Motherhood: Conception in the Heart* (Boulder, CO: Westview Press, 1994), Chapter 4.

[631] Ibid., at 125. The title of the book comes from another such quote from an intentional mother: "Ann is my baby, she was conceived in my heart before she was conceived in Lisa's body": at 126.

As evidenced above in the comments of donors who said they weren't the parents of donor children, there is definitely social acceptance for the idea that recipients gain parental status through establishing the parent-child relationship, through the intent to parent, instead of the more-commonly understood genetic connection. This assumption is demonstrated by the fact that most research projects do not ask recipients if they feel like parents – that question was usually saved for the donors. When recipients are questioned, they invariably declare themselves to be the parents of their children.[632] Obviously, the whole reason for using someone else's gametes is to have a child that you will raise. From that standpoint, the question of parentage seems a bit absurd, which is no doubt why it is rarely asked.

This does not mean that genetic connections meant nothing to these people, or that genes have no influence on their perceptions of parentage. Several researchers discovered a certain level of confusion in the language used to discuss the donor in relation to the intentional parent. For example, one father in the Snowden study referred to the donor of his DI child as the "real father," but he then went on to assert his own paternity.[633] Claire Snowdon also remarked on what she called "linguistic difficulties" when the social mothers also referred to the genetic or gestational mothers;[634] it was difficult to describe all the parties without using the language of parentage, a problem discussed above in the Introduction. She felt, however, that the women were clear in their own minds that social motherhood was the recognized form, and that all biological connections meant nothing if a person did not rear the child. There was a tendency, though, for the women to rely on biology when it fit their purposes, and to ignore it when it did not,[635] a pattern of language also found in DI families.[636] One study of lesbian mothers

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[632] Snowdon, supra note 556 at 83; Robert Snowden & Elizabeth Snowden, "Families created through donor insemination" in Ken Daniels & Erica Haimes, eds., *Donor Insemination: International Social Science Perspectives* (Cambridge: Cambridge University Press, 1998) 33 at 39; Kirkman, supra note 538 at 12.
[633] Snowden & Snowden, ibid., at 39.
[634] Snowdon, supra note 556 at 83.
[635] Ibid.
[636] Snowden & Snowden, supra note 632 at 45.

discovered that the women often denied the importance of genes but would (sometimes jokingly) attribute any negative behaviour in their children to traits inherited from the donor.[637]

For some, the language problem was less of a problem depending on the structure of the family. One study of open-identity donor offspring found that the children of single mothers tended to refer to the donor as a donor father or biological father, while children born to lesbian couples most often used the word donor, and children with heterosexual social parents showed no preferences at all.[638] Since a few clinics find that a significant percentage of their prospective recipients are single women or partnered lesbians,[639] this finding may be relevant to embryo donation families as their children get older. Open-identity donor situations in DI are rare, however, since most heterosexual couples do not tell their offspring about their conceptions.[640] In general, women are more likely to support disclosure of gamete recipient status to their children than are men,[641] but lesbian birth mothers are more positive about disclosure than are their co-mothers.[642] There appears to be a pattern of not telling the child about her genetic past to protect the status of the non-genetic parent,[643] fearing the child may reject them if told the truth.[644] Genes, then, still hold powerful sway in these families, and not just with the men who may be embarrassed about the infertility problem which led the family to use DI. Genetic insecurity is not gendered; it seems to be based on worries about exclusive two-parent families in

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[637] Vanfraussen et al, supra note 561 at 2024.
[638] J.E. Scheib, M. Riordan & S. Rubin, "Adolescents with open-identity sperm donors: reports from 12-17 year olds" (2005) 20 Human Reprod. 239 at 244.
[639] Steven R. Lindheim & Mark V. Sauer, "Embryo donation: a programmed approach" (1999) 72 Fertility & Sterility 940 at 941. It seems, however, that most studies have been done on heterosexual couples, and that most media reports cover Snowflakes, which, not surprisingly, has yet to have a lesbian or single woman "adopt" embryos.
[640] Supra note 623.
[641] Brewaeys et al, supra note 623 at 1594; Naomi Cahn, "Children's Interests and Information Disclosure: Who Provided the Egg and Sperm? Or Mommy, Where (and Whom) Do I Come From?" (2000) 2 Geo. J Gender & Law 1 at 15; Susan Caruso Klock, Mary Casey Jacob & Donald Maier, "A comparison of single and married recipients of donor insemination" (1966) 11 Human Reprod. 2554 at 2557.
[642] Brewaeys et al, ibid., at 1596.
[643] Maggie Kirkman, "Parents' contributions to the narrative identity of offspring of donor-assisted conception" (2003) 57 Soc. Sci. Med. 2229 at 2234.
[644] Brewaeys et al, supra note 623 at 1595.

the case of "uneven" genetic relationship to the social parents, where one parent is a genetic relative of the child but the other is not.

The terminology issues, and the fear of the genetic parent "stealing" the affection of the children, are also dealt with in adoptive families, especially those involved in open adoption. Barbara Yngvesson, an adoptive mother in an open adoption, writes about the extreme difficulty of being a mother in circumstances for which no accepted social road map exists.[645] Existing linguistic conventions are ill-designed to accommodate the new types of relationships. Her small study tells the story of birth parents and adoptive parents who struggle to define themselves against each other, always fearful of making the wrong move that might alienate them from the child. Adoptive parents fear the birth mother wanting the child back; birth mothers fear triggering that other fear in the adoptive family, which can lead to termination of all openness, and therefore their connection to the child. Some openness agreements do not survive the stress. Yngvesson's own open adoptive relationship, which she clearly believes in, causes her periodic fears of losing her child to the birth family, and her son can almost mischievously trigger these moments by playing with the language issue.

> ...when I asked my son Finn who had given him the present he had just opened,...he answered (with a glimmer of humor in his eye) 'It's from my Mom, Mom."...I remember the moment, the suddenness with which I felt a stranger to myself, 'not Mom,' with the reminder of this double whose recognition of Finn as 'child' sustains his sense of who he is, as "Finn" who grew in her belly, whom we both had named, whom she entrusted to us, who is 'mine' and 'not mine' at the same time.[646]

The complexity of feeling and of confusion in these stories can be staggering. Still, many of the parties prevail and foster new understandings of family.

While these issues of identity and genetic family do evoke comparisons with the gamete donor literature, the openness construct obviously reminds the reader of Snowflakes. Open

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[645] Barbara Yngvesson, "Negotiating Motherhood: Identity and Difference in 'Open' Adoption" (1997) 31 L & Soc'y Rev 31.

[646] Ibid., at 67. Note that she focusses on the gestational relationship to her son's birth mother, not the genetic one.

information and open-identity adoption, promoted by the "adoption community"[647] and many feminists alike,[648] is the mode of operation for these Christian "embryo adoption" brokers, although that openness can be limited to the parties selecting each other from anonymous profiles.[649] Anyone reading the American media reports of the openness of Snowflakes' "adoptions" would question the raw emotion of Yngvesson's stories; everyone in the Snowflakes universe, it seems, is happy to acknowledge the genetic family and is usually also happy to facilitate ongoing information exchanges between the two sets of families. There are no identity crises or broken-down openness agreements in these "win-win" stories.[650]

The limited foreign media who have covered the Snowflakes phenomenon, however, have not been as rah-rah. A report in the *Globe and Mail* describing the first face to face meeting between the Canadian donors, the Benthams, and the American recipients, the Johnsons, describes some tension on both sides, including awkward pauses in the conversation and the poorly behaved genetic offspring of the Benthams, who will become the poorly-behaved genetic siblings of Zara, the soon-to-be born member of the Johnson's household.[651] Karen Bentham had difficulty coming to terms with the birth of Zara, calling her "my baby" but "not my baby," and it seemed unlikely that her pain would change much over time.[652] Multiple American media

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[647] The preferred term of adoption activists who oppose any anonymity or secrecy in the adoption process, for both past and prospective adoptions. See most of the literature at the Adoption Council of Canada's website, <http://www.adoption.ca/> for examples.

[648] For example, see the works of Drucilla Cornell, "Adoption and Its Progeny: Rethinking Family Law, Gender, and Sexual Difference" in Sally Haslanger and Charlotte Witt, eds., *Adoption Matters: Philosophical and Feminist Essays* (Ithica: Cornell University Press, 2005) 19; Katrysha Bracco, "Patriarchy and the Law of Adoption: Beneath the Best Interests of the Child" (1997) 35 Alta. L. Rev. 1035; Mary Lyndon Shanley, *Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption, and Same-Sex and Unwed Parents* (Boston: Beacon Press, 2001); Rothman, supra note 587.

[649] Openness can mean as little as this, or it can mean full ongoing face-to-face contact between the families: see Cindy L. Baldassi, "The Quest to Access Closed Adoption Files in Canada: Understanding Social Context and Legal Resistance to Change" (2005) 21 Can. J. Fam. L 211 at 218-225 for a discussion of the range of types of openness and the distinction between open adoption and open adoption records.

[650] This is not to say that there has not been acerbic criticism of the "embryo adoption" phenomenon; some of the most pointed barbs are mentioned in Chapter 2, Part II.

[651] Lisa Priest, "Special delivery" *The Globe and Mail* (31 Aug. 2002) F1, F6.

[652] See also Celeste McGovern, "Tangled web of embryo adoption" *The Report* (31 March 2003) 39, which also describes Karen Bentham's second thoughts: "There are times when I think, 'Oh, what have I done?...I don't know how I'll feel eight years from now.'" None of the American media articles report on any second thoughts of Snowflakes' donors.

stories on the Johnsons, however, report blue skies all around, from beginning of the tale until the end;[653] they were one of the families who appeared at the White House in 2005.[654]

Another story in the *London Times*[655] describes an openness agreement that has broken down; the recipient couple has now halted communication with the donor parents, who had wanted regular meetings between the two families. "My sons are the only genetic brothers of this child, I want him to know we didn't just throw him to the wolves...I do feel that I've given a child away." It appears that Snowflakes insistence on the initial parental status of embryo donors does not always hold in the real world. And if the genetic family can be so easily erased from the picture, were those genetic entities described as pre-born children ever really children at all, before they became part of their new families?

To some people yes, to (likely) more people, no. But most women and men directly involved appear to have far more complicated feelings than straight "yes" and "no" answers can represent. This ambivalence is reflected in the behaviour of embryo recipients, some of whom appear to have conflicts about asserting themselves as full parents. These conflicts are not only based on their own beliefs but also on their perceived beliefs of the other parties involved, and of society as a whole. Those latter beliefs are about the fundamental truth of genetic connection, connection that may be contradicted by actual lived experience, which in embryo donation includes gestation, a lengthy biological process far more involving that the other aspects of biological parenthood. The fact that other people believe genes equal parenthood probably makes others question their own feelings, which affect their behaviour as well. It's no wonder we can't determine what people actually think – they think everything under the sun, in all combinations possible. No doubt many people's actual emotions are too complex to be adequately captured by

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[653] For stories about the Johnsons, see Dorinda Bordlee, "Leftover Lives" *National Review Online* (23 May 2005), online: <http://www.nationalreview.com>; Virginia Lynn, "Frozen embryo donation an emerging industry" *Pittsburgh Post-Gazette* (31 July 2005), online: <http://www.post-gazette.com>.

[654] See discussion in Chapter 2, Part II above.

standardized surveys which lack open-ended questions, and which are subject to interpretation by researchers, who may fail to report findings that other readers might consider significant.

Such complexity does not fit well with Snowflakes' stated goals of recognition of the embryo as a pre-born child. Some people completely agree with the basic statement, but they are frequently the ones who think that embryo destruction is the proper way to deal with excess embryos – the exact opposite of what the Christian adoption agency intends. Janet Dolgin has demonstrated how the abortion debate, and now the "status of the embryo" debate, are really about limiting individual choices in how we want to construct our families, attempting to revert to the "traditional" model of family as hierarchical, gendered and status-based. Allowing women the choice to abort goes against this model.[656] It would seem that allowing people the choice of erasing the genetic family also hurts the cause. It can only be a matter of time before the American media love-in with Snowflakes switches to reports of the (almost) inevitable disputed "embryo adoption" case, and a more realistic view of embryo donation breaks up the pro-life message.

In the meantime, the existing message coming from Snowflakes and from the above data on embryo and gamete recipients is not that blastocysts are babies, but that parenthood is not the nuclear, two-parent structure some conservative and religious groups might promote. In promoting tradition, "embryo adoption" advocates have instead reinforced the growing notion that parenthood need not be an exclusive immutable status available to only two people for each child. The fact that embryo donation participants present no unified reality of beliefs reflects a diversity of opinion on the nature of family that can only continue to make waves in the existing discourse on parenthood.

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[655] Stephanie Marsh, "Pre-born in the USA" *Times (London)* (16 Feb. 2006), online: <http://www.timesonline.co.uk>.

[656] Janet L. Dolgin, "Surrounding Embryos: Biology, Ideology and Politics" (2006) 16 Health Matrix 27.

III. Conclusions on Social, Genetic and Gestational Parentage

Both "embryo adoption" and the actual practice of embryo donation demonstrate the power genes hold in our culture. At least nine out of ten people cannot let go of their extra embryos, and it is likely that embryo recipients have the same doubts about the 'truth' of their parental status that both some gamete recipients and adoptive parents feel. Regardless of the success stories that adoption, gamete donation and embryo donation may spawn, there will always be difficulties because of fundamental doubts in some minds about how "real" non-genetic families really are.

Since some people with extra embryos, likely a minority of them, believe that the embryo is a child, they obviously would tend to think of embryo donation as embryo adoption, even if the law thinks differently. It seems, however, that few of these people will ever participate in embryo donation. (Although the Canadian study showed that a subgroup of potential donors was more likely to donate when directed donations and openness were available options, we do not know if that subgroup actually thought their embryos were children.) As we also saw in the Canadian jurisprudence in Chapter 4, adoption, therefore, is still a negative choice even when the "child" has yet to create a pregnancy. As in actual adoption, there is more demand from childless people than there is supply from the fertile.

On the other hand, genes do not always trump other signifiers of family. Some people seem to experience no conflict about the relative importance of genetic connection when contrasted with social families – social families win hands down. This was especially evident in the women who participate in egg donation and surrogacy. Still others think that gestation outweighs genes when the two are compared to each other, especially when coupled with the intent to be the social parent. Given Western societies' default position that genes are parenthood, however, those who believe in social and/or gestational parenting may experience a

reluctance to act on it, because their actions will not always be accepted as they intend them to be – others will still say that family is defined by the blood tie.

Unfortunately, we have no idea what produces this difference of perspectives. There are hints that those who have experienced non-genetic family life are more likely to think of it as "real", but there are indications that some people with their own genetic children also do not think that genes are what family is all about. In the case of embryo donation, it does appear that simply uniting the genes in an embryo changes some people's perspectives on that genetic link, but other still say that the embryos are just "cells." We can only conclude that legal and social structures which support only one set of beliefs about the nature of family and the complexities of embryo donation will fail to garner support from the majority, because there is no one majority opinion.

CHAPTER 6: CONCLUSIONS

The efforts of the anti-abortion movement notwithstanding, embryo donation is not legal adoption, even when participants rely on the trappings of adoption to effect embryo transfer. Not only is there no existing child to care for, when embryo creators believe the embryo is a potential child, the most likely result is destruction rather than donation, a distinctly different ending than one would expect when dealing with a real child. Still, any policy maker must remember that some people will think that embryo donation is an adoption, since they believe their embryos are children. These potential donors sometimes want different rights and protections than would usually be offered in a standard medical donation. Attempts to legislate should encompass this point; unfortunately, the currently-proposed regulations fail to give prospective embryo donors the control they might want over the end result of their donation.

It is clear from this study that embryo donation opens up unique questions not dealt with other areas of reproductive technology or in adoption, although many issues benefit from comparison study with the other situations. Some of these questions create a legal minefield of uncertainty, as discussed in Chapter 4. The obvious difference from the other situations is that the rearing parents have a gestational link with the resulting child, but none of them will share genes with her. The embryos are created with the pre-conception intent to bear and raise a child, unlike in most adoptions, but are passed to the recipient parents based on post-conception intent, as in most adoptions. But feelings on all sides may sometimes be unclear, exactly as in some adoptions.

These similarities and differences have made it both intriguing yet complicated to apply any existing body of feminist work on adoption or reproductive technology to the topic. Embryo donation participants are participating in an alternate discourse about genes and parentage, one that addresses the many feminist critiques of RT use discussed in Chapter 3. The muddled

parentage picture in embryo donation appears to be exactly what feminists who praise the transformative potential of RT have been looking for. It offers reduced focus on genes, gestation as the sole biological link between the resulting child and her legal family, and a multiplicity of ways to actually view the web of relationships that can potentially flow from a successful donation. It can be and is used by single women and lesbian couples to form families, and, for a change, the cost is less out of reach than both other RT techniques and most types of adoption. In general, the donation end seems to be relatively free of exploitation and coercion if the laws of informed consent are followed, quite a bit different from most feminist perceptions of birth mothers and some feminist perceptions of women using RT to become pregnant. No embryo recipient is undergoing the procedure to perpetuate her male partner's genes. However, we might question whether recipients are always making a free choice to undergo RT treatment in the attempt to become a mother, or if they are instead following a sometimes-maligned pronatalist directive that is part of the patriarchal project? No one has asked this question yet. In comparison to egg extraction, we must note that embryo implantation is much less risky to women. If we accept the feminist admonitions against criticizing women who want children but have been unable to produce them in the traditional way, embryo donation may indeed provide one of the better methods to accomplish that goal.

It is unlikely that embryo donation will remain out of the courts forever. Any eventual litigation might not produce such a positive feminist story, although embryo donation offers the unique possibility of focussing on gestational relationships, something Canadian courts have not been very good at when faced with RT cases, as we saw in Chapter 4. However, the existing genetic bias seen in the precedential cases does not exactly bode well for embryo recipients, in that there does seem to be a presumption of "real" parentage in the minds of many judges, and that presumption is not about pregnancy and childbirth. In my opinion, there is little legal justification for awarding full parental rights to the genetic donors of a child born of embryo

donation, but that does not preclude the possibility that partial rights and responsibilities could accrue in certain circumstances, most likely fraud or deception on the part of the embryo recipients.

One of the few clear conclusions to arise out of this project is that adoption is still a much-denigrated family form, despite the fact that a minority of "embryo adoption" proponents present it as the perfect solution to excess embryos for some and childlessness for others. Many RT participants take pains to distinguish their actions from adoption, and courts accept those reasons without close examination. Apparently, no one wants to be seen as taking in "someone else's child" when they planned for the child to be born. Promoters of "embryo adoption" even explain how it is better than actual adoption, since the receiving mother has control over the earliest steps of the child's life, implying a level of risk for parents who cannot do so. Even the progenitors who are most likely to think of embryo donation as adoption mostly refuse to participate. There apparently is still something wrong with "giving away your child" even when the "child" is eight cells in a cryopreservation straw.

Otherwise, this thesis could be summed up by saying that legal parentage in embryo donation is more uncertain than it should be and that social-psychological studies suggest that non-legal parentage is assigned by some to the donors, some to the recipients, and is split amongst the parties by many more. Not exactly conclusive conclusions. It is frustrating to reach the end of a year-long project and reach the finding that much, much more research is necessary, but this may be the unavoidable result when areas as new as embryo donation are explored. The following are the obvious areas of research that should be pursued.

How potential embryo donors feel towards the embryos. No study has directly asked this question, only one has asked if they think they are children, and two more asked related questions, yet those limited results from Belgium and Australia are often cited as indisputable

fact. Respondents need the possibility of open-ended questions to be able to express their beliefs in a useful manner.

How gender differences in beliefs and responses to gamete donation play out in embryo donation. Surveys should involve separate questionnaires for partners, and responses should be tabulated separately and compared. Certain aspects of previous research need further exploration, such as the difference between men and women (and genetic and social parents) when it comes to preferences on information disclosure.

Class. The lower cost of embryo donation when compared to both most other RT procedures and to some adoptions is striking, but it may not be attracting many people who otherwise want to use IVF and/or adoption but cannot afford it. The cost might still be greater than many can afford, especially if several implantation cycles are required. Also, people of different socio-economic backgrounds may very well have different understandings of the importance of genetics, gestation and social parenting. Research on step-families in the United Kingdom suggests that working class people do not subscribe to the "genes are real family" category, although the authors warn the sample was too small to draw many conclusions from.[657] Since RT clinic staff and academic researchers are less likely to be working class themselves, important distinctions may be missed during interviews and data compilation.

Socio-psychological ramifications of severing the genetic parenting tie. We need more study of how people negotiate the terrain of non-genetic parenting, and of how people deal with not parenting the resulting offspring of their genetic procreation. The second is perhaps less understood than the first in North American society, but will be no less important in the

[657] 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.

upcoming decades, as scientific advances and legal changes towards identity disclosure may increase the number of donor offspring who can actually locate their progenitors.[658]

One huge issue not explored in this thesis but which does have some completed research behind it is the perspective of the donor offspring. While no one has studied children born of embryo donation, we know that some donor offspring want more information about their progenitors, and that at least a few want full identity disclosure and face-to-face meetings.[659] It is usually presumed that this is about genetic connection, and indeed, donor offspring speak of wanting to know more about their genetic inheritance and who they look like.[660] The actual percentage of donor children who search is unknown, in part because many do not know the circumstances of their conception. There is some evidence, however, that some who search are spurred on by late and/or accidental disclosure of the genetic truth – either their parents waited until they were adults to inform them of their donor offspring status or they found out through another source.[661] There is a growing belief in the field that not telling a donor child the truth while she is still a child is a mistake that leads to resentment and a lack of trust between the

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[658] Demonstrating the power of multiple modern technologies, a 15-year old found his donor father last year. He provided a sample of his DNA and used online genealogical websites to find two men with whom he shared a Y-chromosome, who also had strikingly similar last names to each other. Using another website to receive the names of all men born on the date of his donor in the same city, he matched surnames and then contacted the one man who fit, who was indeed the donor. Ian Sample, "Teenager finds sperm donor dad on internet," *Guardian* (3 November 2005), online: <http://www.guardian.co.uk>.

[659] About half the DI children in lesbian families wanted more information about their donors, but not all of them wanted to know his identity: K. Vanfraussen, I. Ponjaert-Kristoffersen & A. Brewaeys, "An attempt to reconstruct children's donor concept: a comparison between children's and lesbian parents' attitudes towards donor anonymity" (2001) 16 Human Reprod. 2019. The oldest respondent was only 17, however, so it is very possible this number will change as they get older. See discussion of the few existing studies (one unpublished) in Maggie Kirkman, "Parents' contributions to the narrative identity of offspring of donor-assisted conception" (2003) 57 Soc. Sci. Med. 2229 at 2232.

[660] Vanfraussen et al, ibid.

[661] Naomi Cahn, "Children's Interests and Information Disclosure: Who Provided the Sperm? Or Mommy, Where (and Whom) do I Come From?" (2000) 2 Georgetown J Gender & L 1 at 10. Late disclosure of adoption also seems to lead to more searching: one study showed that people who did not search had been told of their adoptee status at an earlier age than the group who searched for the birth families: Ulrich Müller & Barbara Perry, "Adopted Persons' Search for and Contact with Their Birth Parents I: Who Searches and Why?" (2001) 4:3 Adoption Q. 5 at 22.

offspring and her parents.[662] The fact that some facts were once hidden may given certain people the impetus to discover those that remain hidden.

One of the problems is that RT authors usually rely on the fact that some adoptees want reunion with their birth families as proof that donor offspring will act the same way. Few of these authors appear to be intimately familiar with the actual adoption research. For one, most adoptees do not search. They are also looking for a wide variety of things that have nothing to do with the same issues that children born of donated gametes face: for example, why they were given away.[663] Female adoptees often begin the search after they become pregnant or give birth,[664] suggesting a connection to gestational mothering. A percentage of adoptees who search for their birth parents say they are looking for genetic ties,[665] but this seems to be countered by people's explanations of reunion and the fact that most searchers only want to find their birth mothers, not their birth fathers who contributed 50 per cent of their genes.[666]

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[662] A. McWhinnie, "Should offspring from donated gametes continue to be denied knowledge of their origins and antecedents?" (2001) 16 Human Reprod. 807 at 811. J.E. Scheib, M. Riordan & S. Rubin, "Adolescents with open-identity sperm donors: reports from 12-17 year olds" (2005) 20 Human Reprod. 239, found that children who had "always known" had slightly better relationships with their birth mothers than those who could remember being told, even though the average age at which the latter group found out was only 7: at 243. Learning when an adult appears to have even more serious impact on the family relationships: see A.J. Turner & A. Coyle, "What does it mean to be a donor offspring? The identity experiences of adults conceived by donor insemination and the implications for counselling and therapy" (2000) 15 Human Reprod. 2041; Kirkman, supra note 659; McWhinnie, above, at 812.

[663] See discussion in Melanie Roberts, "Children by Donation: Do They Have a Claim to Their Genetic Parentage?" in Jo Bridgeman & Daniel Monk, eds., *Feminist Perspectives on Child Law* (London: Cavendish Publishing Limited, 2000) 47 at 61; Ruth Deech, "Family Law and Genetics" (1998) 61 Mod. L Rev. 697 at 705; Katherine O'Donovan, " A Right to Know One's Parentage" (1988) 2 Int'l J L & Fam 27 at 42. See John Triseliotis, "Identity Formation and the Adopted Person Revisited" in Amal Treacher & Ilan Katz, eds., *The Dynamics of Adoption* (London: Jessica Kingsley Publishers, 2000) 81 at 93 for a lengthy list of answers given by adoptees to explain their reunion desires; most have nothing to do with genetics; also, Müller & Perry, supra note 661. However, one study of DI children found that almost 11% wanted to know why their genetic father had donated sperm: Scheib et al, supra note 662 at 245. Embryo donation offspring might be more likely to have these types of questions that those whose parents only used one set of donor gamtes.

[664] Karen March, *The Stranger Who Bore Me: Adoptee-Birth Mother Relationships* (Toronto: University of Toronto Press, 1995) at 59, and discussing other such research at 34 and 53.

[665] Triseliotis, ibid.; Linda J. Lacey, "'O Wind, Remind Him that I Have No Child': Infertility and Feminist Jurisprudence" (1998) 5 Mich. J of Gender & L 163 at 187.

[666] Cahn, supra note 661 at 18; Barbara Melosh, *Strangers and Kin: The American Way of Adoption* (Cambridge, MA: Harvard UP, 2002) at 245; Barbara Katz Rothman, *Recreating Motherhood* (New Brunswick, NJ: Rutgers UP, 2000) at 183.

Furthermore, since only a minority of adoptees search for their biological families, the majority who do not search are poorly studied. It is near impossible, therefore, to say whether most adoptees think that their birth parents are parents to them, or what these people think about genes as compared to the adoptees who do search. Since the first children born of surrogacy, egg donation and embryo donation are few in number and have only now reached their early 20s, even less can be divined about their opinions on the matter of parentage, but we cannot simply extrapolate answers from the adoption realm without considering the fundamental situational differences between adoptees and children born of embryo donation. It does seem, however, that the latter group will have fewer reasons to search, since the backstory of embryo donation is rather uniform compared to the reasons people relinquish children for adoption, and since all embryos were created on purpose, not by accident. A detailed examination of the available related research combined with a theoretical review is desperately needed here, since prospective donors obviously are concerned about issues of disclosure and potential reunion. The actual risk of being sought by the resulting child from an anonymous embryo donation may very well be lower than they think.

We could also use a detailed Canadian legal analysis of the question of the rights of the donor offspring, both as a child and as an adult. Unlike adoption, the state is not usually directly involved in selecting recipient parents, and some jurisdictions have very limited regulations on screening recipients. Some commentators believe such laxity is outrageous,[667] while others have more circumscribed concerns.[668] The issue of rights and other legal interests is far from settled, and embryo donation would again provide a unique set of circumstances to consider the variety of questions that can arise in the areas of RT and adoption.

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[667] See Paula J. Manning, "Baby Needs a New Set of Rules: Using Adoption Doctrine to Regulate Embryo Donation" (2004) 5 Geo. J. Gender & L. 677.

[668] Katheryn D. Katz, "Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation" (2003) 18 Wisc. Women's L J 179.

There is no way to know whether the recent attention to embryo donation is a mere media fad, a successful political ploy or a reflection of the deeply-held fascination the general public appears to have with stories of non-genetic families. Likely, all three come into play. As embryo donation continues into its third decade, consensus on its nature is nowhere on the horizon. Opinions on embryo donation will continue to be affected by opinions on other RT and family law issues, such as non-traditional families and the ongoing experiments with open adoption. The hegemony of the gene will not disappear any time soon, if ever, and certainly will not wane solely because of embryo donation. But embryo donation may eventually become just one more model for the successful non-genetic family, if continued practice can survive the bias against such entities.

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