

**Ministry of Attorney General
Justice Services Branch
Civil and Family Law Policy Office**

Family Relations Act Review

Chapter 10

Defining Legal Parenthood

Discussion Paper

**Prepared by the Civil and Family Law Policy
Office**

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This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* or other laws should seek legal advice from a lawyer.

TABLE OF CONTENTS

SETTING THE SCENE.....	1
DISCUSSION.....	2
PART A – A CHILD’S PARENTAGE AT BIRTH.....	2
<i>Discussion Point (1) – Who is a Child’s Mother?</i>	<i>2</i>
<i>Discussion Point (2) – Who is a Child’s Other Legal Parent?</i>	<i>3</i>
<i>Discussion Point (3) – What is the Status of Donors?.....</i>	<i>5</i>
<i>Discussion Point (4) – How Many Legal Parents May a Child Have?.....</i>	<i>6</i>
PART B – SURROGACY	7
<i>Discussion Point (5) – Surrogacy Arrangements.....</i>	<i>7</i>
PART C – INFORMATION AND PRIVACY	10
<i>Discussion Point (6) –Information about Genetic Identity.....</i>	<i>10</i>
PART D – GENERAL FEEDBACK	11
ENDNOTES	12

SETTING THE SCENE

This paper focuses on the law used in British Columbia to determine who is a child's legal parent.

It does not examine issues related to parental roles and responsibilities after separation (custody, access and guardianship): those issues are covered in [Chapter 6 of this Review](#).

Legal parentage is not the same as guardianship. Legal parentage is fundamental to establishing a person's identity, including family name; nationality and cultural heritage; family relationships; and inheritance rights. The legal rights and responsibilities flowing from guardianship are less extensive. For example, inheritance rights do not flow from guardianship. Also, while legal parentage establishes a permanent parent-child relationship, guardianship ends when the child reaches adulthood (age 19 in B.C.).

In British Columbia, s. 61 of the *Law and Equity Act* says that, subject to the *Adoption Act*¹ and the *Family Relations Act*,² "a person is the child of his or her natural parents."³ The *Family Relations Act* deals with determining parentage only when it is disputed in a child support case.⁴ There is no general authority in the *Family Relations Act* for judges to make declarations of legal parentage.

Section 1 of the *Family Relations Act* does include a definition of "parent."⁵ However, its purpose is not to determine legal parentage, but to expand the meaning of "parent" for the purposes of the Act, to include people who are not a child's legal parents, but who have taken on a parenting role. This makes it possible to allocate responsibility for the care and support of a child to people who have assumed a parenting role, even though they are not the child's legal parents. Throughout this paper, "legal parent" or "legal parentage" is distinguished from the broader use of "parent" in the *Family Relations Act*.

Family laws in most provinces and territories have more comprehensive provisions for determining a child's legal parentage than British Columbia's law does.⁶

All provinces and territories, including B.C., also have vital statistics laws that govern how births are recorded.⁷ But these laws merely provide for a record of legal parentage, not a determination of who those parents are.

Assisted reproduction, which includes artificial insemination and *in vitro* fertilization, complicates the matter. Now it is possible for more than two people to be involved in the conception and birth of a child. This raises the potential for competing claims of legal parentage based on biology (by the woman who gives birth); genetics (by the person who contributes egg or sperm); and intention (by the person who intends to raise the child). British Columbia's current laws do not address these issues. This is a problem not only in B.C., but to varying degrees across Canada and in other countries.

B.C.'s obligations under the United Nations *Convention on the Rights of the Child*, which Canada signed in 1991, include:

- protecting children from discrimination;
- recognizing that children's best interests are a primary consideration in matters concerning children; and
- ensuring that the status of the parent-child relationship is protected from birth.⁸

The law can best protect the parent-child relationship through a legal framework that provides clarity and certainty of legal parentage for all children at the earliest possible time. All children born in British Columbia are entitled to equal treatment regardless of the circumstances of their conception and birth. They all should have the benefit of the stability and certainty about their family relationships that could be provided by clear rules for determining legal parentage at birth.

In 1992, the Uniform Law Conference of Canada⁹ adopted the *Uniform Child Status Act*.¹⁰ This uniform act includes provisions for determining legal parentage where assisted reproduction is used and the birth mother and her husband (or male partner) intend to be the child's parents. It does not deal with how to determine legal parentage where the birth mother is in a same-sex relationship, or where a child is born as a result of a surrogacy arrangement.

Alberta, Quebec, Newfoundland and Labrador, and the Yukon are the only places in Canada with laws that deal specifically with the legal parentage of children born as a result of assisted reproduction. Only Alberta and Quebec have provisions dealing with the legal parentage of children born to same-sex couples, and with surrogacy.

In 2004, Parliament passed the *Assisted Human Reproduction Act* to regulate assisted reproduction and related research. It begins with a set of principles that include:

- the health and well-being of children must be given priority in all decisions regarding the use of assisted reproduction;
- the health and well-being of women must be protected in the use of assisted reproduction; and
- trade in reproductive capabilities and the commercial exploitation of children, women and men raise health and ethical concerns that justify their prohibition.¹¹

This federal law prohibits payment for surrogacy, and sets the minimum age for a woman to act as a surrogate at 21 and for a person to donate genetic material (eggs or sperm) at 18. It also has provisions not yet in effect that would require a donor's consent before the donor's genetic material is used and would deal with privacy and access to information.¹²

This paper is divided into four sections. The first discusses general rules for determining who a child's legal parents are at birth; the second covers some issues related specifically to surrogacy arrangements; and the third discusses access to information. The final section asks you to identify any issues not covered in the paper that you think should be considered. Once you have read the paper, use the feedback form to send us your responses. The feedback form includes all of the questions posed in this paper.

If you wish to see any of the laws referred to in this paper, please use the following link to [Legislation](#).

DISCUSSION

PART A – A CHILD'S PARENTAGE AT BIRTH

The markers of parentage are biology, genetics, and intention to parent. The challenge in developing a scheme for determining legal parentage that works for both natural and assisted reproduction is to find the appropriate balance among the three markers of parentage so as to meet children's best interests and foster stable family relationships.

Discussion Point (1) – Who is a Child's Mother?

Under B.C.'s *Law and Equity Act*,¹³ the woman who gives birth to a child—the "natural" mother—is the child's legal mother. The act of giving birth establishes a biological connection between mother and child. Until relatively recently, the birth mother has always been both the child's biological and genetic parent. However, advances in assisted reproduction mean that the woman who provides the egg need no longer be the same woman who carries and gives birth to the child. In such cases, who is the child's legal mother?

The Uniform Law Conference of Canada's 1992 uniform act says that a woman who gives birth to a child as a result of assisted reproduction is deemed to be the child's mother, whether or not she is the genetic mother—that is, whether or not her egg is used to conceive the child.¹⁴ In Alberta's family law, "mother" is defined as a woman who gives birth to a child, except in adoption and certain surrogacy cases.¹⁵ It does not say that the birth mother's egg must have been used in the child's conception. New Zealand's law says specifically that the birth mother is the child's legal mother, even if the egg used to conceive the child was donated by another woman.¹⁶

The traditional exception to the rule that the birth mother is the legal mother has been adoption, where the birth mother consents to give up her parental rights. The effect of an adoption order is that the adoptive parent becomes the child's legal parent and the birth mother's status as the child's legal parent ends. In places that have laws covering surrogacy, surrogacy may be another exception to the general rule that the birth mother is the child's legal mother. This is discussed in Part B.

QUESTIONS

- 1a. Should the general rule be that a woman who gives birth to a child is the child's legal mother, whether the child is conceived using that woman's egg or a donor's egg? Why or why not?
- 1b. If no, what would you propose as a general rule?

Discussion Point (2) – Who is a Child's Other Legal Parent?

Presumptions of Parentage

Under the *Law and Equity Act*, a child's biological ("natural") father is his or her other parent.¹⁷ Of course proving the identity of a father is more difficult than proving who is the birth mother. The biological link between father and child cannot be observed in the same way as between a birth mother and her child. To deal with this problem, before DNA testing, the law created presumptions as a way of determining paternity. The presumptions are based on a man's relationship to the birth mother.

The family laws in most provinces and territories presume that the birth mother's husband (or male partner) is the child's other parent. That presumption may be rebutted by proof that another man is the father, for example by using a DNA test.

The *Family Relations Act* also contains presumptions of paternity, but they apply only to disputes about legal parentage in child support claims. The *Family Relations Act* says:

- 95 (1) If a male person denies responsibility under section 88 (1) [obligation of parents to support their children] on the basis that he is not the father of the child, the court must, unless the contrary is proved on a balance of probabilities, presume that the male person is the father of the child in any one of the following circumstances:
- (a) the person is married to the mother of the child at the time of the birth of the child;
 - (b) the person was married to the mother of the child and the marriage was terminated
 - (i) by death of the person or judgment of nullity within 300 days before the birth of the child, or
 - (ii) by divorce if the decree nisi was granted or the divorce took effect within 300 days before the birth of the child;
 - (c) the person marries the mother of the child after the birth of the child and acknowledges that he is the natural father;

- (d) the person was cohabiting with the mother of the child in a relationship of some permanence at the time of the birth of the child, or the child is born within 300 days after the person and the mother ceased to cohabit;
- (e) the person has been found or recognized in his lifetime by a court of competent jurisdiction in Canada to be the father of the child;
- (f) the person has acknowledged paternity of the child by having signed a statement under section 3 of the *Vital Statistics Act*;
- (g) the person has acknowledged paternity of the child by having signed an agreement under section 20 of the *Child Paternity and Support Act*, R.S.BC 1979, c. 49.¹⁸

Originally, presumptions of paternity applied only to a birth mother's husband. In many places, including B.C., they were later extended to include an unmarried birth mother's male partner. In some places, there are now presumptions that apply where a child is born as a result of assisted reproduction. As in other paternity cases, the presumption of fatherhood is based on the relationship between the man and the birth mother. The difference is that the link between father and child is not a presumed genetic connection--because where a donor's sperm is used there will be no such connection. Rather, the link is the intention of the birth mother's male partner to be the child's parent.

For example, where a donor's sperm is used, the *Uniform Child Status Act* presumes that the birth mother's husband (or male partner) is the legal father. To rebut this presumption of paternity, her husband (or male partner) must prove not only that he is not the child's genetic father but also that he did not consent to be the father, or that before conception he withdrew his consent. Or, where the presumed father's sperm was used in the assisted conception, that he did not consent to be the father, or before conception he withdrew his consent, and the child was not conceived as a result of sexual intercourse between him and the birth mother.¹⁹

The law in Newfoundland and Labrador says that if a child is born as a result of assisted reproduction using the sperm of the birth mother's husband or male partner, that man is the child's legal father, even if his sperm was mixed with another man's sperm. If only another man's sperm is used:

- the birth mother's husband is considered to be the child's legal father if he consented in advance to the use of assisted reproduction; or
- if the couple is not married, the birth mother's male partner is considered to be the child's legal father if he consented in advance to the use of assisted reproduction, unless he proves that he did not consent to assume the responsibilities of parenthood.

However, even if the husband or male partner did not consent to the use of assisted reproduction (and to assume the responsibilities of parenthood, in the case of an unmarried male partner), he will still be considered to be the child's legal father if he demonstrated a "settled intention" to treat the child as his child, unless he proves that he did not know that the child was conceived by means of assisted reproduction.²⁰ The Yukon has similar provisions in its law.²¹

These laws do not cover the situation of a child born to a female couple.

In 2005, Alberta changed its family law to say that a man is the father of a child if the man is the spouse of the birth mother (or in an interdependent relationship of some permanence with her) and

- his sperm is used in the assisted reproduction, or
- his sperm is not used but he consented before conception to be the child's parent.²²

This provision was successfully challenged as discriminatory because in cases where donated sperm was used, it applied only to the male partner of a birth mother and not to a female

partner. As a result of the challenge, the provision now applies to a birth mother's female partner as well, which means that if a woman is the spouse of the birth mother (or in an interdependent relationship of some permanence with her) , she is the child's parent if, before conception, she consented to be the child's parent. The judge ruled that the provision be interpreted as saying:

A person is the parent of the resulting child if at the time of an assisted conception the person was the spouse of or in a relationship of interdependence of some permanence with the female person and

(a) his sperm was used in the assisted conception even if it was mixed with the sperm of another male person, or

(b) the person's sperm was not used in the assisted conception, but the person consented in advance of the conception to being a parent of the resulting child.²³

In Quebec, a presumption of legal parentage applies both to same-sex female couples and opposite-sex couples if a child is born as a result of assisted reproduction. The married or civil union spouse (as defined in Quebec law) of the birth mother is presumed to be child's other parent.²⁴ New Zealand's law also applies presumptions of parentage both to opposite-sex couples and female couples.²⁵

In British Columbia, as a result of a Human Rights Tribunal decision in 2001, the Vital Statistics Agency changed its birth registration form so that a birth to either an opposite-sex couple or a female couple may be registered naming the birth mother as the child's mother and her spouse of either sex, whether married or not, as the child's co-parent.²⁶ As of June 1, 2007, the Vital Statistics Agency had registered 134 births to female couples.

In Ontario, a judge recently ruled that a birth mother's female partner was entitled to register as the child's other parent.²⁷ As a result, Ontario has changed its Vital Statistics Regulation to specifically allow a birth mother's female partner to register as the child's other parent in cases where the child was conceived using assisted reproduction and the genetic father (the sperm donor) is unknown.²⁸

Since these presumptions flow from a person's relationship to the child's birth mother, they do not apply to male couples. Determining a child's legal parentage in the case of male couples is discussed in Part B.

QUESTIONS

2. Should the presumption of paternity in the *Family Relations Act* apply generally, not just to paternity disputes in claims for child support? Why or why not?
- 3a. Should a presumption of paternity apply if a child is born to an opposite-sex couple as a result of assisted reproduction? Why or why not?
- 3b. If yes, what should it say?
- 4a. Should a presumption of parentage apply if a child is born to a female couple as a result of assisted reproduction? Why or why not?
- 4b. If yes, what should it say?
5. If assisted reproduction is used, in what circumstances, if any, should a birth mother's spouse be able to rebut the presumption of paternity or parentage?

Discussion Point (3) – What is the Status of Donors?

Currently in British Columbia, there is no clear legal relationship among the children born as a result of assisted reproduction, donors of genetic material, and the children's intended parents. While B.C.'s Vital Statistics Agency accepts birth registration forms naming a birth mother's

spouse or partner (opposite-sex or same-sex) as the child's parent, this does not determine the legal relationship between the child and that person because it does not extinguish any parental rights that the sperm or egg donor, who is genetically related to the child, may have. Nor does it establish a legal parent-child relationship between the child and a co-parent who is not biologically or genetically related to the child.

Generally speaking, donors do not intend to assume the responsibilities of a legal parent. They donate eggs or sperm to enable others to have children. Laws for determining legal parentage when assisted reproduction is used have recognized this by providing that a donor of genetic material is not a child's legal parent.

The *Uniform Child Status Act* says,

- (1) A woman whose egg is used in an assisted conception and who does not give birth to the child conceived using her egg, is deemed not to be the mother of the child.
- (2) A man whose sperm is used in an assisted conception and who is not presumed to be the father of a child pursuant to section 9 [presumptions of paternity] is deemed not to be the father of the child.²⁹

Alberta's law says that a sperm donor who is not the spouse of the birth mother (or in a relationship of interdependence of some permanence with her), "is not the father of the resulting child and acquires no parental or guardianship rights or responsibilities of any kind as a result of the use of his sperm"³⁰ It does not have a similar provision for egg donors. Quebec's law says that contributing genetic material does not create a legal parent-child relationship between the donor and the child.³¹

The issue of access to identifying information about donors is discussed in Part C.

QUESTIONS

6. Should a woman who donates her egg but who does not give birth to the child have any parental rights and obligations to the child based solely on the fact of the donation? Why or why not?
7. Should a man who donates his sperm have any parental rights and obligations to the child based solely on the fact of the donation? Why or why not?

Discussion Point (4) – How Many Legal Parents May a Child Have?

The law in British Columbia has only ever recognized a maximum of two legal parents for a child. The *Law and Equity Act* says that a person is the child of his or her natural parents:³² when this law was written, these were assumed to be the biological mother and father. Adoption allows for other legal parents, but it extinguishes the child's legal relationship with his or her birth parents. The *Adoption Act* also limits the number of people who can adopt a child to a maximum of two.³³ Under the *Family Relations Act*, it is possible for more than two people to be defined as parents for the purposes of the Act, by taking on a parenting role in relation to a child. But those people do not become legal parents simply by taking on that role.

In a 2005 report, the New Zealand Law Commission considered whether it should be possible for a child to have more than two legal parents. The Commission said that while having more than two legal parents may mean a greater potential for conflict, this was not a sufficient reason to limit the number of parents to two. It noted that there were no restrictions on the number of guardians that could be appointed for a child. The Commission agreed that if relationships break down it could be more difficult to sort out parenting issues if there were more than two parents, but noted that judges already deal with similar problems when step-families separate. The Commission also observed that it is not uncommon for children to have a number of parental figures in their lives, for example through step-parenting. It found that the argument that

children with three parents would have an unfair advantage was not a valid concern because there are already great differences between children's circumstances based on their parents' resources, the involvement of extended family in their parenting and care arrangements, and the quality of parenting.³⁴

The Commission proposed a two-stage process for a donor of genetic material to become a legal parent if the donor and the couple who would be the child's legal parents agreed that the donor would also be a legal parent and raise the child jointly with them:

1. Before conception the couple and the donor would file with the court:
 - a sworn statement by the woman and her partner that the donor will be the child's genetic parent and that they want the donor to be a legal parent, along with a sworn statement from the donor that he or she will be the child's genetic parent and wants to be a legal parent;
 - evidence that all of them received independent legal advice, as well as counselling about issues raised by their planned family; and
 - an agreement between the couple and the donor about contact between the donor and the child or the role of the donor in the child's upbringing.

If satisfied that the evidence is in order, a Family Court registrar would give interim approval to the appointment of the donor as a legal parent.

2. After the child's birth, with proof of the donor's genetic parentage, the registrar would approve the appointment. The donor would then be allowed to be registered with the Registrar-General of Births, Deaths and Marriages, along with the couple, as a legal parent.³⁵

The government of New Zealand has not adopted this recommendation.

However, as a result of a recent decision by the Ontario Court of Appeal, a child in Ontario now has three legal parents. In that case, a female couple in a long-term relationship decided to have a child using sperm donated by a male friend. The two women were to be the child's primary caregivers, but they believed that it would be in the child's interests for the sperm donor to remain involved in the child's life. When the child was born, the birth mother and the sperm donor were registered as the child's parents. The birth mother's partner applied for a declaration that she was also the child's mother. The Court of Appeal stated that it would be contrary to the child's best interests to deprive him of the legal recognition of the parentage of one of his mothers. But if the mothers applied for an adoption order, that would mean extinguishing the parentage of the father, which also would not be in the child's best interests. So, the Court of Appeal declared the birth mother's partner to be a mother of the child. As a result, the child has two legal mothers and a legal father.³⁶

QUESTIONS

- 8a. Should it be possible for a child to have more than two legal parents? Why or why not?
- 8b. If yes, in what circumstances should it be possible?

PART B – SURROGACY

Discussion Point (5) – Surrogacy Arrangements

Surrogacy refers to an arrangement between a couple (or an individual) and a woman who agrees to carry and give birth to a child and then give the child to them to raise from birth, as parents. The child is conceived using assisted reproduction, and usually using genetic material provided by one or both of the intended parents. But both egg and sperm could be donated by

third parties. Sometimes the woman who agrees to carry and give birth to the child is also the egg donor. While at least one of the intended parents is usually genetically related to the child, neither will ever be the child's birth mother. This means that some special rules are needed for determining legal parentage of a child born as a result of a surrogacy arrangement.

In some ways, surrogacy is like adoption: after the child's birth, the birth mother gives the child to other people to raise, as the child's parents, and gives up her legal status as a parent. However, in other ways it is quite different, including:

- the intended parents' role: the child would never have been conceived or born but for the efforts of the intended parents who initiated the surrogacy arrangement;
- timing: the planning for the surrogacy arrangement is done before conception;
- intention: the woman who carries and gives birth to the child never intends to be the child's parent, while the intended parents have that intention from before conception; and
- genetics: in most cases, at least one of the intended parents has a genetic link to the child.

In 1985, the Ontario Law Reform Commission supported the use of surrogacy agreements and recommended establishing a scheme to regulate them.³⁷ A 1989 task force report of the B.C. Branch of the Canadian Bar Association recommended that surrogacy arrangements should not be specifically prohibited, but should not be enforceable against the birth mother. It also recommended that payment to the birth mother or third parties should be prohibited. The report stated, "This recommendation purports neither to prohibit, nor to encourage surrogacy agreements, but to acknowledge their existence and provide an appropriate legal response."³⁸

In 1993, the Canadian Royal Commission on New Reproductive Technologies recommended prohibiting commercial surrogacy (paying a woman to carry and give birth to a child for other people, or paying an intermediary to arrange for such a service). It also recommended that non-commercial surrogacy arrangements (where the woman receives no payment, but can be reimbursed for reasonable expenses) not be enforceable against the birth mother.³⁹ In a December 2001 report, the House of Commons Standing Committee on Health agreed that commercial surrogacy should be prohibited and felt that non-commercial arrangements should be discouraged.⁴⁰ In 2004, Parliament passed the *Assisted Human Reproduction Act* to regulate assisted reproduction and related research.⁴¹ This law prohibits commercial surrogacy, but leaves it to each province and territory to decide how to treat non-commercial surrogacy.⁴²

Under Quebec law, surrogacy agreements are void, which means that the law does not recognize them.⁴³ So, there are no special provisions for determining the parentage of a child born as a result of a surrogacy arrangement. This means that in Quebec, if a couple makes an arrangement with a woman to carry and give birth to a child that they will raise from birth, the birth mother will be the child's legal mother, even though that was not her intention. It is not clear whether the intended parents would be able to adopt the child to become the child's legal parents.

Surrogacy agreements are unenforceable in Alberta. This means that if a woman who gives birth to a child under a surrogacy arrangement changes her mind and decides to keep the child, the intended parents cannot rely on the surrogacy arrangement to compel the woman to give them the child.

In surrogacy arrangements in Alberta, if the intended mother provides the egg used to conceive the child, and the woman who carries and gives birth to the child consents after the child's birth, a judge must declare the woman who provided the egg to be the legal mother of the child from birth.⁴⁴ Once she is declared to be the mother, her husband (or male partner) can be presumed to be the father, using the presumptions of parentage in Alberta's law.⁴⁵

Alberta's family law does not have special provisions for determining legal parentage if the intended father provides the sperm used to conceive the child and a third party donates the egg, or if third parties donate both egg and sperm. In those cases, the woman who carries and gives birth to the child would be the legal mother. It seems that legal parentage could only be transferred to the intended parents through adoption.

Elsewhere, some different approaches are used, for example:⁴⁶

- Before conception, the intended parents get a judge's approval of the surrogacy arrangement in order to be recognized as the child's legal parents after birth.
- The intended parents, along with the woman who carried and gave birth to the child, and her husband, sign a voluntary acknowledgement that the intended parents are the child's parents. This allows the intended parents to be registered as legal parents on the child's birth certificate.
- After the child's birth, the intended parents apply for a court order to acquire the status of legal parents.

In all three approaches at least one of the intended parents must be genetically related to the child.

Children are born in British Columbia as a result of surrogacy arrangements. The first court ruling in a case involving a surrogacy arrangement was made in 2003. In that case, the intended parents provided the egg and sperm and the embryo was implanted in a second woman who had agreed to carry and give birth to the child for the couple. The intended parents applied to court for a declaration that they were the child's legal parents, because the Vital Statistics Agency would not register them as the mother and father. They could have applied to adopt the child but felt that adoption was inappropriate because they were the child's genetic and intended parents. Since there is no statutory authority for judges to make declarations of legal parentage in these circumstances, the judge used the *parens patriae* authority (a power that superior court judges have to make decisions in a child's best interests) to declare that the intended parents were the child's legal parents. Based on this declaration of legal parentage, the intended parents were able to register the child's birth with the Vital Statistics Agency naming themselves as mother and father. By that time the child was two years old.⁴⁷

Since then, the Vital Statistics Agency has registered intended parents as legal parents in 26 births resulting from surrogacy arrangements. The intended parents apply to court for a declaration of legal parentage after the birth. Using the *parens patriae* authority, a judge makes the declaration based on evidence in an affidavit filed by the woman who gave birth to the child (a sworn statement that includes her consent to give up parentage of the child) and by at least one of the intended parents. Then, based on the declaration of legal parentage, the Vital Statistics Agency registers the intended parents as the child's parents. In all cases so far, at least one of the intended parents has been genetically related to the child.

QUESTIONS

9. Should surrogacy arrangements be enforceable? Why or why not?

10a. Should intended parents be able to acquire legal parentage [check all that apply]

- automatically, if certain requirements are met;
- by applying to court for a declaration of parentage;
- other [please specify]:_____.

10b. If you chose "automatically, if certain requirements are met", what should the requirements be [check all that apply]:

- evidence of pre-conception intention – for example, before conception, participants declare in writing their intention and their role in the surrogacy arrangement;
- evidence of birth mother's consent after birth – for example, after the birth, the woman who gave birth to the child under the surrogacy arrangement consents in writing to give up her parental rights and to give the child to the intended parents to raise as the child's parents;
- evidence that the child is living with the intended parents;
- other [please specify]: _____.

11a. Should the process for intended parents to acquire legal parentage be different if neither of them is genetically related to the child; that is, if both egg and sperm are donated by other people? Why or why not?

11b. If yes, what should that process be?

PART C – INFORMATION AND PRIVACY

Discussion Point (6) – Information about Genetic Identity

The importance of genetic lineage to a child's sense of identity is increasingly being recognized internationally.⁴⁸ The concerns of people born as a result of donated genetic material are similar to those expressed by people who were adopted under closed adoption schemes. Many who were adopted or conceived with donated genetic material express a need to know their birth origins for many reasons, including to allow them to fill a gap in their sense of identity; to help them compile a complete medical history; and to help them avoid intimate relationships with people to whom they are closely genetically related, such as half-siblings.⁴⁹

On the other side of the debate are concerns about the effect on donors' privacy of disclosing identifying information. However, since donation is a voluntary act, prospective donors may always maintain their privacy by choosing not to donate. While this could lead to shortages of donated genetic material, it is not a certainty. Some studies have shown that while donations decreased initially when schemes for disclosing identifying information about donors were introduced, the number of donations eventually rebounded.⁵⁰

Canadian adoption laws have varying degrees of openness about disclosure of identifying information. More than 10 years ago, B.C.'s *Adoption Act* was changed to make it easier for birth parents and people adopted in British Columbia to get identifying information about each other. At age 19, people who were adopted in B.C. may apply to the Vital Statistics Agency for a copy of their original birth registration, including the names of any birth parents on record, and a copy of their adoption order. To honour past promises of confidentiality, for adoptions that took place before November 1996, adopted children and birth parents who wish to maintain confidentiality may file a disclosure veto. If they do, the Vital Statistics Agency cannot release any information on the birth registration or in the adoption order that identifies the person who filed the disclosure veto. People who were adopted after that time may file a no-contact declaration any time after their 18th birthday. Birth parents may file a no-contact declaration at any time. A no-contact declaration allows the release of birth registration and adoption order information but prohibits personal contact with the person who filed the declaration. The maximum penalty for breaching a no-contact declaration is a \$10, 000 fine and 6 months in jail.⁵¹

The federal *Assisted Human Reproduction Act* has provisions (not yet in effect) for establishing a personal health information registry to be maintained by the Assisted Human Reproduction Agency of Canada. It will keep health reporting information about donors, people who have undergone assisted reproduction, and children conceived using assisted reproduction. The

definition of “health reporting information” will be set out in regulations that have not yet been made.⁵² This information will be confidential and may only be disclosed with the consent of the person to whom it relates, except in certain circumstances. Two exceptions are:

- If the person who receives the genetic material, or a person conceived using it, or his or her descendants, requests information about the donor, the Agency must disclose the donor’s health reporting information. However, the identity of the donor—or information that can reasonably be expected to be used to identify the donor—must not be disclosed without the donor’s written consent;⁵³ and
- Two people, one or both of whom were conceived using assisted reproduction, and who think they may be genetically related, may apply to the Agency. The Agency must tell them whether it has information that they are genetically related and if so, the nature of the relationship.⁵⁴

In view of the importance of information about their donors to people conceived using assisted reproduction, protecting a donor’s identity in this way seems at odds with the first of the principles set out in the federal law: “the health and well-being of children born through the application of assisted human reproductive technologies must be given priority in all decisions respecting their use.”⁵⁵ Some other countries, such as Australia, New Zealand and England have put systems in place for releasing identifying information about donors of genetic material.⁵⁶

QUESTIONS

12. What information about their donors should people born as a result of donated genetic material be entitled to receive?

PART D – GENERAL FEEDBACK

QUESTIONS

13. Are there issues related to legal parentage not covered in this paper that you would like to raise?

Please provide your [feedback](#).

ENDNOTES

¹ *Adoption Act*, R.S.B.C. 1996, c. 5 [B.C. A.A.].

² *Family Relations Act*, R.S.B.C. 1996, c. 128 [B.C. F.R.A.].

³ *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 61(1)(a) [B.C. L.E.A.].

⁴ B.C. F.R.A., *supra* note 2, ss. 94, 95, 95.1.

⁵ “parent” **includes**

(a) a guardian or guardian of the person of the child, or

(b) a stepparent of the child if

(i) the stepparent contributed to the support and maintenance of the child for at least one year, and

(ii) the proceeding under this Act by or against the stepparent is commenced within one year after the date the stepparent last contributed to the support and maintenance of the child [emphasis added].

⁶ *Family Law Act*, S.A. 2003, c. F-4.5, Part 1 [Alberta F.L.A.]; *Children's Law Act, 1997*, S.S. 1997, c. C-8.2, Part VI [Saskatchewan C.L.A.]; *Family Maintenance Act*, C.C.S.M. c. F20, Part II [Manitoba F.M.A.]; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, Parts I and II [Ontario C.L.R.A.]; *Civil Code of Quebec*, S.Q. 1991, c. 64, Book 2, Title 2 [Quebec C.C.]; *Child Status Act*, R.S.P.E.I. 1988, c. C-6 [P.E.I. C.S.A.]; *Children's Law Act*, R.S.N.L. 1990, c. C-13, Parts I and II [Newfoundland & Labrador C.L.A.]; *Children's Act*, R.S.Y. 2002, c. 31, Part 1 [Yukon C.A.]; *Children's Law Act*, S.N.W.T. 1997, c. 14, Parts I and II [N.W.T. C.L.A.]; *Children's Law Act (Nunavut)*, S.N.W.T. 1997, c. 14, Parts I and II [Nunavut C.L.A.].

⁷ See, for example, *Vital Statistics Act*, R.S.B.C. 1996, c. 479.

⁸ *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, arts. 2, 3, 7.

⁹ The Uniform Law Conference of Canada considers both criminal and civil law issues. Its Civil Section is made up of government policy lawyers and analysts, private lawyers and law reformers who examine areas of the law in which the provinces and territories could benefit from harmonization. It develops uniform acts on many different subjects which provinces and territories may choose to follow when developing their own statutes.

¹⁰ Uniform Law Conference of Canada, *Uniform Child Status Act*, online: Uniform Law Conference of Canada <<http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1u9>> (last accessed May 8, 2007) [Uniform C.S.A.].

¹¹ *Assisted Human Reproduction Act*, S.C. 2004, c.2, s. 2 [Canada A.H.R.A.].

¹² *Ibid.*, ss. 6, 8, 9, 14-19.

¹³ B.C. L.E.A., *supra* note 3.

¹⁴ Uniform C.S.A., *supra* note 10, s. 11.3.

¹⁵ Alberta F.L.A., *supra* note 6, s. 1.

¹⁶ *Status of Children Act 1969* (N.Z.) 1969/18, as am. by *Status of Children Amendment Act 2004* (N.Z.) 2004/91, s. 17 [New Zealand S.C.A.].

¹⁷ Before assisted reproduction became available, a man would have been both the child's biological and genetic father. However, using assisted reproduction means that there is no biological connection (that is, the child is not conceived through sexual intercourse with the birth mother) and there may or may not be a genetic connection between the man and the child, depending on whether the man's sperm is used or a donor's sperm is used to conceive the child.

¹⁸ B.C. F.R.A., *supra* note 2, s. 95(1).

¹⁹ Uniform C.S.A., *supra* note 10, s. 11.2.

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- ²⁰ Newfoundland and Labrador C.L.A., *supra* note 6, s. 12.
- ²¹ Yukon C.A., *supra* note 6, s. 13.
- ²² Alberta F.L.A., *supra* note 6, ss. 1, 13 (2).
- ²³ *Fraess v. Alberta (Minister of Justice and Attorney General)*, [2005] A.J. No. 1665 (Q.B.).
- ²⁴ Quebec C.C., *supra* note 6, art. 538.3.
- ²⁵ New Zealand S.C.A., *supra* note 16, s. 18.
- ²⁶ *Gill & Maher et al. v. Ministry of Health*, 2001 BCHRT 34. This case involved complaints of discrimination flowing from the Vital Statistics Agency's refusal to register the birth mother's female spouse as the child's other parent. The Human Rights Tribunal ruled that the Vital Statistics Agency had discriminated against the same-sex couples on the basis of sex, sexual orientation and family status and against the children on the same grounds by denying them the right to have both their parents named on the birth registration.
- ²⁷ *M.D.R. v. Ontario (Deputy Registrar General)*, [2006] O.J. No. 2268 (S.C.J.). This case involved several lesbian couples with children conceived through anonymous donor insemination. In all cases, the Deputy Registrar General of Vital Statistics had refused to register the birth mother's partner as a parent along with birth mother on children's birth certificates. The judge ruled that the birth registration provisions of the Ontario *Vital Statistics Act* were invalid because they discriminated against the co-parents on the basis of sex, contrary to the *Charter of Rights and Freedoms*.
- ²⁸ *General*, R.R.O. 1990, Reg.1094 (1 of 3), s. 2.
- ²⁹ Uniform C.S.A., *supra* note 10, s. 11.4.
- ³⁰ Alberta F.L.A., *supra* note 6, s. 13(3).
- ³¹ Quebec C.C., *supra* note 6, art. 538.2.
- ³² B.C. L.E.A., *supra* note 3.
- ³³ B.C. A.A., *supra* note 1, ss. 5, 29, 37.
- ³⁴ New Zealand Law Commission, "New Issues in Legal Parenthood" (April 2005) NZLC R 88 at 70-72, online: New Zealand Law Commission <http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_91_315_R88.pdf> (last accessed June 21, 2007) [New Zealand Law Commission].
- ³⁵ *Ibid.* at 68-69.
- ³⁶ *A.A. v. B.B.*, 2007 ONCA 2 at paras. 37, 41.
- ³⁷ Ontario Law Reform Commission, "Report on Human Artificial Reproduction and Related Matters" (Toronto: 1985).
- ³⁸ Canadian Bar Association, "Report of the Special Task Force Committee in Reproductive Technology of the British Columbia Branch" (1989) at 29.
- ³⁹ Canada, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Canada Communications Group, 1993).
- ⁴⁰ Canada, House of Commons Standing Committee on Health, *Assisted Human Reproduction: Building Families* (December 2001) at 10-11.
- ⁴¹ Canada A.H.R.A., *supra* note 11.
- ⁴² *Ibid.*, ss. 6, 7.
- ⁴³ Quebec C.C., *supra* note 6, art. 541.
- ⁴⁴ Alberta F.L.A., *supra* note 6, s. 12.
- ⁴⁵ *Ibid.*, s. 8.

⁴⁶ New Zealand Law Commission, *supra* note 34. See discussion at 84-87.

⁴⁷ *Rypkema v. British Columbia* (2003), 233 D.L.R. (4th) 760 (B.C.S.C.).

⁴⁸ This was a recurring theme of presentations at Nobody's Child Everybody's Children, An International Conference on New Reproductive & Genetic Technologies held in Nanaimo, British Columbia, May 24-27, 2007.

⁴⁹ See, for example, *Rose v. Secretary of State for Health and Human Fertilisation and Embryology Authority*, [2002] 2 F.L.R. 962 (H.C.J.), an English case in which a woman born as a result of sperm donation sued for the release of information about her genetic father.

⁵⁰ Hilary Young, "In Search of Identity: Reconciling the Interests of Gamete Donors and Their Offspring in the Disclosure of Identifying Information About the Donor" (Paper presented to the International Conference on New Reproductive & Genetic Technologies, Nanaimo, British Columbia, May 26, 2007), citing K. Daniels & O. Lalos, "The Swedish Insemination Act and the Availability of Donors" (1995) 10 (7) *Human Reproduction* 1871.

⁵¹ B.C. A.A., *supra* note 1, Part 5.

⁵² Canada A.H.R.A., *supra* note 11, s. 14.

⁵³ *Ibid.*, s. 18(3).

⁵⁴ *Ibid.*, s. 18(4).

⁵⁵ *Ibid.*, s. 2(a).

⁵⁶ Hilary Young, *supra* note 50.