The Law and the Parent: the Numbers Game of Standing and Status

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In November 2010, the University of Alberta's student newspaper, *the Gateway*, published a recruiting advertisement directed at aspiring sports' journalists. The ad featured a picture of golfer Greg Norman, and quoted him as follows: "I owe a lot to my parents, especially my mother and father." It seems likely that the designers of the ad envisioned that this quirky claim would be read as an example of 'stupid jock speak.' But for us, as scholars of the law and politics of intimate relationships, Norman's statement portends a rich and complicated debate in the field of parentage law in Canada.

In the pages that follow, we explore the distinctive principles that name and govern people who 'stand in place of a parent' and those who have parental status. Since 1999, in the Supreme Court of Canada's decision in *Chartier v Chartier,* step-parents may incur sustained support obligations to the children of their former partners. Thus it is possible that three or more adults may be deemed to have some parental obligations to a single child. This decision offers a qualified challenge to parental obligations stemming from biological relationships and thus, we argue, begins to untether the heteronormative, monogamous, and biological presumption from the family structure. But standing in place of a parent is different than *being* a parent; distinct from parental status. With the notable exception of the Ontario Court of Appeal's ruling in *A.A. v. B.B.* (2007), two remains the maximum number of people that are entitled to claim parental status in Canadian jurisdictions. Our aim then, is to explore the reasons for these distinctions, their consequences and the prospects for displacing the monogamous model of parentage.

We weave three broad theoretical themes through our analysis of the distinction between standing in place of a parent and parental status. One involves the tenuous grounding of parental relationships in biological contribution. Although this grounding has always been a legal fiction, it has become increasingly difficult to sustain in the wake of reproductive technologies and the recognition of co-habiting relationships and marriages between same-sex partners. Anxiety concerning the place of fatherhood is evident here. Second, we observe the tensions between liberal freedom and domestic privacy on the one hand, and a rigid adherence to monogamy, justified in terms of democratic equality on the other. The claim that the state has no place in the bedrooms of the nation may be fundamental to liberal privacy, but the liberal democratic character of the nation is, nonetheless tightly entwined "in the winding cloth of the conjugal bed" (Povinelli 2006, 179). Third, we consider the relationships among kinship rules, inter-generationality, inheritance and citizenship. Ultimately, we argue that once the biological presumption that has justified the current regime is fully displaced, the rationale supporting a two person limit on parentage weakens, presenting the opportunity to advance a potentially more

open regime for the regulation of relationships between children and their caregivers. At the same time, this openness gives rise to concerns regarding the clarity and efficiency of kinship determination and the transmission of both wealth and national identity that flows directly from that determination.

The paper begins by developing these theoretical themes and then proceeds to examine legal developments surrounding the designation of standing in place of a parent. Canadian courts have held that the need to ensure privatized forms of economic support and serving 'the best interests of the child' justify the plurality of parental figures that may inhabit the familial scene for children of post-separation couples. We then consider parental status determinations. The cases and legislation that we examine in this context have been instrumental in exposing and challenging the alleged biological grounding of parental status, but these challenges have not been uniformly successful. As Boyd (2007), Kelly (2009), and Millbank (2008), have observed, several judgments have sought to 'preserve' the claims of fathers over, rather than in addition to, lesbian co-mothers. In the process both fatherhood and the biological family have sometimes been reified even as the 'common sense' of the reproductive family has been contested. Moreover, even in cases where the court has been willing to eschew the claims of fathers, the monogamous couple has maintained pride of place. The Ontario Court of Appeal ruling in *A.A. v. B.B.* might indicate a rupture in this pattern or it may be the exception that defines the rule. Certainly the judicial reasoning in the case demonstrates how the biological and monogamous presumptions unfold, even as the outcome suggests the possibility of more plural parental configurations. The remarkable privilege and unanimity of purpose among the parties in *A.A. v. B.B.* suggests that the threshold relationship for a finding of status for three parents may be very high indeed. We conclude our analysis with an invitation to consider the adequacy of the current laws of parentage both in terms of their role in framing contemporary familial life and for the integrity of the liberal democratic polity.

The Law and the Making of the Biological Family

The English common law tradition, the Napoleonic Code, and Sharia law all maintain a paternal presumption in which a husband is the father to any children of his marriage: *pater est quem nuptia demonstrant* (Freeman and Richards 2006, 72). This presumption finds its origins in the indeterminacy of paternity and the certainty of birth from the mother. Since paternal certainty through DNA testing is only a very recent development, the law's paternal presumption via marriage did the work of securing the relationship between father and children. Thus a child born within the context of a marriage, but whose biological inheritance came from someone other than the husband, nonetheless was understood to be a son or daughter to the mother's husband. The paternal presumption also distinguished between legitimate children, defined as those of the marriage, and illegitimate children, those produced outside of marital relations. A child born out-of-wedlock, historically, was rendered *filius nullius* (child of no one). In this truly magical sleight of hand, an actually, existing living being could not command the status of a legal person, nor could that non-person claim rights to lineage, to inherit, or pass on his own wealth (Mykitiuk 2002, 782). While mothers could create bare life, only husband-fathers, could confer full humanity and full entry into the social realm.

Today, this paternal presumption is both more easily rebutted but also more extensive. Since the status of legitimacy is no longer operative in Canadian jurisdictions, and because of the frequency of cohabiting relationships and the prevalence of birth out of wedlock, Canada's various provincial family law acts designate fathers as male persons who were the spouses of, or cohabited with, women who gave birth during the course of the relationship, for 300 days after the relationship ended, or who married or began co-habiting with the mother and acknowledge that they are the father of the child.[1] Intriguingly these laws do not mandate DNA testing. Moreover, if paternity is contested, Canadian law declares that no person shall be presumed to be the child's father.[2] Despite the availability of genetic testing and hence the capacity to determine a child's 'natural' father, contested paternity may actually result in a rather unnatural outcome of having no father at all (Harder 2011). Fatherhood then, is not the product of biology, but the law, and more specifically, the relative formality of the connection between men and mothers.

Scientific advances have also troubled the certainty of maternity. Reproductive technologies have made it possible for three people to claim motherhood: she who intends to have and care for a child; she who contributes the genetic material; and she who gestates the embryo and gives birth (Boyd 2007, 69; Mykitiuk 2002, 791). This complicated field of potential maternal claims provides no clear path to resolution. Canadian law dictates that surrogacy for pay is unlawful, and that surrogacy contracts are unenforceable.[3] These provisions appear to favor the gestational mother as the legal mother until she relinquishes her claim on the child. In that case, her parental status is wiped out (as it is in the adoption context), and the intentional mother is named on the birth certificate as the mother (*Rypkema v. H.M.T.Q. et al.* 2003).[4] But in the *Alberta Family Law Act,* this switch of mothers only occurs between the gestational mother and the genetic mother (2003, s.12). Evidently if the intentional mother did not make any biogenetic or physical contribution to the production of the child, her route to parenthood is through the adoption process. By contrast, several US jurisdictions have held that the intentional parents trump any claims of the surrogate mother and her husband.[5]

The recognition of relationships between same-sex partners has further complicated the biological presumptions at work in the nuclear family. While all Canadian provinces permit same-sex partners to adopt a child, and thus, technically to permit a child to have two mothers or two fathers, same-sex parental presumption from the time of birth

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[1] See, for example, Alberta, *Family Law Act,* S.A. 2003, c. F-4.5 s. 8; *Family Relations Act* (BC) R.S.B.C. 1996, c. 128 s. 95; Ontario, *Children's Law Reform Act* R.S.O. 1990, c. C. 12 s. 8; Quebec, *Civil Code* L.R.Q., c. C-1991, 1991, c. 64, a.525; 2002, c.6. s.28.

[2] *Children's Law Reform Act* (ON) R.S.O. 1990 C. 12 s. 8(3). See also *Family Law Act* (AB) 2005, c. 10. S. 4 s. 8(2); *Family Relations Act* (BC) R.S.B.C. 1996, c. 128 s. 95(3);

[3] Canada. *Assisted Human Reproduction Act.* 2004. C. 2 s. 12. Alberta *Family Law Act,* S.A. 2003, c. F-4.5 s. 12(7).

[4] *Rypkema v. H.M.T.Q. et al.* 2003 BCSC 1784 (CanLII).

[5] See *Johnson v. Calvert* 19 Cal Rptr. 2d 494(Sup. Ct) and *Re Marriage of Buzzanca* 61 Cal. App. 4th 1410 (1998) and discussion in Myktiuk 2002, pp. 801- 814.

has not been legislated except by the provinces of Quebec and Manitoba, but only in situations of assisted conception.[6] Since 2002 when reforms to the filiation provisions of Quebec's Civil Code were enacted, it has become possible for same-sex partners to be named as a child's parents from birth (Leckey 2009, 62). As Robert Leckey observes, the Code discusses intentional parents and the formation of a parental project, and in doing so, its provisions import the old concept of paternal presumption, now modernized to accommodate sex neutrality (Leckey 2009, 67). "If a child is born of a parental project involving assisted procreation between married or civil union spouses during the marriage or civil union, or within 300 days after its termination, 'the *spouse* of the woman who gave birth to the child is presumed to be the child's other *parent*.' (Leckey 2009. 67, his emphasis). Thus, the lesbian partner of the birth mother is presumed to be the second parent, just as the husband or male civil partner of a woman who gives birth is presumed to be the father. Gay men are not included within this regime – a fact that Leckey suggests is indicative of the Quebec legislature's refusal to countenance surrogacy agreements; that is, that men are not to arrange a surrogate to have a child on their behalf (2009, 78-79 fn 11). Further, the provision only pertains to lesbian couples that make use of assisted reproduction. If sexual intercourse is the means by which insemination occurs, a biological father can advance a claim to parental status within one year of the child's birth, during which the co-mother may not claim status.[7] The tensions between biological and social parentage inherent in parental presumptions, as well as the law's attachment to heterosexual fatherhood, thus remain very much alive in Quebec law. Certainly the Code does not contemplate the possibility of more than two people being designated as parents.[8]

Equality, democracy and western civilization

As our discussion has already indicated, the limit of two official parents and the monogamous couple adhere in a sticky conceptual bond. This bond, according to some theorists of the western liberal tradition, is indicative of the triumph of the Enlightenment's freely choosing individual over the social constraints of inherited status. The uniting of two people, and only two people, in matrimony, has been claimed as a defining feature of liberal democracies, a key distinction between the egalitarianism of the west and the patriarchy of the rest, in which the specificity of attraction to one's singular beloved defines the break between a society oriented towards choice and futurity, and one mired in the heavy obligations of its genealogical past (Povinelli 2006, 210). As Elizabeth Povinelli so compellingly argues, "the self-evident value of liberal adult love depends on instantiating as its opposite a particular kind of illiberal, tribal, customary, and ancestral love" (2006, 225-226).

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[6] Manitoba, *Vital Statistics Act,* C.C.S.M. c. V60, s.3(6). Quebec, *Civil Code* L.R.Q., c. C-1991, c. 64, a. 538.3 para 1.

[7] Quebec, *Civil Code* L.R.Q., c. C-1991, c. 64, a. 538.2 para 2.

[8] The Manitoba *Vital Statistics Act* C.C.S.M. c. V60 is even clearer that the heterosexual presumption is the norm, due to the frequent use of 'father' and 'husband' throughout the legislation.

Any self-respecting feminist would undoubtedly point out that this formulation of monogamous marriage as the embodiment of liberal equality only passes muster if you say it fast. Historically, of course, the doctrine of coverture ensured that the legal personality of the family resided in the husband. Even the 17th century English social contract theorists and parliamentarians, who so desperately sought a justification for limiting monarchial power, rankled under the logical extension of self-governance, including divorce, to their wives (Shanley 1979, 85). This troublesome contradiction was eventually resolved by asserting that women's choice and consent to the marriage contract meant that their subordination was the effect of the exercise of their individual will (Pateman 1988, pp. 90-91; Shanley 1979, 86-87).[9] Only with the struggle to attain married women's property rights in the 19th century, do we begin to see some indication of the incursion of liberal values into the realm of marriage. And even today, as Jacqueline Stevens argues, claims of equality within marriage are belied by the fact that heterosexual *matrimony* – not biology – legally and presumptively establishes a man's relationship to children (1999, 222). The fact that Canadian law has not uniformly extended the parental presumption to the non-gestational partner in a lesbian relationship is evidence of the continued privilege of heterosexual marriage. The special powers of husband-fathers underscore how heterosexual marriage produces gender difference, and through that difference, inequality.

Even if the western practice and legal edifice of marriage does not fully realize its egalitarian ambitions, what really matters, as Povinelli observes, is the normative heft of liberal marriage (2006, 208). The union of two, freely-choosing subjects in a bond of intimacy – the marital form of two people (and not more) whose love is (allegedly) unfettered by custom, arrangement or obligation - provides the foundation for liberal democracy and inaugurates "the singular achievement of the Western Enlightenment." (Povinelli 006, 188). This is a bold claim. One might object that it is over-stated. And yet, consider the vigor with which western states have imposed the monogamous norm. In the colonial context, for example, as Bettina Bradbury notes, the imposition of monogamy on colonized subjects has been a well-established practice of empire – a means to civilize barbaric heathens and to mark the superiority of the colonizer (2005, 150). British colonizers in Canada even went so far as to specify that an Indigenous woman's marriage to a European transformed her into a European as well, a practice that continues in Canada under the auspices of the Indian Act.

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[9] This highly unsatisfactory rationale was contemporarily contested by John Locke, who, while arguing that husbands should have the final say regarding decisions affecting domestic life, also felt that husbands and wives should be able to negotiate their own terms to the marriage contract (Locke 2003, *Second Treatise*, §82, p. 135 cited in Shanley pp. 89-90). For Locke, once the job of procreation and child-rearing was complete – the task which he viewed as the central function of marriage – husband and wife should be free to go their separate ways (Locke 2003, *Second Treatise, §* 81 p. 133). Locke was able to make these claims because, unlike his compatriots, he rejected analogizing the state-citizen relationship with husbands and wives (Locke 2003, *Second Treatise* §2, p. 101). As Shanley explains, for Locke, the terrain of marriage and the family was distinct from the political (1979, 91).

Of course, the virtues of monogamy were not always evident to western colonizers and settlers, and thus various forms of enforcement were required for would-be polygamists, bigamists, and advocates of free love and concubinage. In the latter 1800s in the United States, for example, the Mormon practice of plural marriage was condemned by politicians, journalists and clergy, among others, on the basis that polygamy "represented tyranny in a land of liberty" (Carter 2008, 42). Historian Nancy Cott observes that, after the U.S. Civil War, 'the "zeal and concentration" of the federal firepower aimed at polygamy was…"unequalled in the annals of federal law enforcement." (2000, 111 citing Orma Linford). Canada, for its part, was willing to welcome American Mormons as immigrants, but only if they agreed to abandon polygamy. This expectation was reinforced through an anti-polygamy provision in the Criminal Code that explicitly outlawed the practice of Mormon spiritual marriage (Carter, 2008, 86).

More recently, slippery slope arguments that figured polygamy as the logical next step following the legalization of marriage between same sex partners, as well as the re-invigoration of Islamophobia, and the efforts to prosecute two leaders of the polygamous community of Bountiful in British Columbia, have fore-grounded the relationship between monogamy and liberal democracy.[10] Now, as earlier, polygamy's harms are claimed to lie in its rejection of the "Western romantic notion of 'one love'" (Sigman 2006, 170-171), its potential to exploit women and children, and its thwarting of the democratic ideal. The fact that monogamy has not been a particularly reliable defence against the abuse of women and children is regularly overlooked in this argument (Campbell 2005). Instead, monogamy is harnessed to the cause of freedom, equality and women's rights. To be western, to be Enlightened, to be liberal – is to be monogamous.

Passing on

Western liberalism's embrace of monogamy and the legal fictions of biological relatedness between parents and children are also powerfully justified in the context of inheritance. Ironically, liberalism's attachment to futurity and choice is heavily freighted with inter-generationality. What is available to be transmitted to the next generation – in terms of wealth as well as citizenship and, in Canada, Indian status, can have a powerful bearing on the life chances of those who come next. And the determination of inter-generational claims is directly tied to the heterosexual, monogamous marital, or at least marriage-like, form. Indeed, as Fredrich Engels tells us, the undisputed paternity of monogamous marriage 'is demanded because these children are later to come into their father's property as his natural heirs' (Engels 1986, 92).

Notions of inheritance and inter-generational entitlements sit rather awkwardly within the logic of liberal individualism and the formation of democratic nation-states. After all, if the

[10] It should be noted that concerns surrounding polygamy were also linked to Islam at the time of Confederation. Sarah Carter offers the following quote from Sir John A. Macdonald "Her Majesty has a good many British subjects who are Mohammedans, and if they came here we would be obliged to receive them; but whether they are Mohammedans or Mormons, when they come here they must obey the laws of Canada." (2008, 44)

point is that we are born equal, that the application of our talents and industry should be what determines our success, and that we must actively consent to be governed, then inherited wealth and birthright citizenship are antithetical to the liberal project of individual self-development. In her 2010 effort to think through what liberalism would look like if its ideals were fully incorporated in democratic governance, Jacqueline Stevens considers the laws of inheritance and makes the provocative claim that the impulse behind these laws 'consists largely of a presumed shared desire for remembrance and family loyalties and a specifically masculine anxiety about the inability to give birth' (p. 109).

Stevens' argument is that wealth should not be transferred through kinship ties, but rather, when a person dies, all that he or she has accumulated should be returned to a common pot and redistributed equally among the living. But she notes that a counter-argument to her position might be that the provision to pass on one's accumulated wealth to one's family acts as a powerful incentive, encouraging an entrepreneurial spirit that is both necessary for capitalism's on-going success and providing for the well-being of one's family, in perpetuity (Stevens 2010, 120). If one can ensure that one's family has an adequate means of support, then the state is also spared the burden of providing for them. This accumulative ethos is especially powerful for men, Stevens argues, because their attachment to their progeny is so tenuous. Men cannot give birth, but through patrilineage, they can pass along their names and their wealth (Stevens 2010, 128-129).

Ensuring the continuity and quality of the line diminishes the finality of one's death. This function of lineage is important for both the individual and the state, since the identity of the family, determined by laws of kinship, also defines the identity of the state. Political membership in the nation-state, or citizenship, is an invaluable benefit that parents may confer on their children. While Canada does grant citizenship on the basis of *jus soli* – birth in the territory –one may also become a Canadian by virtue of the citizenship of one's parent(s)– *jus sanguinis.* This inheritable status is particularly significant in situations in which a child is born outside of Canadian territory. Since the advent of a distinct Canadian citizenship (as opposed to British subject status) in 1947, the Canadian state has imposed a changing set of rules to determine parentally inheritable citizenship. Until the Supreme Court of Canada's rulings in *Benner v. Canada* (1997) and *Augier v. Canada* (2004), the sex and marital status of one's parents was a key determiner of one's citizenship.[11] If the parents were married, a child inherited her citizenship from her father. If the child was born out of wedlock, she inherited her citizenship from her mother. Today, a child may inherit citizenship from either parent, regardless of their marital status. However, in the wake of two crises in Canada's citizenship regime, one concerning the evacuation of Canadians from Lebanon in 2006 and a second emanating from the imposition of passport requirements to cross the Canada-US border in 2007, Canada now denies inheritable citizenship to children born abroad whose Canadian parent(s) were also born abroad (Harder 2010; Harder and Zhyznomirska forthcoming; *Citizenship Act* R.S.C. 1985, c. C-29, Part I, s. 3(3)).

[11] *Benner v. Canada (Secretary of State)* [1997] 1 S.C.R. 358 (CanLII); *Augier V. Canada (Minister of Citizenship and Immigration)* 2004 FC 613 [2004] 4 F.C.R. 150 (CanLII).

This 'second-generation cut-off rule' in the *Citizenship Act* mirrors the provisions that determine Indian status in the *Indian Act.* As noted above, Canada's colonial project imposed the patriarchal monogamous family form on the disparate kinship practices of Indigenous peoples as well as transforming certain Indigenous peoples into status Indians and others, through marriage, into Europeans. Transposing the European patrilineal practice to Indigenous peoples, status Indian men who married non-status Indian women conferred Indian status on their wives. By contrast, status Indian women who 'married out' lost their status as Indians and became European. In the wake of the equality guarantees of the *Charter of Rights and Freedoms,* amendments to the *Indian Act* in 1985 subsequently extended the deprivation of status equally to both men and women who married out – but only if they did so in two successive generations. This law has recently been amended so that the loss of status does not occur until three generations have married out.[12]

Inheritance of wealth and property, but especially citizenship and identity, provide a particularly stark illustration of the significance of declaring parental status. And we can also see that a multitude of parents may pose real challenges to naming the members of the liberal democratic state. While countries differ regarding their willingness to extend citizenship to expatriates and to tolerate multiple citizenships, Canada's recent practice indicates a desire to limit those claims. What might happen then, if a child could inherit Canadian citizenship from more than two parents? How would the Canadian state assess the status claims of a child whose biological parents were not status Indians, or Canadian citizens, but whose lesbian co-mother was? The power of monogamous marriage to confer identity on spouses; to make parents out of husbands and wives and to confer nationality on children demonstrates the force of law in the intimate domain. People may have sex – procreative or otherwise – and children may be born, but the social meaning of these activities is a complicated amalgam in which biology is instrumentally and unevenly invoked in the service of a purportedly liberal governance.

The Plurality of Parental Standing

To this point we have argued that the monogamous marital form – even as it has been stretched to include same-sex partners and co-habitation as well as marriage – is tightly bound up with the two person limit on parentage. In the remainder of the paper, we turn our attention to a number of contemporary court rulings that have begun to unravel this connection between monogamy and parentage. As we will see, in the context of support, Canadian courts have been willing to assign parental *standing* beyond the two parent, pseudo-biological limit. Whether parental *status* can retain its two-person limit is an increasingly challenged and challenging political and legal terrain.

Tellingly, it is the terrain of divorce/relationship breakdown that offers up a legal willingness to consider parental pluralism. Once the intimate connection between the adults is severed, the law's concern with safe-guarding monogamy is de-emphasized, though not forgotten, and the focus shifts to ensuring adequate financial provision for children. Canadian law has explicitly recognized the child support obligations of step-

[12] Canada. *Gender Equity in Indian Registration Act* 2010.

parents who meet the criteria of standing in place of a parent (*in loco parentis*) since the 1968 reforms to Canadian divorce law (Rogerson 2001, 51). The provinces, whose constitutional jurisdiction covers co-habiting relationships other than marriage, have made similar provisions.[13] But the interest in *plural* parental obligations intensified in the late 1990s when the Federal government enacted Child Support Guidelines as regulations under the *Divorce Act* and the Supreme Court of Canada's delivered its ruling in *Chartier* v *Chartier* (1999) (Rogerson 2001, pp. 15-16). These developments focused attention on the extent of the obligations of people designated as standing in place of a parent, in terms of both duration and quantum, and clearly stated that support obligations could fall on both a biological parent and step-parents (as well as the custodial parent) at the same time.

The issue of step-parent obligation emerges from the dynamics of contemporary families and a growing emphasis, at least in some contexts, on function over form. The argument is that what matters is the work that the relationship does rather than the form of the relationship. If two people are interdependent in a 'marriage-like' way, it is their interdependency that should be recognized (Cossman and Ryder 2001). Similarly, the responsibilities and entitlements that emerge from a relationship between adults and children should be recognized, regardless of whether the relationship between the adults is sanctified by the legal status of civil union, adult interdependent partnership or marriage (Polikoff 2008). Given the prevalence of step parent and blended families then, children may consider several adults to be their parents, and depending on the circumstances, their biological parent(s) may or may not be among them.[14] It thus makes sense that the connection between the adult and the child would be maintained through both support *and* access if the relationship between the adults came apart.

The Supreme Court's decision in *Chartier* articulated a contemporary view of familial relationships. *Chartier* resolved two opposing judicial approaches to the post-relationship support obligations of step-parents. In *Carignan v. Carignan* (1989), the Manitoba Court of Appeal followed the traditional line of the common law, asserting that it is one thing for a person (generally a man) to assume the caring functions of a parent towards a child who is not 'one's own,' and quite another to assume a duty to provide for that child. In brief, a person who has stood in place of a parent but is not a parent can unilaterally withdraw from the relationship. Standing in place of a parent is a terminable status, at the discretion of the (former) step-parent.[15] The second line of cases, represented by the ruling of the Alberta Court of Appeal in its decision in *Thériault v Thériault* (1994), held that once one stood in the place of a parent, unilateral withdrawal was not an option.[16] The question was how to determine the threshold for this parental standing.

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[13] Quebec's Civil Code does not, however, include such provisions.

[14] This inclusive approach to parenthood co-exists with a growing emphasis on the responsibilities of biological fathers (or presumed biological fathers), particularly in the area of social assistance (Smith 2007), but also in the arguments of fathers' rights advocates (Boyd 2007, 68).

[15] *Carignan v. Carignan* 1989 CanLII 180 (MB C.A.)

[16] *Thériault v. Thériault* 1994 Can LII 5255 (AB C.A.)

In *Chartier* then, the Supreme Court overturned *Carignan* and approved *Thériault*, finding that a person could not unilaterally withdraw from a relationship in which he or she stood in place of a parent. The determination of whether or not one did, in fact, stand in place of a parent, rested on the objective nature of the relationship between the adult and the child (*Chartier* para 39). The duration of the relationship was not considered to be relevant (*Chartier* para 39). Among the non-exhaustive list of indicators that were worthy of consideration, Justice Bastarache listed participation in the extended family in the same way as a biological child; financial provision for the child (based on the ability to pay); whether the person disciplines the child; whether the person represents to the child, the family and the world that he or she has a parental responsibility for the child; and the child's relationship to the absent biological parent (*Chartier* para 39). But despite this range of considerations in determining parental standing, ultimately, significant emphasis was placed on the need for support. And here, the Court was adamant that the obligations of an absent biological parent did not pre-empt or cancel those of the step-parent. "The issue of contribution is one between all of the parents who have obligations towards the child, whether they are biological parents or step-parents; it should not affect the child" (*Chartier* para 41). Thus, the objective of realizing the child's best interests – qua access to private means of support – enabled the Court to look beyond the strict configuration of marriage/presumed biological relationship/parental obligation to a more expansive definition of who might be understood as a parent.

Despite the Supreme Court's explicit articulation of the simultaneous obligation of 'all of the parents who have obligations towards the child' in *Chartier,* subsequent decisions in some lower courts indicated a continued attachment to the *Carignan* reasoning and a reluctance to apply the Supreme Court's plural vision of parental responsibility. In the Nova Scotia case of *Cook v. Cook* (2000) for example, Justice Campbell asserted that there should be a high threshold for a finding of parental status for a step- parent, due, in part, to the significant financial costs that such a finding could produce (para 22-23).[17] In this reasoning, the best interests of the child vanish as the burden to the payor takes pride of place. But plurality was also an issue for Justice Campbell. His ruling indicates a strong commitment to the two-parent model, even as he acknowledged the plurality of parental obligations established by the Supreme Court's decision in *Chartier* (*Cook v Cook* para 38). For Justice Campbell the designation of standing should only occur 'where the step-parent can be clearly shown to have assumed the role of the natural parent and in substantial substitution for the natural parent's role' (para 28). This was much more likely to occur, in the learned judge's view, in the absence of the natural parent. Moreover, in his application of the rules of statutory interpretation, Justice Campbell asserted that 'in their grammatical sense, the words 'in the place of' mean 'in substitution for' and not 'in addition to' (para 32) He goes on "in my opinion, it is not the object of the [Divorce] Act or the intention of Parliament that those words were intended to be used to maximize the number of persons paying support for or exercising access to children of broken marriages" (para 33). He then invokes a slippery slope argument in which former spouses each remarry and then the children of the original marriage have four prospective parents. If the new spouses also

[17] *Cook v. Cook* [2000] N.S.J. No. 19 (Quicklaw)

bring children into the relationship, Justice Campbell opines, the scenario becomes "more absurd"(para 35).

Justice Campbell's remarks indicate a willingness to concede a multiple payor outcome if the natural parent did not pay adequate support and there was a strong connection between the step parent and the child. But his resistance to a multiple parent model is palpable. As he sums up the situation, parents cannot divorce their children, but "a decision by the adults to marry each other is not an offer by the one to adopt the children of the other." (Para 44). Thus Justice Campbell's position is that both monogamous marriage and a two parent model should be safe-guarded even if the parents and the spouses do not correspond.

The extent to which the need to ensure private support trumps conventional relationship norms is evident in the post-*Chartier* decisions, and, in fact, even in Justice Campbell's reasoning in *Cook.* In the Saskatchewan case of *Swindler v Swindler* (2005),[18] the step-father was obliged to continue paying child support even after the mother had re-established her relationship with the biological father and, in fact, married him. Significantly, the biological father of the child was unemployed. As a result, the former step-father was required to pay the full required amount of child support (para 16). It was the court's determination that the child's best interests were served by maintaining the step-father's support obligations despite the fact that he no longer considered himself to be standing in the place of a parent. Since he had stood in the place of a parent during his relationship with the child's mother, the step-father could not unilaterally withdraw (para 14).

Ultimately, the designation of 'standing in place of a parent' is centrally focused on financial support. Often access to the child is part of the arrangement, and a parent-like relationship must be established in order to incur the support obligation and the entitlement to access. But in a practical sense, to stand in place of a parent, in the context of the law, means that one incurs a support obligation. Parents, as any middle-class teenager might tell you, are wallets. Despite the discomfort among some judges regarding a plural notion of parental support obligations, it is nonetheless the case that the Supreme Court has interpreted the Divorce Act to enable more than two people to have parent-like standing. Importantly, this openness to parental pluralism is strictly limited to a post-spousal relationship and is most likely to occur when a non-custodial biological parent lacks the resources to provide adequate support to the child (Rogerson 2001 pp. 94-95). It slips the knot of heteronormative parenting, but, ultimately, the lie of the rope still makes it appear that the knot is in tact. In sum, standing in the place of a parent establishes an obligation to pay and generally an entitlement to access, and hence connection with a child, but it does not produce the effects of parental status. To stand in place of a parent may be to have a deep social and psychological connection to a child, but that connection is secondary to the (presumed) biological or adoptive parents. Monogamy still pertains here, though now in seriality, but with regard to the children, it is the prior relationship of presumed biology that maintains significance. Only adoption, which would entail the

[18] *Swindler v. Swindler* 2005 SKCA 131 (CanLII)

cancellation of the biological parent's claim and the granting of parental status, could disrupt the biological connection. To *be* a parent, intriguingly, is a status that, outside the context of international adoption, no amount of money can buy nor evidence of mutual affection and respect can establish.

Parental Status

While Canadian law has been willing to contemplate the prospect of a plurality of parents/parent-like figures in the context of divorce, the attachment to monogamy and the limit of two people with parental standing has been virtually unassailable in the context of functioning relationships. As we have already discussed, fortress heterosexual monogamy is under siege from same sex relationships and reproductive technologies. Some accommodations have been negotiated, but an emphasis on defending paternity against a demand for the recognition of liberal equality rights is readily apparent. The Canadian state has been willing to grant people the freedom to choose their intimate partners regardless of sex, as long as they publicly choose just one at a time, but the paternal presumption that accompanies heterosexual relationships has not been readily remade to accommodate sex neutrality and, as a result, has been very irregularly extended to same-sex partners, even if they marry. Even in Quebec where the parental presumption has been extended to a co-mother in a situation of assisted conception in the Civil Code, a 2004 decision over-rode the presumption, describing it as artificial, and held that the parental project existed not between the mothers, but between the biological mother and the sperm donor (Kelly 2009, 340-42).

But what exactly is at stake in being declared a parent? We have touched on this in our opening discussion, but to be more precise, parentage grants:

- a lifelong immutable status
- the right to full participation in the child's life
- a requirement of consent to any future adoption
- a determination of lineage
- assurance that the child will inherit on intestacy
- the ability of the parent to obtain health insurance, a social insurance number, airline tickets and passports for the child
- citizenship for the child
- authority to register the child in school
- rights under various laws, including those pertaining to health care decision-making. (adapted from *A.A. v. B.B.* para 14).[19]

Despite the fact that each of these elements could be formally assumed by willing parties, that many of these elements have very little to do with the emotional attachment between a parent and a child, and that none of them, including lineage, relies on an immutable natural characteristic or biological affinity, they are, nonetheless, thoroughly enmeshed in fictive biological relationships. Our task in this section is to examine some representative efforts

[19] *A.A. v. B.B.* 2007 CarswellOnt 2. (Westlaw)

to challenge and/or expand the biogenetic presumption that informs designations of parentage and observe the forces of resistance to those challenges.

Families headed by lesbian partners are the most well-studied opponents of heteronormative parental status requirements. Their efforts have focused on acquiring parental status recognition for the non-gestational mother as an automatic right upon the birth of a child to the relationship. Same-sex partners have been permitted to adopt children, but the demand here is that the paternal presumption that operates in heterosexual relationships should be extended to same-sex partners. As already discussed, Quebec and Manitoba have used legislation to transform the paternal presumption to a parental presumption that is available to a non-biological co-mother. Other jurisdictions rely on the case law (Boyd 2007, p. 66, fn 13).

The legal arguments surrounding paternal presumption are instructive as they outline the significance of biology and paternity in defining the individual's identity and the difficulties that some legislatures and courts have in acceding equality rights in the context of procreation. In British Columbia, for example, *Gill and Maher, Murray and Popoff v. Ministry of Health* (2005) involved two lesbian couples that challenged the province's birth registration requirements under the *Vital Statistics Act*.[20] Birth registration is a particularly significant element in the articulation of parentage because birth certificates are primary evidence of how the state defines a person's identity. They are a testament to a person's place of birth and names of parents; details of lineage that are fundamental determinants of citizenship. As well, a birth certificate is required in order to attain health insurance, various licenses and a passport.

In *Gill,* the complainants argued that the province's birth registration procedures discriminated against them on the grounds of family status and sexual orientation since two women were not permitted to be named as parents on their children's birth registration (*Gill* para 40-41). The province, for its part, argued that the information provided on the birth registration was used as both evidence of identity and as a basis for medical research concerning individual and population health (*Gill,* para 23). The province's representative stated that the expectation was that the name of the 'natural biological father' would be provided on the birth registration form, although he conceded that no evidence of biological relationship was actually required from the male identified as the father on the form (*Gill,* para 24). He also conceded that a woman who gave birth to a child conceived through a donor egg inseminated by her husband's sperm would be registered as the mother regardless of her lack of genetic relationship to the child (*Gill,* para 32). Further undermining the province's professed investment in birth registration as a record of biological relatedness was the fact that in B.C., as elsewhere in Canada, the birth registration form requires information concerning the mother, but not *necessarily* the father (*Gill,* para 21). A birth mother's uncontested refusal to acknowledge a father will

[20] *Gill and Maher, Murray and Popoff v. Ministry of Health* [2001] B.C.H.R.T.D. no. 34. (Quicklaw)

result in no father being recorded.[21] The B.C. government's arguments regarding birth registration as a record of biological relatedness thus fell apart and the Human Rights Tribunal held that the inability of same-sex couples to register themselves as the parents of their children offended 'the principles of equality on the bases of sexual orientation, family status and sex.' (*Gill* para 82).

Similar findings have been rendered in courts in Alberta and Ontario in situations involving lesbian co-mothers whose children were conceived through assisted conception.[22] But, as Susan Boyd observes, it is less certain that courts will be willing to extend the parental presumption to non-biological mothers when the sperm comes from a known donor (2007, 66; see also Kelly 2009), and especially when the pregnancy is the result of sexual relations, as the Quebec Civil Code explicitly articulates (Leckey 2009, 68). The protection of the paternal interest becomes paramount along with the sense that the child is the product of a singular interaction between two different sex people. The Saskatchewan case of *C. (P) v. L. (S.)* 2005, for example, involved an effort by a lesbian co-mother to claim the parental (paternal) presumption in the province's *Children's Law Act.*[23] In this situation, the biological mother had two children from a previous relationship. The third child was born during the relationship and the parties disagreed as to whether the child was the product of a parental project or rather, as the biological mother argued, was the unintended result of casual sexual relations with a male friend. But both the province and the judge in this case cleaved to the association of biological relationship with paternal presumption. The Attorney General argued and ultimately the judge held that the Charter claim regarding the sex discrimination of paternal presumption caused no harm to the dignity of lesbian co-mothers. The presumption was rebuttable and evidentiary, thus conferring no parental rights (para 17). Moreover, the paternal presumption arose from the gender specificity of paternity; parentage was a matter of fact. A woman plainly could not have provided the seed (para 17). The court was willing to acknowledge that parental rights were about more than biological connection (para 21), but nonetheless, paternal presumption was the issue at hand and it was simply impossible for the court to 'aspire to affect the fundamentals of biology that underlie the presumption purely in the interests of equal treatment before the law' (para 20). The 'fact' that paternal presumptions had created the legal fiction of a biologically related father was beside the point. A child was the issue of a mother and a father, even if not exactly that specific father.

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[21] In practice though, this refusal to acknowledge the father has encountered some serious resistance. In *Trociuk,* the Supreme Court of Canada ruled that an unacknowledged father should have recourse to challenge a mother's refusal to name him on the birth registration and, in this case to add his last name to that of the triplets born to his former partner. In the Court's view including one's particulars on a birth certificate and determining a child's surname (symbolizing familial bonds across generations) were significant modes of participation in a child's life – forms of participation that should be granted regardless of the father's involvement with the children or the mother's express desire. (para 16-17). *Trociuk v. British Columbia (Attorney General)* 2003 SCC 34 (CanLII).

[22] *Fraess v. Alberta (Minister of Justice and Attorney General*) 2005 ABQB 889 (CanLII); *Rutherford v. Ontario (Deputy Registrar General)* 81 O.R. (3d) 81 (2006).

[23] *C. (P) v. L. (S.)* 2005 CarswellSask 794 Saskatchewan Court of QB (Westlaw)

In 2010, the Alberta government passed the *Family Law Statutes Amendment Act* (although at time of writing it has not yet been proclaimed).[24] The new law limits parental presumption to births resulting from natural conception. But at the same time, the law enables the court to declare parentage for both members of a couple – straight, gay or lesbian – when assisted conception is used in pursuit of a consensual parental project (s.8.1(2) and (3)). This legislation represents the broadest and most inclusive approach to parental status determinations among Canadian jurisdictions. No other province has incorporated gay men within their parentage laws, and Alberta's new Act also clarifies the status of surrogate mothers and *their* conjugal partners.[25] Yet despite the inclusiveness of parental standing declarations, parental (ie. paternal) *presumptions* are limited to heterosexual relationships in which children are naturally conceived. This limitation effectively re-imposes the distinction between 'normal' relationships in which familial affinities can be assumed, and those that require a court order to guarantee their legitimacy. As well, even though the law envisions that straight couples who use methods of assisted human reproduction will have to gain a court order to declare the parentage of the non-biological partner, the fact that fertility clinics maintain patient confidentiality and that informal means of acquiring reproductive materials would operate under the law, means that straight couples will only have to declare their use of reproductive technologies if they choose to do so. By contrast, the biological emphasis of the law will continue to expose same sex couples to the state's interrogatory stare-down.

If provincial legislatures and courts are ambivalent about the presumption of parental status for same-sex partners (as distinct from a willingness to permit adoption), especially in cases where the genetic contributors are known, the recognition of three (or more) parents might provide a resolution. Ultimately this was the outcome in the Ontario case of *A.A. v. B.B.* (2007) but to date, the child in this case is the only Canadian to have three recognized parents. Following from this ruling, the Uniform Law Conference of Canada in its Uniform Child Status Act 2010 also recommended the recognition of multiple parents under certain conditions.[26] But to date, courts and legislatures have resisted any further application of this innovation.

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[24] The unproclaimed version of the Act can be found at http://www.qp.alberta.ca/546.cfm?page=CH16_10.CFM&leg_type=fall.

[25] The surrogate mother is not a parent unless she withdraws her consent from the surrogacy arrangement. Her spouse or conjugal partner is not a parent.

[26] The *Uniform Child Status Act* 2010 is the product of a Federal, Provincial, Territorial working group established in 2007 in order to address the developments in parentage law arising from assisted human reproduction. It is published under the auspices of the Uniform Law Conference of Canada and is available as a word document download from www.ulcc.ca. Alberta, it might be noted, disregarded the Uniform Child Status Act's recommended provisions regarding parental presumptions in the case of assisted reproduction and with regard to extending parentage beyond the two person model (Alberta 2011, p. 4).

A.A. v. B.B. was first heard in the Ontario Superior Court.[27] The case involved a lesbian couple, (A.A. and C.C.) who formed a parental project with their male friend and sperm donor (B.B.) which resulted in the birth of D.D. When D.D. was born B.B. and C.C. were listed on the child's birth certificate as his mother and father. A.A. sought legal status as D.D.'s parent, but she did not want to negate the legal status of B.B., a situation that was mandated by the adoption process. A.A. and C.C. were the primary caregivers of the child, but B.B. was also actively involved in the child's life (*A.A. v. B.B.* 2003, para 8). While the trial judge was sympathetic to the parents' request and felt that a finding of three parents could be perceived to be in the best interests of the child (para 40), he ultimately felt bound by the two parent limit that he interpreted in Ontario's *Children's Law Reform Act* (*CLRA*). For Justice Aston, the plain and unambiguous meaning of the phrase 'the mother' with its use of the definite article 'the' rather than the indefinite article 'a' meant that the *CLRA* contemplated a limit of one mother and one father (para 34-37).

Justice Aston then considered the parties' submission that the court should use its *parens patriae* powers to ensure that the best interests of the child were protected and thus to fill a legislative gap (para 39).[28] He did not see a gap in the legislation and thus refused to consider this option. In Justice Aston's view, while it might have been in D.D'.s best interest to have three parents, there were other children to consider. Justice Aston's concern about plural parentage was expressed as a slippery slope argument.

> If this application is granted, it seems to me the door is wide open to stepparents, extended family and others to claim parental status in less harmonious circumstances. If a child can have three parents, why not four or six or a dozen? What about all the adults in a commune or a religious organization or sect? Quite apart from social policy implications, the potential to create or exacerbate custody and access litigation should not be ignored (2003, para 41).

Of course, as we've already seen, a child *can* have multiple adults who stand in the place of a parent and the Supreme Court has determined that plurality in this context can be made to accommodate custody and access. And ironically, if A.A. and C.C. ended their relationship, A.A. would likely be recognized as standing in the place of a parent. But again, that situation only pertains in the context of support and access. In this situation, in which all of the adults are acting in concert and the question is status rather than standing, two is the hallowed limit. The risk of plurality, as Justice Aston informs us, is the illiberality of a commune or religious sect. And, given the resonance of these terms with the fundamentalist Mormon community of Bountiful, which had recently become a subject of media interest at the time of this decision, it seems possible that Justice Aston was invoking the spectre of polygamy as well. Echoing Justice Campbell's concerns in *Cook,* Justice Aston's anxieties about the appropriate number of parents transforms a case involving the relationship between a child and the people who care for him into an occasion to fortify monogamy for adults.

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[27] *A.A. v. B.B.* [2003] O.J. No. 1215 (Quicklaw)

[28] *Parens patriae* is the power vested in the court to fill a legislative gap in the interests of protecting children and other vulnerable individuals.

Justice Aston did not have the last word in this dispute. The parties appealed the decision and had a more positive result in the Ontario Supreme Court. There, Justice Rosenberg expressed his agreement with Justice Aston regarding the two parent limit outlined in the CLRA, but, in this case, he was willing to use the court's *parens patriae* jurisdiction to name three parents. Justice Rosenberg also noted that the Attorney General had chosen not to intervene to support the *CLRA,* thus giving tacit consent to a three parent outcome in this case (2007, para 6). Justice Rosenberg felt that there was a gap in the legislation that the court could fill; a gap resulting from the development of reproductive technologies and alternative families that could not have been foreseen by legislators at the time of its original drafting (2007, para 36). In Justice Rosenberg's considered opinion, the children that result from those technologies or as the result of the formation of alternative families 'are deprived of the equality of status that declarations of parentage provide' (2007, para 35).

Justice Rosenberg repeated Justice Aston's favorable assessment of the conditions in which DD was being raised, an assessment that demonstrates the peculiar tensions of the primacy of biology when describing alternative families. DD's primary care-givers were A.A. and C.C., yet in Justice Aston's description (as quoted in the Court of Appeal decision), it appears as though A.A. is the anomalous third party on whom the heterosexual parents are entitled to pronounce.

> The child is a bright, healthy, happy individual who is obviously thriving in a loving family that meets his every need. The applicant has been a daily and consistent presence in his life. She is fully committed to a parental role. She has the support of the two biological parents who themselves recognize her equal status with them. (2007, para 3).

Given the fact that DD's legal parents were, in fact, his biological parents, and that AA was the person requesting that she be named as a parent, this emphasis makes sense in the context. But it is the context itself that is the problem, an observation that, to his credit, Justice Rosenberg was prepared to advance (2007, para 35). The third parent, as described here, is the non-biological parent, regardless of the relative involvement of the adults in the child's life. This formulation was necessitated by the law that pertained at the time of D.D.'s birth, as well as the desire of the parties to seek a third parent declaration. And, given the considerable judicial interest in ensuring the presence of fathers in children's lives, it was strategically astute to maintain the centrality of the biological parents. Nonetheless, an impressive amount of reconstructive work was required to make the reality of the situation conform to the prevailing social norms. And the factual situation presented in A.A. v. B.B. is as close to the normative ideal of the nuclear family as it is possible to come. After all, we have a long term monogamous relationship, celebrated in a public ceremony (in 1992) and an amicable sperm donor and father figure whose involvement with another woman further entrenches the exclusivity of the conjugal relationship between D.D'.s mothers (A.A. v. B.B. 2003 para 2, 6). Moreover, each of the adults has enjoyed impressive professional success, and waited until their careers were established before taking on the responsibility of raising a child (A.A. v. B.B. 2003 para 3,4). They are also financially secure (A.A. v. B.B.

2003 para 7). If the situation was less conventional, entailing, perhaps, a more fractious relationship among the adults, or a polyamorous relationship among the adults, or the lack of any conjugal relationship among any of the adults, but simply a mutual desire to raise a child, it seems less likely that the parties would have met with such success.

This concern regarding the necessity of amicable relations among all three parties as a prerequisite to a three parent finding was born out in M.A.C. v. M.K. (2009) in which a similar three parent arrangement came apart, the lesbian co-mother sought to adopt her partner's child, and the known sperm donor/engaged father, in this case a married gay man, refused his consent to the adoption.[29] Although the parties had drafted pleadings for a three-way parentage in 2007 (when their child was already five and they had maintained a successful parenting arrangement over her young life), this plan was abandoned as the relationship between the father and the two mothers became conflictual (para 15-16). Interestingly, the judge in this case suggested that the parties could jointly apply to the Superior Court for a declaration that the child had three parents (para 30), and this was, in fact, the preference of the father. But because the mothers were now interested in limiting their family to a more conventional two-parent model, this option no longer appealed to them. They sought a step-parent adoption for the non-biological mother.

The court rejected the mothers' claim. In Justice Cohen's view, MAC could seek to solidify her position via a custody order. The evidence indicated that her daughter's school and other social venues did recognize her authority as a parent, but if she was particularly concerned about this, perhaps a marriage between the women would assist (para 33). That said, it was the judge's view that the court did not have a particular preference for the nuclear family, and so was not moved by the aspiration of the lesbian couple to conform to the nuclear model, especially since such a model was not necessarily in the best interest of the child (para 36). Then, in a telling mobilization of the heteronorm itself, the judge analogized the situation here with those 'countless custodial step-parents who would like irrevocably to sever their child's connection to the access parent, or, as in this case, radically diminish that parent's role in the child's life. '(Para 37). Because MAC was not a biological parent, she was automatically designated as a step-parent and her legitimacy as a parent to her daughter, a child to whom she had been a primary parent from the outset, was trumped by the father, despite his secondary role. If the couple at the center of this dispute was heterosexual, the conjugal partner of the biological mother would be the presumptive father, and the calculation of best interests would likely have unfolded very differently.

In any event, Justice Cohen refused to grant the adoption order. In a powerful example of the power of law's fictions, the judge emphasized the importance of biological ties and cited adoption as 'the statutory guillotine of the biological relationship.' (para 70) Adoption is thus conceived as a complete genetic transfusion. Given the important role of MK in the child's life and the original plan to devise a three parent family, the court was not willing to cancel MK's claims to fatherhood through an adoption order. (para 74). To do so would risk "severing the child's sense of her place in the world, her confidence in her

[29] *M.A.C. v. M.K.* [2009] O.J. No. 368 (Quicklaw)

experience of the world and her understanding of who her family is" (para 64). The fact that this decision meant that MAC's role as a primary parent was not acknowledged in similar terms, nor deemed to be in need of protection, points to the age-old significance of fatherhood in binding a child to the social realm.

Fiona Kelly observes that the recognition of three parents may impose fathers on lesbian couples who want to safeguard their autonomy. It is not entirely clear that MAC v MK provides a precise of example of the phenomenon that concerns Kelly, but the dispute does illustrate what she describes as the ironic possibility that a successful breach of the dual parent model might happen not because of some progressive notion of contemporary parenting, but as a means to ensure a continued role for fathers (2009, 349). Fatherhood, with all of its associations to lineage and its capacity to confer social standing, inheritance, and belonging (national and familial) remains powerfully protected in the law.

The terrain of parenthood is treacherous even in its conventional, heterosexual two-parent form. It becomes a minefield when the conventions of paternity, monogamy and biology encounter reproductive technologies and same-sex parenting. In our contemporary context, assumptions, norms and competing values collide. Even when the parties might be better served by more innovative approaches to relationship status and may desire to pursue those approaches, the force of law imposes legal strategies and social frames of meaning that constrict ways of doing domestic life, but also ways of thinking about it. Even the seemingly radical proposal to recognize up to six parents, advanced by the Uniform Law Conference of Canada, bases its conception of parentage on monogamous conjugal relationships and paternal presumption.[30] The six potential parents that they envision are the intentional parents, the donors of the biological materials and the conjugal partners of those donors.[31] There is an element of a social parentage here, but the plan does not envision a parental project that fundamentally displaces the fictive biological relationship that lies at the heart of the nuclear norm.

Conclusion

We began this paper by outlining a three-part rationale for the liberal democratic state's interest in regulating the status of parents. It should be evident from our subsequent analysis that the investment in the biological foundation of the nuclear family is profound: so profound that monogamy and the paternal presumption had to be concocted in order to secure the bond of blood. But the insistence on biological relationship is precarious. Even

[30] The website for the Uniform Law Conference of Canada describes its role, with regard to civil law as assembling "government policy lawyers and analysts, private lawyers and law reformers to consider areas in which provincial and territorial laws would benefit from harmonization…. On occasion the [Civil[Section adopts a "model statute", on which it expresses no opinion as a matter of policy, but which it offers as a method of harmonization where member governments want to use it." http://www.ulcc.ca/en/about

[31] In which case there might actually be eight potential parents – the intentional parents, the surrogate mother and her partner, the sperm donor and his partner and the egg donor and her partner. Nonetheless, the Uniform Child Status Act only lists six.

now, when we can know who a child's biological parents are with certainty, the law does not insist that genetic relationships define parental status. Instead, as Roxanne Mykitiuk insightfully observes, the determination of paternity, and we would argue, parentage more broadly, is ideological – sometimes it is rooted in biology, sometimes in the social relationship of paternal presumption, depending on the circumstances and the values of policy makers and judges (cited in Kelly 2009, 329). The tension between a biological essentialism, in the Saskatchewan case of C(P) v L(S), in which the applicability of equality rights to parental determinations was deemed nonsensical, and the mobilization of those same equality rights in the Quebec Civil Code to extend parental presumption to a lesbian co-mother, demonstrates how malleable biological and social designations of parentage can be.

The second part of our rationale for the regulation of parentage and parental standing concerned the nuclear family form as an expression of liberal democratic values. Equality, consent, and freedom in the space of private ordering are key among these values. But again, their manifestation in the law of parenting is uneven and instrumental. Profound inequities concerning gender and sexual orientation are readily apparent in the cases we discussed. And it is also very clear that when it comes to the legal sanctioning of intimate relationships between adults, monogamy is as far as one's freedom extends. In the realm of parental relationships, the number of parents can only multiply beyond two in the context of a need for economic support for children and fractured monogamy. The risk of expanding beyond the dual parent limit, as Justice Aston indicated, is to venture into the irrational and potentially exploitative terrain of religious cultists.

The third strand of our rationale concerned the inter-generationality of kinship and its association with lineage, inheritance and national belonging. This theme is more subdued in the cases we've discussed here, but the concern to maintain the role of fathers in the lives of children, the importance of passing along one's name and articulating one's place in the world by virtue of one's connection to one's father, do make an appearance. The lack of consideration given to these concerns in the context of lesbian co-mothers is telling. Old conceptions of coverture in which women are mere vessels while men have the power to confer social standing are, evidently, still with us. Given liberalism's explicit condemnation of the political relevance of ancestry and status relationships, it is not surprising that this very illiberal rendering of the source of individual identity would receive less attention in courts and legislation steeped in the liberal democratic tradition. But this blindness to the extent to which kinship frames our identities, both personal and political, as well as the legitimacy of our claims for recognition and resources is a serious impediment to the attainment of democratic goals. At the very least, it impedes a full and frank discussion of the objectives and consequences of our prevailing forms of private ordering as well as limiting the scope for alternatives.

Despite the plethora of evidence to the contrary, the privacy of our intimate lives and our freedom to construct those intimate associations is a commonplace. As liberal subjects, we internalize the belief that our intimate associations are a reflection of a profound personal choice. Indeed the struggle to secure marriage rights for same-sex couples (and earlier and elsewhere to interracial couples) was articulated in precisely this

conceptualization of intimate relationships as a space of personal expression, thus requiring the utmost respect for the individual's choice of mate. But of course, the state *does* regulate and sanctify these relationships – that is what the rules of birth registration and parentage are designed to perform. The question is, are the regulative forms that frame our intimate associations the ones that we want? Do we really mean to choose the persistence of status and kinship as the basis for defining our political subjectivity?

In the face of increasing family diversity and complex forms social and genetic relationship, the response of policy makers has been to demand that we contort our intimate relationships to fit established norms and forms. In the process we participate in legal fictions and recruit our children to campaigns of familial meaning-making that may be at considerable odds from how they, themselves would define the people who are their parents. Undoubtedly the law needs to protect children and to ensure that adults deliver on their obligations to children. And we do not want to discount the psychological value and personal meaning of parental relationships. Rather, our task here, has been to expose some of the fallacies and political investments in the contemporary law of parental standing and status in the service of an on-going conversation about how and whether it might be otherwise.

[LaViolette discusses access to inheritable rights in her review of A.A. v. B.B. and talks about French language rights. But she doesn't seem to have a problem with inheritance. That paper, like the other feminist legal scholarship, does not engage in any analysis of liberalism, or consider the kind of political work that parentage does. There is obviously an awareness of inequality but the response is to say 'fix the inequality' rather than understand what purposes the inequality serves in the process of governance.]

[Joslin, in her analysis of forum-shopping in same-sex parentage cases in the US, notes that if a child is denied the benefits of two parents, their access to various social benefits may be cut in half. Would be interesting to know whether the relationship of standing in place of a parent enables the child to gain access to employer provided family benefits – find this out for Manchester, since if not, that limit clearly shows the privatization of responsibility and the desire to limit the reach of who is on the hook for economic well-being. Such a limitation would indicate the state's view that employers (private and public?) should be spared the effects of accommodating family diversity.]

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