# Baby Steps II: Assisted Reproductive Technology and the B.C. Family Law Act (Canada)

The original version of this paper Baby Steps: Assisted Reproductive Technology and the BC Family Law Act, was prepared by barbara findlay QC and Zara Suleman for the Continuing Legal Education Society of British Columbia in 2013. This updated Baby Steps II version was prepared by Lynda Cassels and Michelle Kinney for the Continuing Legal Education Society of British Columbia in April 2016.

# BABY STEPS II: ASSISTED REPRODUCTIVE TECHNOLOGY AND THE B.C. FAMILY LAW ACT[1]



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# I. Introduction

In her 2010 paper "Who is a Parent?" Heather Mackay summarized the Canadian legal landscape regarding parentage and assisted reproductive technologies through a series of questions:

> "New family models and reproductive technologies are challenging family law across the country. The law is struggling to keep up, both legislatively. . . and through case law, where the courts are grappling with questions like:
>
> Is a surrogate who gives birth to a child that is not her genetic progeny the child's mother?
>
> What about a lesbian woman who bears her partner's genetic child? Are both the genetic and gestational mothers the child's mother?
>
> Can a child have more than two parents?
>
> What about a gay man who helps a lesbian conceive a child or a lesbian woman who bears a child for a gay couple, but then has nothing to do with the child? Should the rights and obligations of parenthood be imposed on genetic contributors?
>
> Or, the converse, where a gay man helps a lesbian couple conceive a child or a lesbian woman bears a child for a gay couple, and then remains involved in the child's life?"[2]

When British Columbia's then new *Family Law Act* came into force in 2013, we had, for the first time, legislation that expressly addressed these issues. The *Act* provides a statutory scheme for the determination of legal parentage, including the parentage of children conceived by assisted reproduction. Prior to those provisions, courts were left to rely on their inherent jurisdiction or their *parens patriae* jurisdiction to determine legal parentage of children born as a result of assisted reproductive technology.

The purpose of this paper is to provide a survey of the current legal framework for determining parentage in British Columbia under the *FLA*. We also aim to set that framework into its social context through a discussion of how reproductive technologies have been used in different family situations, identifying some of the legal challenges that arise from those circumstances and setting out the ways in which both the pre-FLA case law and legislation have responded to those challenges.

Given the complexity of fertility law, we wish to point out that this is, indeed, a survey paper. Many of the issues identified in this paper merit full papers on their own. We have done our best to point the reader toward the applicable law and more fulsome resources.

This paper is also a collaborative project. Much of the content draws heavily from, and in some sections is directly extracted from, the original "Baby Steps" paper authored by barbara findlay, QC and Zara Suleman[3]. Written prior to the coming into force of the *Family Law Act*, that ground-breaking and prospective –looking paper provided important contextual and historical material, not all of which is included in this update. (Any errors or omissions introduced during the updating process are ours alone, and do not necessarily reflect the views of the original authors.)

The original "Baby Steps" paper also includes the following reference materials, which are not reproduced, or fully reproduced herein:

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2 Extract from the introduction to "Who is a parent?" by Heather L. McKay Q.C. This paper was originally prepared for the Federation of Law Societies of Canada 2010 National Family Law Program held in Victoria BC.

3 "Baby Steps: Assisted Reproductive Technology and the B.C. Family Law Act" by barbara findlay QC and Zara Suleman, prepared for the Continuing Legal Education Society of British Columbia, January 2013.

- "Making Parents", a multi-page chart illustrating how the *FLA* will apply to prospective parents depending on the various factors set out the legislation (attached to the original paper as Appendix B)
- "Making More Parents" – a theoretical analysis of how many parents it may be possible to have under the *FLA* (attached to the original paper as Appendix C)
- a detailed comparison of the provisions of the old *Family Relations Act* (B.C.'s previous family law legislation, now repealed) and the *Family Law Act*

The full Baby Steps paper, including those appendices, is available here: http://www.barbarafindlay.com/uploads/9/9/6/7/9967848/baby_steps.pdf

Part IV of the paper (on Transition and Estates issues) also draws heavily on analysis and commentary by Monique Shebbeare, to whom we owe much appreciation. Her article on jurisdictional issues was prepared for this same CLE conference and is available with the course materials (*Crossing Borders without Getting your Wires Crossed: Understanding Jurisdiction for Parentage in Assisted Reproduction).* Monique also contributed to the parentage section of CLE's *Family Law Act Transition Guide.*

Scope of Paper

This paper is divided into five parts:

In Part 1 we examine briefly the social and legal context prior to the enactment of the *FLA*, because it is against that history that the *FLA* provisions with respect to assisted reproductive technology (ART) have been developed.

In Part II, we walk through the *FLA* provisions, considering the limited case law that has emerged and provide some commentary regarding interpretation and issues to consider. We review the shift from genetic connection to intention as the foundation of parental status, and discuss the differences in how the *FLA* treats children conceived with, or without, assisted reproductive technology.

In Part III, we consider some of the transition and interpretation issues that may arise, including the implications for inheritance rights and other estate issues.

In Part IV, Real World Families and ART, we describe some of different family forms and outline practical considerations those different families face as they embark on the project of having a child through ART.

Lastly, in Part V, we look ahead to the future, identifying issues that will remain a challenge as the law moves forward.

In approaching this paper, it is crucial to understand that we are discussing **legal parentage**: that is, the determination of who, in law, a child's parent(s) is or are. As a simple proxy for that question: from whom could a child inherit on an intestacy? This is a different question than the question of who in a child's life has responsibility for that child, or rights in relation to that child. We call the latter group "social parents": adults who acquire responsibility or rights in relation to a child by their relationship with that child. It can also be a different question again from who is listed as a "parent" on a child's birth certificate: a birth certificate is evidence, but not proof, of legal parentage.[4]

Prior to the *FLA*, the categories of legal, social, and registered parents overlapped, but they were not congruent. Now, legal parents and registered parents are largely congruent under B.C. law, particularly with respect to children born through ART. Of course, people other than a child's legal parents will continue to have rights and responsibilities in relation to children –

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4 *Vital Statistics Act* RSBC 1996 c 479 s. 41. Section 41(1) provides that a certificate is admissible in any court in British Columbia as evidence of the facts recorded in the registration.

stepparents, for example. Those responsibilities and rights fall outside the scope of legal parentage, however, and are not considered in this paper.

# II. Part One: Before the Family Law Act

## A. Some Conventions

In this paper we have used the term "prospective parent" to refer to a person who is involved in a parental project of conception and birth of a child, with the intention of raising the child. That term includes, but is broader than, the term "intended parents" as defined in the *FLA*.

We use the term "legal parent" to refer to a person who is a child's legal parent, i.e., for example from whom a child would inherit on intestacy, in order to distinguish the legal parent from people under other sections of the *FLA* who have parenting rights and responsibilities in relation to a child, but who may not be a legal parent.

## B. Some History

Family law has been premised on the assumption that all children were conceived through sexual intercourse; that every child had a mother and a father, even if the father was unknown to or unacknowledged by the mother; and that the child had no other parents.

Before the advent of ART, a child's parentage was not, generally, much of an issue. Her mother was the woman from whose body she came; her father was the male partner in the sexual intercourse, and her genetic father. For child support purposes, there was a presumption in the old *Family Relations Act*[5] —the precursor to the *FLA*—that the male person who is or was married to the mother of a child, or who lived with the mother of the child in a relationship of some permanence, was presumed to be the father (section 95). Doubt about a child's paternity could be resolved with a paternity test.

Section 61 of the *Law and Equity Act* established legal parentage. That section provided only that a child was the child of "his or her natural parents" and that "the relationship of parent and child and all kindred relationships flowing from that relationship" were to be determined in accordance with that section.[6]

The *Vital Statistics Act* governed registration of a child's parents. A child's "mother" was (and still is) defined by inference from the definition of "birth" to be the woman who gave birth to, or was delivered of, a child. When registering the birth of a child, a woman could choose whether to acknowledge the father of her child.[7] Moreover, there was no provision under the *Act* for the registration of parents other than the child's natural or adopted parents. The registration provisions of the Act referred to parents as being either the "mother" or the "father" (section 3). The word "parent" was not defined.

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5 Family Relations Act, RSBC 1996 Ch.128

6 RSBC 1996 c 253 s 61: Subject to the Adoption Act and the Family Relations Act, for all purposes of the law of British Columbia,

(a) a person is the child of his or her natural parents,

(b) any distinction between the status of a child born inside marriage and a child born outside marriage is abolished, and

(c) the relationship of parent and child and kindred relationships flowing from that relationship must be determined in accordance with this subsection.

7 *Vital Statistics Act*, RSBC 1996 c. 479 s 1 and 3.

## 1. Two Things Happened: Assisted Reproductive Technology and New Family Forms

In recent decades, two things happened which outstripped the opposite-sex-and-intercourse model under-pinning the traditional legislative framework of legal parentage.

First, technological advances in fertility treatments made it possible for children to be conceived and gestated without sexual intercourse, and for people to have children even if one or both prospective parents was infertile.

At the same time, new family forms began to develop. Lesbian couples were choosing to have children together, conceiving with sperm from either an unknown, or known, donor. If they conceived with sperm from a known donor, they did so either by the "turkey baster" method, or by sexual intercourse with the donor. Gay men began to have children with the assistance of an egg donor and a surrogate, who might be the same person. In some queer families the sperm donor (or egg donor or surrogate) was actively involved in the child's life together with the lesbian or gay couple.[8]

Families with one transgender partner were also choosing to have children, as were single women and single men. In some cases a lesbian couple and a gay couple would chose to have a child together, with the intention that the child would be raised by the two couples, spending half of his time from birth with each.

Many of these families confirmed their arrangements with written agreements. Some did not.

Overlapping the many possible combinations of family forms that began to emerge were the infertility issues that have become increasingly common in society at large. A lesbian couple needing sperm to conceive may also be infertile, for example, and so need an egg donation as well as sperm, and perhaps require a gestational carrier.

The table prepared by barbara findlay, Q.C. and Zara Suleman, at Appendix B of the original Baby Steps paper, shows the dizzying permutations and combinations of possible prospective parent(s) and the ART choices they have[9].

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8 Fiona Kelly's paper "(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families" (2008-2009) 40 Ottawa L. Rev. 185 – 222 outlines her research into lesbian family forms.

9 The chart also includes a description of how the *Family Law Act* applies to each combination.

## 2. The Law Lagged Behind

The law lagged far behind the developments in ART and in family forms. Courts were left to fill the gaps in legislative regulation.

In the first case to be decided after "sexual orientation" was added as a protected ground in B.C.'s Human Rights Code in 1992, a lesbian couple won the right to have access to sperm from an unknown donor.[10]

In 2001, after a human rights challenge to the Vital Statistics Agency's practice of refusing to register both parents of a child when it appeared to the agency that both parents had "female" given names, B.C. became the first jurisdiction in the world to permit two women to be registered, at birth, as the parents of a child born to one of them.[11] The Agency was forced to change its birth registration practices to include registration of a co-parent who was not genetically or biologically related to the child – a change for which there was no legislative framework. The resulting birth certificate did not identify which of the mothers carried the child.[12] Nor did the registration establish or reflect legal parentage.

The same issue was successfully fought in Ontario on the basis of the Charter in 2006.[13]

In Alberta, the lesbian co-mother of a woman whose child was conceived by sperm donation argued successfully that the presumption of paternity in the Alberta legislation was unconstitutionally discriminatory. If a child was born to a woman with a male partner, he was presumed to be the child's father. No such presumption was available to the co-mother. The court read in a parallel provision for same-gender partners.[14]

It also became possible to get a declaration from the court that a child carried by a gestational carrier, or surrogate mother, was a child of the prospective parent(s) intending to raise her, and not of the woman who gave birth to her.

Prospective parents who were unable to carry a child could use invitro fertilization (IVF) and implant the resulting embryo in a surrogate mother, who then gestated and gave birth to the child. But the prospective parents were precluded from registering the birth of their child showing themselves as parents, because of the structure of the *Vital Statistics Act* --which conferred maternal status on the woman who delivered the child. The problem was solved in B.C. in 2003, in the case of *Rypkemav H.M.T.Q. et al*.[15] The court declared the prospective parents to be the birth parents of the child that had been born and directed that they be

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10 *Potter and Benson v Korn* (1995), 23 C.H.R.R. D/319; aff'd (1996), 25 C.H.R.R. D/141 (B.C.S.C.) At the time, the only source of sperm was a gynecologist who had decided that he would not provide sperm to lesbian couples because he had had to testify as a witness in a court case in which a lesbian couple had a child with sperm provided by him.

11 *Gill v Maher* [2001] B.C.H.R.T.D. No. 34. The two lesbian couples filed a human rights complaint because of the practice of the Vital Statistics Agency. If the Agency received an application to register a birth with a "female name" and a "male name", they registered the female as the mother and the male as the father. They made no inquiry about whether the named man was genetically related to the child. But if they received a request with two "female names" they returned the application and refused to register it. The B.C. Human Rights Tribunal held that this was discrimination on the basis of sexual orientation, since there was no distinction between an unrelated male parent and an unrelated female parent seeking registration.

12 Registration as a parent with the Vital Statistics Agency was *evidence* but not *proof* of legal parentage.

13 *M.D.R. v. Ontario (Deputy Registrar General)* [2006] O.J. No. 2268; 270 D.L.R. (4th) 90; 141 C.R.R. (2d) 292; 30 R.F.L. (6th) 25; 148 A.C.W.S. (3d) 943; 2006 CarswellOnt 3463; [2006] O.T.C. 489

14 *Fraess v HRMQ* (AB) [2005] A.J. No 1665; 2005 ABQB 889; 278 D.L.R. (4th) 187; 56 Alta L.R. (4th) 01.

15 [2003] B.C.J. No. 2721; 2003 BCSC 1784; 233 D.L.R. (4th) 760; [2004] 3 W.W.R. 712; 22 B.C.L.R. (4th) 233; 47 R.F.L. (5th) 398 ; 127 A.C.W.S. (3d) 300

registered with the Vital Statistics Agency as the child's parents. Once again, there was no legislative framework for the court's decision; it was based on the court's inherent jurisdiction.

The result, among other things, was an increasing divergence between "legal parentage" and registered parentage.

Registration under the *Vital Statistics Act* conferred a presumption of parentage, but was not proof of parentage.[16] Prior to the *FLA*, due to policy changes and the evolving case law, the legal parents of a child born through ART were not necessarily the same as his or her registered parents. The fact a lesbian co-parent (not the birth mother) was named on her child's birth certificate, for example, did not make her a legal parent, unless the couple went through a step-parent adoption or obtained a declaration of parentage.

It was against this backdrop that the federal government first undertook to regulate assisted reproductive technology and that the provisions of the new *Family Law Act* were enacted.

## C. Legislative Responses

### 1. Federally: The Assisted Human Reproduction Act

Assisted reproduction has been regulated only since 2004, when the federal government enacted the Assisted Human Reproduction Act (AHRA).17 The statute prohibited some activities such as human cloning, and regulated others, including sperm and egg donation and surrogacy. The AHRA prohibited the purchase of human reproductive materials (eggs, sperm, and embryos) and paying for the services of a surrogate (sections 6 and 7). It also prohibited people from accepting payment for arranging the services of a surrogate, offering to arrange such services, or paying consideration for the arrangement of surrogacy services.[18]

In 2010, after a reference initiated by Quebec, the Supreme Court of Canada struck down many of the administrative provisions of the *AHRA* as being *ultra vires* the federal government and its criminal law powers, and consequently an constitutionally impermissible incursion into provincial jurisdiction.[19] Quebec conceded, however, that the core prohibitions and regulations of reproductive activities, such as the prohibitions on the purchase of gametes and embryos, were *intra vires* the federal criminal law power.

In 2012, the federal government enacted changes to the *AHRA* to comply with that court decision. The prohibitions against the commercialization of human reproductive materials remain.[20] As a result, it continues to be illegal to buy sperm, eggs, or embryos, or to pay a person to be a surrogate or for services to arrange for a surrogate.

Also remaining in force are provisions regarding consent to the use of genetic material (s. 8), and restrictions on the retrieval of gametes from persons under 18 (s. 9). Section 8 provides that no person shall make use of an invitro embryo or human reproductive material, or remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo, unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose.

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16 *Vital Statistics Act* [RSBC 1996] c 479 s. 41(3)(b)

17 SC2004 c.2 ("AHRA")

18 A discussion of the policy framework behind the AHRT Act is beyond the scope of this paper; but see Ubaka Ogbogu "Reference Re: Assisted Human Reproduction Act and the Future of Technology-Assisted Reproduction and Embryo Research in Canada (011) 19 Health L.J. 153-189.

19 *Reference re Human Assisted Reproduction Act* [2010] SCJ No 61

20 2010 SCC 61; [2010] 3 SCR 457. The decision was 4-4-1, and was based on a traditional division of powers analysis.

Although reimbursing a surrogate for out of pocket expenses is not expressly prohibited, the provisions of the *AHRA* which would allow for reimbursement of expenses (s. 12) are not yet in force. Notwithstanding the legislative gap Health Canada's position is that a surrogate may be reimbursed for out-of-pocket costs directly related to the pregnancy[21], and the not-for-profit Canadian Standards Association Group is expected to be releasing Donor and Surrogate Reimbursement Guidelines later in 2016. As will be discussed in more detail later in this paper, in practice surrogates are commonly reimbursed for out-of-pocket expenses including medical expenses, legal fees, and the like.

As a result of Quebec reference, provinces can legislate in regard to fertility treatments, re-implantation genetic diagnosis, research uses of in vitro embryos no longer required for reproduction, and surrogacy arrangements (excluding contracts).[22]

## 2. Uniform Law Conference of Canada: the *Uniform Child Status Act*, 2010

In 2010 the Uniform Law Conference of Canada adopted a new *Uniform Child Status Act* which replaced the previous Uniform Child Status Act of 1992[23]. The 2010 *Uniform Child Status Act* deals directly with the determination of parentage in the ART context, the use of declaratory orders, and with some conflicts of law issues, including the treatment of extraprovincial parentage orders.

Distinct from model legislation and policy papers prepared by the Conference, a "uniform" statute is a document the Conference recommends for enactment by all relevant governments within Canada. To date, British Columbia is the only Canadian jurisdiction to enact parentage legislation in response to the 2010 uniform act (although new legislation is being proposed in Manitoba and Ontario).

Most- but not all- of the *FLA* parentage provisions are similar to the provisions in the uniform act. A significant difference is that the *FLA* provides for legal parentage in ART-assisted births to be determined and confirmed administratively, through the provision of written agreements and consents and completion of the birth registration process. In contrast, the *Uniform Child Status Act* recommends that the parentage of ART-conceived children be determined through the courts (by way of declaratory orders). The specifics of the orders are set out in the uniform act.

Also markedly different is the requirement in the uniform act that in a surrogacy, at least one of the intended parents must have a possible a genetic connection to the child before the intended parents' legal parentage can be established under the act (s. 8(2)(3)). Without the possibility of a genetic link, the drafters of the Uniform Act recommended adoption be used and that jurisdictions adopting the uniform act amend their adoption legislation to address these situations.[24]

As will be discussed later in this paper, the *FLA* takes a distinctly different approach, providing that intended parents in a surrogacy situation may be registered as the parents directly at the time of birth, regardless of whether they have any genetic connection to their child.

For more information see: http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/637-child-status/1495-uniform-child-status-act

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21 See Health Canada's webpage on surrogacy: http://www.hc-sc.gc.ca/dhp-mps/brgtherap/legislation/reprod/surrogacy-substitution-eng.php

22 Ogbogu, op cit, p. 8

23 See text and commentary on the *Uniform Child Status Act* at http://www.ulcc.ca/en/home/86-josetta-1-en-gb/uniform-actsa/child-status-act/1371-child-status-act-2010

24 See commentary to the Uniform Child Status Act, supra, at p. 16.

### 3. Provincially: The Family Law Act

Part 3 of the FLA is the B.C. response to the evolving nature of fertility law. The *FLA* does not restrict ART in any way, but spells out the legal parentage of children conceived by ART. The *Law and Equity Act* and *Vital Statistics Act* were also amended to support and reflect the parentage scheme under Part 3.

## III. Part Two: Legal Parentage of Children under the Family Law Act

### A. Introduction

On March 18, 2013, with the coming into force of the *Family Law Act* ("*FLA*"), British Columbia directly addressed the determination of legal parentage of children conceived by assisted reproductive technology (ART). This was the first time that any Canadian province had provided a comprehensive scheme to directly legislate with respect to determinations of parentage of ART-conceived children .

Part 3 (Parentage) of the *FLA*:

- Addresses determination of parentage for children conceived without, and with, ART
- Spells out the legal standing of the providers of genetic material, depending on whether they are providing their reproductive material to conceive their own child, or a child to be raised by other prospective parents
- Specifies what happens if a participant in the creation of an embryo dies before the embryo is used to conceive a child
- Sets out the requirements for a surrogacy
- Provides mechanisms to amend a determination of parentage.

It is important to note that Part 3 of the *FLA* addresses *legal* parentage. It does not deal with parenting rights and responsibilities, set out in Part 4 of the *FLA,* which may be extended to people in a child's life who are not the child's legal parent(s).[25]

### B. Overview of Parentage Regime under the Family Law Act

The determination of who is a parent of a child conceived by sexual intercourse is straightforward: that child is a child of his or her birth mother and biological father: s.26(1). Where a child is conceived through sexual intercourse, presumptions as to when a male person will be presumed to be the biological father are set out at s. 26(2), and are similar to the

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25 In their backgrounder to the Family Law Act, the Ministry of Justice provides the following clarification: It is important not to confuse Parental status and Parenting roles and responsibilities. Other British Columbia acts and other Parts of the Family Law Act, for example, Part 4 - Care of and Time with Children and Part 7 - Child and Spousal Support, recognize that people who are not Parents may take on a Parenting role and responsibilities in relation to a Child, despite not being legal parents. Defining, other non-Parents as "Parents" for a particular purpose under a law does not grant legal parentage. It simply means that they will be treated in a similar way as a Parent for a particular purpose. For example, section 146 under Part 7 Child and Spousal Support provides a definition of "Parent" that includes a step-Parent. This does not mean that the step Parent is a legal parent. It only means that for the purpose of support, a step Parent may have similar obligations to a Parent The *FLA* also provides that" guardians and Stepparents" will be referred to as "Parents" under the Act but they may not be legal parents. However, under Part 4 of the *FLA*, "guardians and Stepparents" are assigned "legal responsibilities" for a Child. And see . "Family Law Act Explained" see: http://www.ag.gov.bc.ca/legislation/family-law/pdf/part3.pdf

presumptions of paternity used for child support purposes under the old *Family Relations Act*. The parentage of an adopted child is established under the *Adoption Act* (s. 25)

However the determination of children conceived by ART is complex. The factors to assess parentage under the *FLA* include:

- Whether a child was conceived using donated genetic material; and, if so,
    - Whether the provider(s) of the genetic material used that material for their own reproductive project;
    - Whether sperm was provided through the "turkey baster" method or through sexual intercourse
- Whether a child was gestated by a surrogate mother, and, if so, whether there is a pre-conception agreement between the surrogate and the "intended parents" which complies with the requirements of the *FLA*
- Whether there is a prospective co-parent, and if so,
    - Whether the co-parent was in a relationship with the birth parent when the child was conceived and agreed to be a co-parent when the child was conceived
- Whether there are more than two prospective parents, and if so, whether there is a pre-conception agreement among the "intended parents" which complies with the requirements of the *FLA*.

Underlying the *FLA* are the following principles:

- That children will be treated equally regardless of whether they were conceived by sexual intercourse or by ART
- That a child's legal parents for the purposes of all British Columbia laws, including, for example, registration of birth and inheritance, are consistent
- That a child may have more than two legal parents,
- There is a bright-line between children conceived through sexual intercourse and children conceived through assisted reproduction; and
- Where assisted reproduction is used, the determination of who a child's legal parents are relates to who intends to raise the child, rather than who is genetically connected to a child: intention trumps genetics.

## C. Walking through Part 3 of the FLA[26]

### 1. Definitions and Interpretation

#### a. Definitions

The starting points to understand Part 3 of the *FLA* are the definitions in section1 and in section 20, the "definitions" section for Part 3.

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26 Useful resources to understand the *FLA* include: *Family Law Act Transition Guide*, Continuing Legal Education Society of British Columbia, August 2012 (hereinafter "Transition Guide"); *The Family Law Act Explained*, Ministry of Justice, online: http://www.ag.gov.bc.ca/legislation/family-law/acts-explained.htm; *Family Law Act Questions and Answers*, Ministry of Justice, online: http://www.ag.gov.bc.ca/legislation/family-law/qa.htm; *White Paper on the Family Relations Act Reform, Proposals for a New Family Law Act,* Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office, July 2010, online: http://www.ag.gov.bc.ca/legislation/pdf/Family-Law-White-Paper.pdf

"Child" and "parent" are defined in section 1 of the FLA:

> *"**Child,**"* except in Parts 3 *[Parentage]* and 7 *[Child and Spousal Support]* and section 247 *[Regulations Respecting Child Support],* means a person who is under 19 years of age;
>
> *"**Parent**"* means a parent under Part 3 *[Parentage.]*
>
> Note that the definition of "child" does not apply to Part 3 of the Act. "Child" is not otherwise defined in Part 3.

Other definitions are provided in Part 3, Section 20:

> *"**Assisted reproduction**" means a method of conceiving a child other than by sexual intercourse; ART includes donor insemination, in vitro fertilization (IVF), inter uterine insemination (IUI) and surrogacy*[27]*.*
>
> *"**Birth mother**" means the person who gives birth to, or is delivered of, a child, regardless of whether her human reproductive material was used in the child 's conception.*

Under the *FLA*, the definition of "birth mother" is the starting point for the determination of all legal parents of a child.

> *"**Donor**" means a person who, for the purposes of assisted reproduction other than for the person's own reproductive use, provides*
>
> (a) his or her own human reproductive material, from which a child is conceived, or
>
> (b) an embryo created through the use of his or her human reproductive material.

Note that under this definition, someone providing sperm or eggs for their own reproductive use is not a "donor." As we will see below, since the *FLA* presumes a donor is not a parent, this avoids the unintended consequences with respect to parentage that could arise when a person or couple who are having fertility problems use ART to conceive their own child.

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

Fifty six days marks the last phase of the embryonic period and at this point the development of the embryo transitions into the foetal stage of development. After 56 days the major organs of the foetus are developed including the development of brain function. The suspension of the 56 day period relates to circumstances in which an embryo has been frozen through ART to be used at a later time.

> *"**Human reproductive material**" means a sperm, an ovum or another human cell or human gene, and includes a part of any of them.*

These definitions of "embryo" and "human reproductive material" are the same as under the Federal *Assisted Human Reproduction Act*[28]

> *"**Intended Parent" or "Intended Parents**" means a person who intends, or two persons who are married or in a marriage-like relationship who intend, to be a*

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27 A brief explanation of these kinds of ART is at Appendix A. This appendix was prepared by barbara findlay and Zara Suleman for the original Baby Steps paper.

28 S.C. 2004 c. 2.

*parent of a child and, for that purpose, the person makes or the two persons make an agreement with another person before the child is conceived that:*

(a) The other person will be the birth mother of a child conceived through assisted reproduction, and

(b) The person, or the two persons, will be the child 's parent or parents on the child 's birth, regardless of whether that person's or those persons' human reproductive material was used in the child 's conception.

Note that "intended parent(s)" as defined under the *FLA* does not encompass all persons who may intend to be parents of a child conceived with ART. The definition of "intended parent" is restricted to the prospective parents of a child gestated by a surrogate.

In this paper, we have used the term "prospective parent(s)" to refer more broadly to any person or combination of persons intending to raise an ART-conceived child. "Prospective parent" includes an "intended parent" in a surrogacy situation, but also includes, for example, a birth mother (and her partner, if she has one) who will conceive and raise a child conceived with donated sperm; the partner of a gay man who has a child by egg donation and surrogacy; both parents in a couple, one of whom is transgender and who use ART to conceive; and all of the people who are parties to a multi-parent agreement under the *FLA*. A prospective parent may use ART because they or their partner is infertile; because they intend to be an autonomous parent; or because they are in a same sex couple or a couple in which one parent is transgender.

### b. Timing of Conception

Section 20 also defines when a child born through *ART* is considered to have been conceived:

> (2) A child born as a result of assisted reproduction is deemed to have been conceived on the day the human reproductive material or embryo was implanted in the birth mother.

## 2. Section 23: Determination of Parentage for all Purposes

The core of Part 3 of the *FLA* is section 23, which provides that a determination of parentage under Part 3 is a determination for the purposes of all of the laws of British Columbia:

> 23 (1) For all purposes of the law of British Columbia,
>
> (a) A person is the child of his or her parents,
>
> (b) A child 's parent is the person determined under this Part to be the child's parent, and
>
> (c) The relationship of parent and child and kindred relationships flowing from that relationship must be as determined under this Part.
>
> (2) For the purposes of an instrument or enactment that refers to a person, described in terms of his or her relationship to another person by birth, blood or marriage, the reference must be read as a reference to, and read to include, a person who comes within the description because of the relationship of parent and child as determined under this Part.

Part 3 provides a comprehensive framework for determining who a child's legal parents are in B.C. If a person meets the definition of "parent" under the *FLA*, they meet the definition of "parent" for all other legislation, policies, and regulatory schemes in the province, including for the purposes of child support, estates law and any other legal purpose (see estates discussion below). Once a "parent", always a "parent" - unless that status is changed by adoption or a declaration of parentage.

## 3. Section 24: Donor not automatically parent

By section 24, a donor of eggs, sperm or an embryo is never a parent simply by virtue of the donation, where assisted reproduction is used:

> ***24*** (1) If a child is born as a result of assisted reproduction, a donor who provided human reproductive material or an embryo for the assisted reproduction of the child
>
> (a) is not, by reason only of the donation, the child's parent,
>
> (b) may not be declared by a court, by reason only of the donation, to be the child's parent, and
>
> (c) is the child's parent only if determined, under this Part, to be the child's parent.
>
> (2) For the purposes of an instrument or enactment that refers to a person, described in terms of his or her relationship to another person by birth, blood or marriage, the reference must not be read as a reference to, nor read to include, a person who is a donor unless the person comes within the description because of the relationship of parent and child as determined under this Part.

Under these provisions, a person cannot be considered a donor if the child is conceived through sexual intercourse. For example, a heterosexual pair cannot have sex, create a child, and agree that the male sexual partner will just be a donor—as the biological father, he is a parent under s. 26 (see below). Conversely, if a child is conceived through assisted reproduction using donated sperm, the male who provided the sperm is not a parent, and cannot claim to be a parent.

A question arises, however, as to whether there could ever be circumstances where the male partner in a committed relationship could provide sperm for his female partner to conceive a child through assisted reproduction, and avoid becoming a legal parent. (See discussion in the Future Issues section, below.)

Section 24 provides needed clarity and certainty for people using assisted reproduction to create families. A donor cannot seek parentage rights solely due to the fact of the donation, and, similarly, the intended parents cannot seek child support from the donor.

The exception to the general rule that donors are not parents is provided for in section 30, which allows there to be more than two parents in limited situations where the parties using assisted reproduction to have a child enter into a written agreement regarding the parentage arrangement prior to conception of the child.

## 4. Section 25: Parentage if Adoption

Where children are adopted, their parents are as established under the *Adoption Act*. Parts 26 – 30 of Part 3 of the *FLA* do not apply.[29] This was affirmed by the court in *Re British Columbia Birth Registration No. 2004-59-020158*, 2013 BCSC 1262.[30]

## 5. Section 26: Parentage if no assisted reproduction

The *FLA* distinguishes between a child conceived without ART and a child conceived with ART. Section 26 applies whenever a child is born without assisted reproduction.

Section 26(1) replaces s. 61(1) of the *Law and Equity Act*, which had provided that a person was the child of his or her "natural parents."[31]

Section 26 clarifies that unless ART is used, a child's legal parents are the birth mother and biological father. Presumptions of paternity for a child born to a woman in a relationship with a man are set out in section 26(2), and largely carry over the presumptions of paternity previously set out in child support provisions of the *FRA* (s. 95).

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29 *FLA* section 25

30 *Re British Columbia Birth Registration No. 2004-59-020158*, 2013 BCSC 1262, appeal allowed in part on other issue (2014 BCCA 137).

31 RSBC 1996 c 253 s 61

The presumptions of paternity do not apply if more than one person can be presumed to be the child's biological father. If paternity is an issue a party can apply to obtain a parentage test under s. 33.

The full section reads:

> ***26*** (1) On the birth of a child not born as a result of assisted reproduction, the child's parents are the birth mother and the child's biological father.
>
> (2) For the purposes of this section, a male person is presumed, unless the contrary is proved or subsection (3) applies, to be a child's biological father in any of the following circumstances:
>
> (a) he was married to the child's birth mother on the day of the child's birth;
>
> (b) he was married to the child's birth mother and, within 300 days before the child's birth, the marriage was ended
>
> (i) by his death,
>
> (ii) by a judgment of divorce, or
>
> (iii) as referred to in section 21 *[void and voidable marriages]*;
>
> (c) he married the child's birth mother after the child's birth and acknowledges that he is the father;
>
> (d) he was living with the child's birth mother in a marriage-like relationship within 300 days before, or on the day of, the child's birth;
>
> (e) he, along with the child's birth mother, has acknowledged that he is the child's father by having signed a statement under section 3 of the Vital Statistics Act;
>
> (f) he has acknowledged that he is the child's father by having signed an agreement under section 20 of the *Child Paternity and Support Act*, R.S.B.C. 1979, c. 49.
>
> (3) If more than one person may be presumed to be a child's biological father, no presumption of paternity may be made.

## 6. Section 27: Parentage if Assisted Reproduction

Section 27 applies only if a child is conceived through assisted reproduction and born to a birth mother who will raise the child (either alone, or with a co-parent). It does not apply to a surrogacy situation, in which a child conceived by ART and gestated by a surrogate will not raise the child. Surrogacy arrangements are covered under section 29.

> 27 (1) This section applies if
>
> (a) a child is conceived through assisted reproduction, regardless of who provided the human reproductive material or embryo used for the assisted reproduction, and
>
> (b) section 29 [parentage if surrogacy arrangement] does not apply.
>
> (2) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's birth mother is the child's parent.
>
> (3) Subject to section 28 [parentage if assisted reproduction after death], in addition to the child's birth mother, a person who was married to, or in a marriage-like relationship with, the child's birth mother when the child was conceived is also the child's parent unless there is proof that, before the child was conceived, the person
>
> (a) did not consent to be the child's parent, or
>
> (b) withdrew the consent to be the child's parent.

Examples of situations captured by section 27 include:

- A woman intending to raise a child alone, who conceives with donated sperm
- An opposite sex couple in which one spouse is infertile and the woman conceives with donated sperm or eggs, and the couple plan to raise the child

- A lesbian couple, one of whom conceives with donated sperm, and both of whom plan to raise the child.[32]

Section 27 only applies if there has been no sexual intercourse between a donor and a prospective mother. Regardless of whether the donor and the prospective mother have agreed that he will be only a donor of sperm and not a parent, if they have intercourse to conceive the child instead of using a turkey baster or other ART method, the child they conceive is no longer an ART-conceived child under s. 27, but instead falls under s. 26. The act of sexual intercourse makes the "donor"/sex partner a parent.

Section 27 also confers parental status on the conjugal partner of the birth mother. The partner is a parent unless there is proof that the partner did not consent prior to conception, or that the partner withdrew consent prior to conception. As could be done prior to the *FLA*, the partner is registered as a parent at birth. The difference is that now the partner is a legal parent, without need for a declaration of parentage or an adoption.

Note that there is no requirement that the partner actually consent in advance of conception—only that there not be proof they didn't consent. Consequently, it appears an individual may become a legal parent without knowing there was a project of conception in the works.

The wording also indicates that once the child is conceived, the partner's consent cannot be withdrawn. This levels the playing field, so to speak, between the birth mother and her partner: where a couple consciously embark on the project of having a child, it would not be appropriate for one partner to be able to abandon responsibility for that child simply because they are not the one carrying the child. In that way, the co-parent is in a similar legal situation to that of a biological father where intercourse is used.

The birth mother and her partner do not need to qualify as spouses before conception for this provision to apply. The provision states only that the partner be "married to, or in a marriage-like relationship with, the child's birth mother when the child was conceived." There does not appear to be any restriction as to how long the couple need to have been in that marriage-like relationship.

Interestingly, the word "father" is not used in s. 27. If a woman is inseminated with her male partner's sperm through IVF, for example, the parentage of that child is determined under this section, not section 26. Consequently her male partner, who is the biological father, is referred to by the section as a "parent" as opposed to as a "father" under section 26.[33]

## 7. Section 28: Parentage if Assisted Reproduction after Death

Under certain conditions a person who provides eggs or sperm for the purpose of conceiving a child may be recognized as the legal parent of that child even if that person dies before the child is conceived.

Section 28 states that if a child is conceived through ART and the person who provided the human reproductive material or embryo used in the conception has died prior to conception, the deceased person will be one of the child's legal parents if the deceased provided the reproductive material or embryo for their own reproductive use, and if there is proof that they

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32 As a practical matter the only two individuals who know which method was used are the two who conceived the child.

33 I am grateful to Ingrid Bloomfeld, regional manager of the Vital Statistics Agency, for pointing this out. Apparently it is the Agency's practice to accommodate this and allow fathers in this situation to register as fathers even though the birth is being registered under s. 27. However, this is a factor only in the registration of birth form, since all resulting birth certificates, however a child was conceived, specify 'parent' for every legal parent including the birth mother.

had given written consent both to be the parent of the child and for their spouse or partner to use that reproductive material or embryo.

An example would be where a couple has frozen embryos stored at a fertility clinic, and one of the prospective parents dies before a child is conceived. [34]

> **28** (1) This section applies if
>
> (a) a child is conceived through assisted reproduction,
>
> (b) the person who provided the human reproductive material or embryo used in the child's conception
>
> (i) did so for that person's own reproductive use, and
>
> (ii) died before the child's conception, and
>
> (c) there is proof that the person
>
> (i) gave written consent to the use of the human reproductive material or embryo, after that person's death, by a person who was married to, or in a marriage-like relationship with, the deceased person when that person died,
>
> (ii) gave written consent to be the parent of a child conceived after the person's death, and
>
> (iii) did not withdraw the consent referred to in subparagraph (i) or (ii) before the person's death.
>
> (2) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's parents are
>
> (a) the deceased person, and
>
> (b) regardless of whether he or she also provided human reproductive material or the embryo used for the assisted reproduction, the person who was married to, or in a marriage-like relationship with, the deceased person when that person died.

Since the *FLA* determines parentage for all purposes, this provision potentially means children conceived posthumously have the same inheritance rights as other children of a deceased person. The *Wills, Estates and Succession Act* has restricted those rights. This is addressed in more detail below.

## 8. Section 29: Surrogacy

Section 29 governs determination of parentage when surrogacy is used.

Provided that all of the requirements of the section are met, the prospective parents are the child's legal parents at birth. The prospective parent or parents (in this section called "intended parents') do not need to get a declaration of parentage to be their child's legal parents, and provided all the requirements of the section are met the intended parents will be registered as the child's only parents upon the child's birth.

The preconditions for the application of section 29 are:

- That the parties (the intended parent(s) and the surrogate) have a written agreement made before conception, which provides that:
  - The surrogate will not be a parent[35]
  - The surrogate will surrender the child to the intended parent(s) at birth and
  - The intended parent(s) will be the child's parents;

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34 Under the AHRA, a person's reproductive material may be used after death provided the deceased gave written consent prior to death.

35 Unless the surrogate and the intended parent(s) make an "other arrangement" under section 30 to include the surrogate as a parent

- No one withdraws from the agreement before the child is conceived;
- The surrogate gives written consent after birth for the intended parents to be the child's parents[36]; and
- The surrogate relinquishes the child and the intended parents take the child at birth.

It is important to note that if a dispute arises after the child is born, the fact the surrogate signed the pre-conception agreement cannot serve as her post-birth consent for the intended parents to the child's parents, although the agreement can be used as evidence of the parties' intentions: section 29(6).

Section 29(7) provides for the death of an intended parent before the birth of the child, outlining the requirements for the deceased to be listed as a parent of the child.

The text of the section is as follows:

> ***29*** (1) In this section, ***"surrogate"*** means a birth mother who is a party to an agreement described in subsection (2).
>
> (2) This section applies if,
>
> (a) before a child is conceived through assisted reproduction, a written agreement is made between a potential surrogate and an intended parent or the intended parents, and
>
> (b) the agreement provides that the potential surrogate will be the birth mother of a child conceived through assisted reproduction and that, on the child's birth,
>
> (i) the surrogate will not be a parent of the child,
>
> (ii) the surrogate will surrender the child to the intended parent or intended parents, and
>
> (iii) the intended parent or intended parents will be the child's parent or parents.
>
> *(3) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (2), a person who is an intended parent under the agreement is the child's parent if all of the following conditions are met:*
>
> (a) before the child is conceived, no party to the agreement withdraws from the agreement;
>
> (b) after the child's birth,
>
> (i) the surrogate gives written consent to surrender the child to an intended parent or the intended parents, and
>
> (ii) an intended parent or the intended parents take the child into his or her, or their, care.
>
> *(4) For the purposes of the consent required under subsection (3) (b) (i), the Supreme Court may waive the consent if the surrogate*
>
> (a) is deceased or incapable of giving consent, or
>
> (b) cannot be located after reasonable efforts to locate her have been made.
>
> *(5) If an intended parent dies, or the intended parents die, after the child is conceived, the deceased intended parent is, or intended parents are, the child's parent or parents if the surrogate gives written consent to surrender the child to the personal representative or other person acting in the place of the deceased intended parent or intended parents.*
>
> *(6) An agreement under subsection (2) to act as a surrogate or to surrender a child is not consent for the purposes of subsection (3) (b) (i) or (5), but may be used as evidence of the parties' intentions with respect to the child's parentage if a dispute arises after the child's birth.*
>
> *(7) Despite subsection (2) (a), the child's parents are the deceased person and the intended parent if*

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36 Consent can be waived by the court if, after birth, the surrogate dies or is unlocatable: s. 29(4)

(a) the circumstances set out in section 28 (1) *[parentage if assisted reproduction after death]* apply,

(b) before a child is conceived through assisted reproduction, a written agreement is made between a potential surrogate and a person who was married to, or in a marriage-like relationship, with the deceased person, and

(c) subsections (2) (b) and (3) (a) and (b) apply.

## 9. Section 30: Multi-Parent Families (Parentage If Other Arrangement)

Section 30 is the first time Canadian family law legislation has allowed for a child to have more than two legal parents. A condition precedent to there being more than two legal parents is a written agreement, made pre-conception, among all of the prospective parents. Provided that agreement is in place and the other requirements of section 30 are met, the parties may be registered as the child's parents at birth, without the necessity of a declaration of parentage, subject to any limits imposed by the Vital Statistics Agency.

The written agreement must provide that the potential birth mother will be the birth mother of the child and that on the child's birth, the parties to the agreement will be the parents of the child. Persons who may be included as parties to the agreement, in addition to the birth mother, include the birth mother's partner, intended parents (as defined in the Act) and donors.

**30** (1) This section applies if there is a written agreement that

(a) is made before a child is conceived through assisted reproduction,

(b) is made between

(i) an intended parent or the intended parents and a potential birth mother who agrees to be a parent together with the intended parent or intended parents, or

(ii) the potential birth mother, a person who is married to or in a marriage-like relationship with the potential birth mother, and a donor who agrees to be a parent together with the potential birth mother and a person married to or in a marriage-like relationship with the potential birth mother, and

(c) provides that

(i) the potential birth mother will be the birth mother of a child conceived through assisted reproduction, and

(ii) on the child's birth, the parties to the agreement will be the parents of the child.

(2) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's parents are the parties to the agreement.

(3) If an agreement described in subsection (1) is made but, before a child is conceived, a party withdraws from the agreement or dies, the agreement is deemed to be revoked.

A section 30 agreement is necessary if a donor wishes to be a parent. Otherwise, the donor has no parental status, pursuant to s. 24[37].

An agreement made under Section 30 is revoked if, before a child is conceived by way of ART, a party to the agreement withdraws or dies: s. 30(3).

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37 While the intention of these provisions appears clear, there also appears to be a logical inconsistency in the interaction of sections 20 and 30, given that "donor" is defined in section 20 as a person who provides genetic material for a purpose *other than their own reproductive use* – by taking on parentage of that child in section 30, the person providing the genetic material would appear to be doing so for their own reproductive use..

The most common arrangement for an additional parent agreement will likely be a three parent family, for example:

(i) a lesbian couple (the intended parents) and their male friend, all of whom will be parents (ie the male is a parent not a sperm donor);

(ii) a gay male couple (the intended parents) and their female friend who will carry the child, all of whom will be parents (ie the woman is a parent not a surrogate).

(iii) a polyamourous family, one of whom will carry the child.

Section 30(1) could also be interpreted to allow a situation in which intended parents make an agreement with a surrogate to have a family that includes the intended parents, a donor and the surrogate as the parents of a child, for a total of 4 parents.

However, there may be circumstances where the intended parents require more than one donor, and the law may be able to accommodate the possibility of 5 parents, for example, a heterosexual couple (the intended parents) who are infertile and require a sperm donation, and egg donation and a surrogate, all of whom wish to be the parents of the child.

There is debate, even among the authors of this paper, about whether more than 5 parents could be contemplated under the law and what the maximum number of parents may be. The previous version of this paper "Baby Steps", considers in more detail the potential arguments that could be considered.

As a practical matter, the Vital Statistics Agency, by administrative policy, establishes a maximum number of "parents" that they consider eligible to be registered. If more parents than that request to be registered, the Vital Statistics Agency will refuse the registration and suggest the parties obtain a declaration of parentage from the court, likely at least until there is a legislative amendment or case law clarifying the issue. At the time of writing, it is the writers' understanding that the Agency's policy is to accept no more than four parents for registration.[38] Note that for members of a polyamorous family all to be "parents" they must either bring themselves within one of the configurations above, or get a court order (declaration of parentage).[39] The premise that the gestating person is female ("birth mother") can also be problematic, since trans men may gestate a child.[40]

## 10. Sections 31 and 32: Orders Declaring Parentage

Section 31 provides the court the ability to make declarations of parentage in cases where there may be a "dispute or any uncertainty" regarding parental status of one or more parties. The section requires the court to apply the parentage rules under Part 3 as far as possible (s. 31(3)).

> ***31*** (1) Subject to subsection (5), if there is a dispute or any uncertainty as to whether a person is or is not a parent under this Part, either of the following, on application, may make an order declaring whether a person is a child's parent:
>
> (a) the Supreme Court;

38 From discussions with Ingrid Bloomfield, Regional Manager of the Vital Statistics registry.

39 For example, if a three person poly family were intending to be parents by having one of the three donate sperm to a non-member surrogate, the other two members of the poly family would not be "parents" without a declaration of parentage. Note that although polygamy (marriage to more than one person at the same time) is a criminal offence in Canada, it appears members of a polyamorous family may all be common law partners with each other under the *Family Law Act*.

40 See for example http://www.npr.org/sections/health-shots/2014/11/07/362269036/transgender-men-who-become-pregnant-face-health-challenges. As a practical matter, in these circumstances one should contact the Vital Statistics registry to confirm how best to accommodate the gender of the gestating parent on the registration of birth form.

(b) if such an order is necessary to determine another family law dispute over which the Provincial Court has jurisdiction, the Provincial Court.

(2) If an application is made under subsection (1), the following persons must be served with notice of the application:

(a) the child, if the child is 16 years of age or older;

(b) each guardian of the child;

(c) each adult person with whom the child usually resides and who generally has care of the child;

(d) each person, known to the applicant, who claims or is alleged to be a parent of the child;

(e) any other person to whom the court considers it appropriate to provide notice, including a child under 16 years of age.

(3) To the extent possible, an order under this section must give effect to the rules respecting the determination of parentage set out under this Part.

(4) The court may make an order under this section despite the death of the child or person who is the subject of the application, or both.

(5) An application may not be made respecting a child who has been adopted.

There does not appear to be any limitation period to request a declaration of parentage. The child must be served if she is over 16, and the court may order a child under 16 be notified if appropriate. The application may be brought before or after the child's birth is registered, and an order may be made even if the child or one of the parties to the application has died. An application cannot be made if a child has been adopted.

Declarations of parentage maybe made by the Supreme Court or, in limited circumstances by the Provincial Court, "if such an order is necessary to determine another family law dispute over which the Provincial Court has jurisdiction" (s. 31 (1)(b), which would include guardianship, parenting issues and child support.

A question arises as to the scope of the court's authority to make such declarations, and what degree of "uncertainty" will be considered sufficient for such an order to be made.

In *Family Law Act (Re)* 2016 BCSC 22 the BC Supreme Court granted a parentage declaration to a same sex couple whose child was born in British Columbia to a surrogate mother.[41] The child was conceived using a donor egg fertilized with sperm from one of the intended parents. The intended parents and the surrogate had all filed the required statutory declarations with Vital Statistics, and the child's birth registration accordingly referred to the intended parents as the child's parents. The parents, however, had obtained a legal opinion from a lawyer in their home province, Quebec, advising that an order from the B.C. court may be required before their parentage of the child would be recognized in that province.

The parents applied for a declaration of parentage and for declarations confirming that neither the egg donor nor the surrogate were the child's parents. The court granted the declarations. In applying section 31, the court confirmed that the intended parents were the legal parents of the child under the *Family Law Act* (para 36) and noted that if the intended parents resided in B.C., no declaration would be necessary (para 44). The court also observed that before its statutory jurisdiction to make a declaration of parentage could be exercised, the court "must find there is either a "dispute" or "uncertainty" regarding a person's parentage." The court accepted there was "some uncertainty" regarding the child's parentage arising from Quebec law and that an order was necessary for the intended parents and the child to function fully as a family unit in Quebec (para 47).

It remains to be seen whether the precondition of "uncertainty" will extend to situations where registered parents may want a declaration of parentage as a preventative measure, in

41 *Family Law Act (Re)*, 2016 BCSC 22

anticipation of how their child's B.C. birth certificate and their parental status may be interpreted in other jurisdictions in future, or whether evidence will need to be presented of some actual "uncertainty" tangibly faced by the child or the applicant(s). [42]

With respect to the jurisdiction of the Provincial Court, section 31(1)(b) appears to suggest an application for a parentage declaration may be made in Provincial Court only in the context of a related family law proceeding over which that court has jurisdiction.

A court may confirm or set aside an order made under s. 31 if evidence becomes available that was not available at the time the original application was heard (s. 32). The setting aside of a previous order will not affect rights or duties already exercised, or property interests that have already been distributed.[43]

## 11. Section 33: Parentage Tests

Section 33 provides that parentage tests can be ordered by the court for a child or a person to provide samples of their tissue or blood or both to assist in identifying "inheritable characteristics." Parentage tests may establish or refute any such genetic connections with the child.

Parentage tests will generally only be relevant when children are not conceived by ART, since the scheme respecting assisted reproduction does not turn on a genetic connection. For example, a parentage test may be ordered when a there is a dispute as to whether a male partner is the biological parent of a child born to their female sexual partner to answer the question of whether the child is their child or another man's child or to dispute the presumptions of paternity under section 26.

An order for a parentage test can be made by the Supreme Court or, if it is necessary to determine an application for declaration of parentage, the Provincial Court: s.33(2). The court can order a party to pay all or a portion of the costs associated with obtaining such tests: s.33(3).

Where a party does not adhere to an order to provide their genetic material to be tested, the court has the discretion to draw an inference based on a party not proceeding with a parentage test: s.33(4).

The Court of Appeal has noted, in obiter, that Part 3 now provides statutory guidance on applications for orders for paternity tests.[44]

## 12. Sections 34 and 35: Orders Made Outside British Columbia or Outside Canada

By a combination of sections 34 and 35, a B.C. court is required to recognize any orders with respect to parentage of a child made in another Canadian jurisdiction, unless new evidence has come available or the court is satisfied the extraprovincial order was obtained by fraud or duress (s. 35(3)).

Declaratory orders regarding parentage made outside of Canada are also required to be recognized provided that at the time the order was made the child or at least one of the child's

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42 barbara findlay advises that she has had one case in which a child was to be carried by a person in a U.S. jurisdiction which does not recognize surrogacy. Her advice from a fertility lawyer in that jurisdiction is that a 'declaration of parentage' was inadequate. To register the intended parents, an adoption order would be required. Because the current *Adoption Act*, unlike its predecessor, requires a six month wait after birth even for stepparent adoptions, this is potentially problematic.

43 Section 32(e). See the Transition section of this paper for a brief discussion of what "distribution" of property may mean in this context.

44 *P.(R.J.) v. W. (N.L.)* 2013 BCCA 242 at paragraph 26 (leave to appeal refused 2013 CanLII 74509 (SCC).

parents was habitually resident in, or had a real and substantial connection to, the jurisdiction where the order was made (section 36). The exceptions are if evidence becomes available which was not available at the time the original order was made, the original order was obtained by fraud or duress, or the order is found by the court to be contrary to public policy (s. 36(3)).

Once a court has recognized an order from outside British Columbia, that order has the same effect as if a declaration of parentage had been made under section 31 (s. 36(2)).

### D. Vital Statistics Act

As noted, prior to the *FLA* registered and legal parentage did not always align, particularly for children born through ART.

This fundamentally changed with the *FLA*. A B.C. birth certificate should now be sufficient to establish legal parentage for all purposes under B.C. law.

Amendments were made to the *Vital Statistics Act* to reflect the new parentage regime. Section 1 of the *Act* now defines "parent" as a parent under Part 3 of the *FLA*. In the case of a child born through ART, it is the legal parents, so defined under Part 3, who are entitled to register the child's birth (*Vital Statistics Act* section 3(1.1)). Identification of the birth mother remains mandatory, except where the "birth mother" is a surrogate pursuant to section 29 of the *FLA*.

Where the child is born though sexual intercourse, the presumptions of paternity apply. The birth mother may acknowledge the father, or identify that he is either unknown or unacknowledged (section 3(1)).

The *Vital Statistics Act* also contains provisions with respect to correction of the birth registration where an error or omission is found (s. 30).

Some of the issues arising from this role of the Vital Statistics Agency as "gatekeeper" for the determination of parentage are addressed later in this paper.

## IV. Part Three: Transition and Estates Issues

### A. Parentage and Succession—Implications for Inheritance Rights

Prior to the *Family Law Act* legal parentage was determined under s. 61(1) of the *Law and Equity Act*, which provided that a child was the child of its natural parents. The only exceptions were if there was an adoption order or a declaration of parentage was obtained from the court. Consequently the non-biological co-parent of a child born by ART had no legal status as a parent unless s(he) had obtained a declaration of parentage, or a stepparent adoption, after the child was born.

Without that further legal step of adoption or court order, a child born by ART was potentially unable to inherit from her non-biological co-parent on an intestacy or make a claim under the former *Wills Variation Act*. Although the disputes generally involved foster children or step-children, variation rights applied only to natural and adopted children (*Peri v McCutcheon*, 2011 BCCA 401).[45]

45 *Peri v. McCutcheon*, 2011 BCCA 401. The court did express an openness to considering an expanded definition of children for variation purposes, however, but found that: "the question of whether it is appropriate for this Court to interpret the word "children" in s. 2 of the *Act* to encompass applicants who are not either natural or adopted children of the testator is one which should await a more compelling factual foundation" (paragraph 4).

The *Family Law Act* fundamentally changes this. Section 61 of the *Law and Equity Act*, was repealed[46], and Section 23 of the *FLA* replaced the former s. 61(1). As noted above, section 23 provides that a determination of parentage under Part 3 applies for the purposes of all laws in British Columbia.

The *Wills, Estates and Succession Act (WESA)*, which replaced the former *Estate Administration Act* and *Wills Variation Act* when it came into force in 2014, contains no provisions or definitions to narrow or limit the application of section 23, other than the provisions regarding the inheritance rights of children conceived through ART after the death of their parent (see below) and provisions in regarding the impact of adoptions. (Section 3 of *WESA* provides that the *Adoption Act* applies to determine parentage for inheritance purposes where a child has been adopted. A child who has been adopted has no right to inherit from her pre-adoption parent except by will.)

Consequently, it appears Part 3 should apply to determine parent-child relationships for all purposes under *WESA*, including variation claims. However the application of Part 3 to variation cases does not appear to have been considered yet by the courts. It is worth noting that in one post-*FLA* case, the Court of Appeal's decision in *Peri* was applied to exclude step-children from having standing to bring a variation claim on the basis that only natural or adopted children of a testator can bring such claims47. It appears the application of the *FLA* was not considered. On the facts of that case, however, applying Part 3 would not have changed the outcome: it appears from the reasons for judgment that ART was not involved, and the deceased would not have qualified as a parent under the *FLA* in any event.

## B. Will Variation Rights and Multiple Parent Families

It has been questioned whether, if a child has more than two parents under the *FLA*, all of those persons are those against whom variation of a will could be sought by the child under the wills variation provisions of *WESA* (section 60 ).[48]

There does not yet appear to be any cases considering this issue. A plain reading of section 23(2), however, suggests the answer should be yes: the reference to "children" in section 60 of *WESA* must be read as a reference to, and include, parent/child relationships determined under Part 3 of the *FLA*. Arguably there is no reason, on the face of the legislation, to suggest that the obligation of a parent to provide adequately for their children under s. 60 of *WESA* would apply to some parents and not others.

In a multi-parent family, consequently, it appears each parent would have the obligation to provide adequately for their children in their will. What remains to be seen is how the existence of multiple parents might impact the court's analysis as to what adequate provision entails. Variation cases are fact specific, with outcomes depending on the nature of the relationship, the size of the estate and the needs and means of the various parties involved. In the writer's view, however, a child with multiple parents should have standing to bring a wills variation claim in appropriate circumstances against the estate of any of her parents.

## C. Posthumous Conception

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46 *Family Law Act*, supra, section 399.

47 *Saran v. Saran*, 2015 BCSC 1865 at para 22. In this case, moreover, the step-children contesting the will had been born in India.

48 *Probate and Estate Administration Practice Manual*, Continuing Legal Education Society, at paragraph 19.7.

## 1. Time limits under WESA

Section 28 of the *FLA* allows for a person who provides genetic material for the purpose of conceiving a child to be recognized as the legal parent of that child, even if the person dies before the child is conceived.

Since a determination of parentage under Part 3 applies for all purposes, this would potentially mean children conceived posthumously have the same inheritance rights as children born during their deceased parent's lifetime.

While intuitively "fair" the implications of this pose a significant administrative challenge, creating the possibility that the administration of an estate could be held up indefinitely due to uncertainty as to whether reproductive material provided by the deceased would at some point be used to conceive a child.

*WESA* addresses this issue by imposing time limits and notice requirements within which any such claims by children conceived after death must be made known (*WESA* section 8.1)

The descendant of a deceased person who is conceived and born after the deceased's death will inherit as if he or she had been born during the deceased's lifetime, provided notice is given to the personal representative within 180 days of the person's death that there is an intention to use the reproductive material, and provided the child is born within two years of the deceased's death.

The deceased person must also qualify as the descendant's parent under Part 30f the *FLA* and the person giving the notice must have been married to, or in a marriage-like relationship with, the deceased person at the time of their death.

The time limits may be extended by court order in appropriate circumstances. The full text of the section provides:

> 8.1 (1) A descendant of a deceased person, conceived and born after the person's death, inherits as if the descendant had been born in the lifetime of the deceased person and had survived the deceased person if all of the following conditions apply:
>
> (a) a person who was married to, or in a marriage-like relationship with, the deceased person when that person died gives written notice, within 180 days from the issue of a representation grant, to the deceased person's personal representative, beneficiaries and intestate successors that the person may use the human reproductive material of the deceased person to conceive a child through assisted reproduction;
>
> (b) the descendant is born within 2 years after the deceased person's death and lives for at least 5 days;
>
> (c) the deceased person is the descendant's parent under Part 3 of the Family Law Act.
>
> (2) The right of a descendant described in subsection (1) to inherit from the relatives of a deceased person begins on the date the descendant is born.
>
> (3) Despite subsection (1) (b), a court may extend the time set out in that subsection if the court is satisfied that the order would be appropriate on consideration of all relevant circumstances.

As of the writing of this paper, there had been no judicial consideration of these provisions.

The inheritance rights of ART children conceived before death (but born after death) are not impacted by these sections. The inheritance rights of those children are the same as the inheritance rights of non-ART children born after their parent's death.[49] Note that in all cases,

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49 Under s. 8 of *WESA*, descendants and relatives conceived before death inherit on intestacy as if they had been born during the deceased's lifetime. If the parent dies with a will, the ancient common law presumption of "en ventre sa mere" applies with similar effect.

*WESA* requires that a beneficiary or intestate successor survive the deceased by five days unless otherwise provided for by will (s. 10).

### 2. Parentage if Genetic Material Removed from "Parent" Post-Death

Lastly, the *Assisted Human Reproduction Act* allows human reproductive material to be removed from a donor's body (as "donor" is defined under that Act, being the individual from whose body it was obtained) after death only if there is a document signed by the donor consenting to the removal and use.[50] It is questionable whether section 28(1) (b) of the *FLA* would apply where the human reproductive material was removed from the deceased's body after death instead of during his or her lifetime, although likely a court would apply a similar analysis.[51]

## D. Transition Issues

### 1. Estates and Section 22 of the *Family Law Act*

In the estates context, a question arises as to the impact of Part 3 on the estates of persons who may have done their estate planning long before the FLA came into force. Is parentage to be determined by Part 3 regardless of when the will was made? Does it matter when the deceased died, or when a child whose inheritance rights are in issue was born?

The only section in Part 3 addressing transition is s. 22, which provides that Part 3 "does not affect a disposition of property under an enactment or instrument before the date this section comes into force."[52]

Previously, s. 61(2) of the *Law and Equity Act* stated that the parentage provisions of that Act did not apply to dispositions of property made before the coming into force of that Act or to instruments made before that date.[53] When that provision was repealed and replaced with section 22 of the *FLA*, the express exception for instruments made before the relevant date was not included.

The question of whether the former parentage definition in s. 61 applied to the unadministered estate of a deceased who died before that section came into force was considered in *Re: Estate of Norman Alfred Duncan*, 2008 BCSC 1854. In that case the deceased died without a will in 1977, seven years before the applicable change to s. 61. The estate had yet to be wound up. Citing Saskatchewan and Manitoba case law, the court concluded that no "disposition of the property" within the meaning of s. 61 had occurred. The Saskatchewan case specifically found that the transfer of estate property from an intestate to the administrator did

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50 *AHRA* s. 8(2) and the *Assisted Human Reproduction Act Regulations* at section 6.

51 *Transition Guide*, p. 3-51.

52 The general transition provisions of the *FLA* (Part 13) refer only to claims in regard to pre-existing custody and access orders (or agreements) and existing proceedings in regard to division of family property and pensions (Part 13). There is no reference to determinations of parentage or related issues. When the *FLA* came into force, the new legislation applied to all parenting and child support claims, whether or not court proceedings had previously been commenced under the old legislation.

53 Section 61(2) of the *Law and Equity Act* provided (2) This section applies to an enactment enacted before, on or after April 17, 1985 and to an instrument made on or after that date, but it does not affect

(a) an instrument made before that date, or

(b) a disposition of property made before that date.

not constitute a "disposition" for the purposes of a similar provision in that province's legislation:

> The plain meaning of section 42 indicates the legislature intended section 40 to apply to intestacies occurring prior to its enactment. If the legislature had not intended section 40 to have some retroactive effect, it would not have been necessary to state that it did not apply to prior instruments or dispositions. I take from this that the legislature intended, for the purpose of determining whether a child is "issue" within the meaning of section 5 of The Succession Act and therefore entitled to a particular portion of an intestate's property, the critical moment for that determination is not when the intestate died or when an action or proceeding is commenced but rather when the property is distributed.[54]

The court did not consider whether the analysis would be different if the deceased had died with a will or disposed of specific property by that will. Instruments made before the relevant date were expressly exempted from the provision being considered.

Does that mean Part 3 is intended to apply to the determination of parentage for the purposes of all estates not yet distributed at the time the *FLA* came into force? Even if an estate grant was issued and/or will made before March 18, 2013?

Arguably, this could be the case[55]. If it was intended that the estates of persons who made wills pre-*FLA* were to be exempted, the specific provision regarding instruments made before that date, formerly found in the *Law and Equity Act*, would have been expressly included in section 22. There is a question, however, whether property gifted by will would be considered to have been disposed of at death for the purposes of this section if the will-maker died prior to the *FLA* coming into force.

There are no provisions in *WESA* or the former *Estate Administration Act* addressing these transition issues and the writers have not found any cases considering s. 22. (The *EAA* still applies to the estates of persons who died before *WESA* came into force.) A 2013 decision noted the existence of the issue, but the court determined it was not necessary to consider the question on the facts of the case[56].

## 2. Retrospective/Prospective Application of the FLA More Generally

In mid-March 2016 the B.C. Court of Appeal released two decisions considering the application of the *FLA* to common law spouses who separated before the Act came into force.[57]

The appeal court considered principles of statutory interpretation and the distinctions between retroactive, retrospective and prospective application, including the presumption against interference with vested rights. The court in *Newton*, at paragraph 56, also commented on the unique nature of a determination of status (in that case, spousal status).

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54 *Re: Estate of Norman Alfred Duncan*, 2008 BCSC 1854 at para 19,citing Pearce v. Hubic Estate, [1996] S.J. No. 62.

55 In 2013 the Ministry of Justice stated, in regard to the effect of section 22:"[the section] clarifies that the new parentage rules do not act retroactively with regards to dispositions of property which occur before the coming of force of the Family Law Act. For instance, the terms of a will in which dispositions of property has already been made will not be reopened." - Ministry of Justice background paper, http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/part3.pdf. Arguably, this explanation is not entirely clear.

56 *Barnes Estate v. Barnes*, 2013 B.C.S.C. 1848. At paragraph 25 the court noted that "If the *Family Law Act* applies retrospectively for the purpose of interpreting the [deceased's] will, then it would create a presumption of paternity."

57 *Matteucci v Greenberg*, 2016 BCCA 115 and *Newton v Crouch*, 2016 BCCA 116).

The court found that the Legislature intended the definition of spouse to be applied to circumstances that existed prior to the enactment of the *FLA*, and that the application of the Act to the *future consequences* of that spousal status is a prospective - not retroactive or retrospective- application (paragraphs 31 and 62). In reaching these conclusions, the court noted that:

> ". . . the seemingly neat compartments of prospective retrospective and retroactive are blurred when new legislation attributes a legal consequence to a characteristic or status. . . where legislation attributes a legal consequence to a characteristic or status, persons who have attained that status prior to the legislation coming into force may claim the benefit of that status and, when they do, they do so prospectively."(*Newton*, para 62)

It remains to be seen whether the courts will approach transition issues with respect to parent-child status similarly. However, in light of the above it does appear the legislature intended the determination of parentage under Part 3 to apply to all future events, including the administration of estates in which property had not yet been disposed of when the *Act* came into force.

## 3. What about Vested Rights?

That said, it is easy to imagine situations where a change to the parent-child status of individuals as a result of the coming into force of the *FLA* could have a profound impact on immediate and very personal rights and obligations, such as where individuals entered into arrangements to have children based on the legal parentage scheme previously in place under the *Law and Equity Act*.

An example might be a sperm donor who helped a birth mother to conceive on the informal understanding that he would have the legal status of father, since he was the biological father, although no agreement was entered into and he was not named on the birth certificate. In those cases, the appropriateness of a "retrospective" or "prospective" application of Part 3 is arguably less clear.

It remains to be seen how Part 3 will be applied in such circumstances, particularly if it can be argued that such an application offends the presumption against interference with vested rights.

Citing the Supreme Court of Canada in *Dikranian v Quebec (Attorney General)* 2005 SCC 73 the Court of Appeal noted in *Newton* that an individual must meet two criteria to have a vested right: 1/ the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract, and 2/ this legal situation must have been sufficiently constituted at the time of the new statute's commencement. A "mere possibility of availing oneself of a specific statute is not a basis for arguing a vested right exists." [58]

In the estates context, inheritance rights depend on many factors and are not ascertainable until the moment of death (and sometimes much later, if a will contains contingent gifts). Applying the *Dikranian* criteria, it appears unlikely the lack of an obligation to provide for an individual in your estate planning who was not previously considered to be your child, or a possible "right" to apply to vary the will of a person who might have qualified as a parent for will variation purposes under the earlier legislative scheme would be considered vested rights in most cases. Rights of inheritance do not vest before the death of the intestate or will-maker. In practical terms, a child cannot count on an inheritance: their parent could remarry, have more children, gift away their estate during their lifetime or make other transfers that effectively disinherit the child, or make a will which leaves the child out and then die domiciled in a jurisdiction without the equivalent of B.C.'s wills variation legislation.

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58 *Newton v Crouch*, supra, at para 77. See also *Matteuci* @ para 61).

A proper analysis of the arguments that must be canvased to fully consider these issues is beyond the scope of this paper. For an overview of these issues and the principles of statutory interpretation that may apply to the application of Part 3, see the commentary and references noted in CLE's *Family Law Act Transition Guide* @ pages 3-40 – 3-42.

### 4. Note on Jurisdiction and Planning

Lastly, it is also important to remember, in advising ART families, that the law under which an estate is administered can depend on a number of factors, including the jurisdiction in which the deceased was domiciled or resident at death, the location of the deceased's property at death and the nature of that property.

For the purposes of determining parentage in an estate matter, it can also be necessary to determine the child's domicile at birth. The jurisdiction in which a child is born, and the jurisdiction in which they were domiciled at birth, are not necessarily the same - see Monique Shebbeare's paper *Crossing Borders without Getting your Wires Crossed: Understanding Jurisdiction for Parentage in Assisted Reproduction.*[59]

A discussion of the conflicts of laws issues that can arise in the estate context is well beyond the scope of this paper. Suffice to say it will be particularly important for parents of children born through ART to keep their estate planning documents current, and to consider the value and practicality of obtaining a declaration of parentage from the court. ART parents should be advised of the option of obtaining a declaration, particularly if they are considering moving to a problematic jurisdiction (eg., one that does not recognize their family form or the type of ART process that was used). There is no limitation period for obtaining a declaration of parentage under s. 31.

## V. Part Four: Real World Families and ART

The purpose of this section is to describe some of different family forms and outline practical considerations those different families face as they embark on the project of having a child through ART.

### A. Paradigm Case: A Single Prospective Parent

### 1. Single Mother

An autonomous woman[60] wanting to become pregnant needs donated sperm. Sperm may come from a known donor, such as a friend, or through a fertility clinic from an unknown donor.

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59 Monique Shebbeare, *Crossing Borders without Getting your Wires Crossed: Understanding Jurisdiction for Parentage in Assisted Reproduction,* prepared for the Continuing Legal Education Society of British Columbia, March 2016.

60 "Autonomous" is the term preferred by Fiona Kelly, in her article "Autonomous from the Start: Single Mothers by Choice in the Canadian Legal System" forthcoming 2012 Child and Family Law Quarterly "Single" is a relational status that emphasizes that the woman is without a partner; "autonomous" is a status that emphasizes self-determination and agency.

If she is using sperm from a known donor, and she is not using the services of a fertility clinic to inseminate, she must use ART (for example the "turkey baster" method at home[61]) to ensure she achieves the family structure intended. [62]

Since the *FLA* parentage regime turns on the issue of whether or not assisted reproduction was used, evidence that ART was used could be important, particularly in the unlikely event the mother later dies or becomes mentally incapable. Therefore, when home insemination with sperm from a known donor is used, the woman and donor may want to make an agreement to ensure there is a clear record of the method of conception. An agreement can also help ensure there are no misunderstandings between the known donor (who may be a friend) and the woman as to the donor's role: that he is not a parent and has no legal rights with respect to the child.

A donor agreement can clarify that:

- ART was used to conceive the child, and the parties did not have sexual intercourse;
- the donor will have no legal rights in relation to the child;
- that if the donor is to have any non-parental role in the child's life, as a family friend or uncle figure, for example, it will be informal and at the discretion of the mother;
- the donor will have no parental or financial responsibilities in relation to the child;
- the mother is and will be the sole decision maker and guardian.

## 2. Single Father

An autonomous man wanting to become a father will need both an egg donor and a gestational carrier, or surrogate. The egg donor and the gestational carrier may be the same person (traditional surrogacy, where there is a genetic connection between the surrogate and the child), in which case the surrogate would be inseminated using sperm from the prospective father.

If eggs are donated by a woman other than the gestational carrier, the insemination would be done by *in vitro* fertilization, with the embryo implanted in the gestational carrier (gestational surrogacy, where there is no genetic connection between the surrogate and the child).

A single man having a child will likely need a contract with the egg donor, if she is different from the gestational carrier. He requires a contract with the surrogate under the law. [63]

While a complete survey of the issues involved in surrogacy agreements is outside the scope of this paper, a surrogacy contract typically provides:

- The manner of insemination;
- Who owns the genetic material;

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61 Conception is accomplished at home by inserting the donation of sperm into a woman by way of syringe. The method is colloquially referred to as the "turkey baster method".

62 Some autonomous mothers may wish to conceive by sexual intercourse with the donor: both parties agree that pregnancy is the intended outcome; but that the donor will not be a "father" of the child. This is not an option in BC.

63 Because egg donation can only be done at a fertility clinic, the intended parent and the egg donor will be required by the fertility clinic to sign contracts regarding the procedure.

- That the gestational carrier will accept sperm or be implanted with an embryo, if conception results, carry the fetus to term and provide exceptions;
- That the parties recognize the surrogate cannot be paid to act as a surrogate;
- Itemization of the expenses that will be covered for the surrogate, and the process that will be followed for reimbursement (eg identifying the type of covered possible expenses, possible maximum amounts for some categories of expenses, and the provision of receipts);
- That the surrogate will provide regular medical information to the intended parent(s) during her pregnancy;
- That the surrogate will follow medical advice during her pregnancy; and will abstain from potentially harmful activities;
- Provisions acknowledging the legal problems that can ensue if the baby is born in another jurisdiction, and restrictions or conditions on travel during pregnancy, and an agreement that the surrogate will sign any documents required to establish the legal parentage of the intended parents in whatever jurisdiction the child is born;
- provisions possibly addressing under what circumstances the intended parent(s) may be present at the birth;
- That the intended parent(s) are entitled to be present at the birth of the child;
- That the intended parents will take, and the surrogate will relinquish, the child immediately after birth;
- That the surrogate will have no parental rights or responsibilities in relation to the child.

It continues to be illegal under the *AHRA* to pay a surrogate mother or gestational carrier except to compensate her for surrogacy-related expenses. What expenses are allowed has not been spelled out by regulation, though the *AHRA* contemplates such regulations, therefore it is important that the issue of expenses is clearly dealt with in an agreement. [64] As a rule of thumb, the 'but for' test is helpful: would this expense have been incurred but for the pregnancy?

Pursuant to the *FLA*, so long as the parties contract appropriately under the law, and the parties carry through with the agreement, the intended parent is the child's parent and the surrogate is not the parent of the child. As such, Vital Statistics will register the intended parent as the sole parent after the birth of the child. Note that in order for the registration of birth to proceed in the name of the intended parents, however, the surrogate must sign a further written consent, post-birth, in which she agrees to surrender the child. (Her commitment to doing so would have been a term of the original agreement between the parties.) If the surrogate refuses, an application for declaration of parentage would be needed. In that case the contract between the parties is admissible as to their intention.

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[64] Rakhi Ruparelia has argued that the rationale permitting altruistic (unpaid) surrogacy but not commercial surrogacy is flawed, since there may be strong cultural pressure on a woman to agree to an "altruistic" surrogacy. "Giving Away the 'Gift of Life': Surrogacy and the Assisted Human Reproduction Act" CJFL (2007) 2 Can J Fam Law 11-54

## B. More Complex Situations

The case of a single parent wanting to have a child is paradigmatic. More commonly, there are two prospective parents at the time of conception.

### 1. Infertile Opposite-Sex Parents

An opposite-sex couple may be unable to conceive a child because one or both of them is infertile.

If a man is infertile, but the woman is not, donor sperm is required. The same contractual considerations as those above with respect to the single mother apply here as well.

Vital Statistics will then register the birth mother and her partner as the child's parents, regardless of the biological or genetic connection between the child and the father.

### 2. Same Sex Couples

An outstanding difference between single parents, same sex parents, some families with one transgender parent, on the one hand, and cisgender[65] opposite-sex parents on the other, is that there is no opportunity for accidental pregnancy in the former group. All of those families are planned families.[66]

A lesbian couple will conceive with donated sperm, obtained either from a fertility clinic or from a known donor. One of the lesbian couple may be the gestational and genetic parent of the child. In that case, the child is conceived with simple sperm donation.

If the two women want both of them to have a connection to the child, they may choose to have one partner donate her eggs. Fertilization of those eggs happens by IVF, and the embryo is then implanted into the other partner, who is then the gestational carrier. 67

The contractual considerations respecting sperm donation that apply in these scenarios are the same as those above with respect to the single mother.

Vital Statistics will then register the birth mother and her partner as the child's parents, whether or not there is a genetic connection between the child and the other mother.

Two gay men may choose to have a child with the help of a surrogate using sperm from one of them, or a mixture of sperm from both of them so that a child's parental genetic heritage is unknown.

The contractual considerations that apply in this scenario are the same as those above with respect to the single father.

Vital Statistics will then register the gay male couple (the intended parents) as the child's parents, whether or not there is a genetic connection between the child and one of the fathers.

### 3. Transgender Parents

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65 A cisgender individual is someone for whom all of the aspects of gender – gender identity, genitalia, hormones, social gender, chromosomes – are congruent. Cisgender is the opposite of transgender.

66 See Kelly, Fiona, "(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families" (2008-2009) 40 Ottawa L. Rev. 185 – 222 for a discussion of the role of intentionality in determining parenthood.

67 In these circumstances the Vital Statics Registry is willing to amend the Registration of Birth form to show both women as birth parents.

We are accustomed to thinking of gender as being a single factor. We think that there are two genders; that there are only two genders; that the gender of a person is immediately ascertainable, at birth and ever after; that gender is immutable; that the two genders are complementary.

All of those assumptions are inaccurate. Gender is multifactoral. A person's gender includes their hormonal profile, their chromosomal profile, their genitalia, their gender identity (their own sense of their gender) and their social gender (how they are treated in the world).

Intersex people are those whose gender is medically ambiguous.

Transgender people are people whose gender identity does not align with other components of their gender. Trans people may experience themselves as neither male nor female, or both male and female, or they may experience themselves as being "born in the wrong body." When someone experiences themselves as having been born in the wrong body, the incongruence between their gender identity and their other gender components is so acute that they have "gender incongruence," a condition for which the medical treatment is to administer hormones and potentially have sex reassignment surgery to align their bodies with their gender identity.

Part of the counseling for those corrective treatments is to counsel the individual about making provision to have children in the future to whom they will be genetically connected.

A male to female trans person may choose to freeze and store sperm, which can later be used for the insemination of their partner, if their partner is a woman, or for the insemination of a surrogate, if their partner is a man or an infertile woman, or if they want to be a single parent.

A female-to-male trans person may similarly freeze eggs (though the cost is much higher than the cost of sperm storage) for later use to conceive an embryo through IVF. If his post-transition partner is a woman, the eggs can be implanted in her. If his post-transition partner is a man, or if he wants to be a single father, he would use his preserved eggs and his partner's or a donor's sperm to create an embryo by IVF. The embryo would be carried by his partner, if she is a woman, or by a surrogate.

Transmen (female-to-male trans person) may be able to conceive and carry a child, even though they have changed gender. For that to happen, the transman must discontinue masculinizing hormones and must not have had a hysterectomy. A transman may become pregnant through sex with a man, or with donated sperm.

A recent study found that a significant number of trans persons have and/or wish to have, children.[68] However, the majority of trans persons who access assisted reproduction services have reported negative experiences with service providers, such as fertility clinics and doctors. The study is consistent with previous studies in other areas of medicine, which indicate an absence of trans-friendly health care environments and an unwillingness or lack of understanding on the part of service providers with respect to issues faced by trans persons.

68 S. James-Abra, L.A. Tarasoff, d.green, R. Epstein, S. Anderson, S. Marvel, L.S. Steele, L.E. Ross, "Trans people's experiences with assisted reproduction services: a qualitative study" Human Reproduction Advance Access April 22, 2015.

## 4. Sperm Donor

If a couple is opposite-sex, and the man is infertile; or if the couple is gay or lesbian; or if a single woman or trans person wants to have a child on her or his own, a sperm donor is required. [69]

Sperm can be acquired from sperm banks or a known donor. Sperm banks permit a prospective mother to choose a donor (by a description of his attributes) and then, if she wishes, freeze sperm from the same donor to be used later to create genetic siblings of her first child.

## 5. Egg Donor

A woman may be unable to produce eggs, for example because of damaged fallopian tubes, or because she is a male-to-female trans woman who does not have ovaries.

In that case, the prospective mother may use eggs donated from an egg donor. Depending on her own biological circumstance, she may be able to carry a child conceived, through IVF, with donated eggs. Conception occurs *in vitro*, and the embryo is implanted in the uterus of the prospective mother.

In a surrogacy situation, the egg can be the egg of the gestational carrier, the prospective mother or a woman who is neither the prospective mother nor a surrogate.

Fertility clinics in British Columbia will inseminate through IVF only if the egg donor is known to the prospective mother.

It is wise to have a contract between the egg donor and the prospective parent or parents, similar in terms to a donor insemination agreement.

## 6. Surrogate

Surrogacy refers to having a woman other than the prospective mother carry the child and give birth.

Conception can happen:

- With an egg from the surrogate and sperm from a prospective father or a known or unknown sperm donor, through donor insemination; or
- With an embryo created from an egg from a prospective mother or egg donor and sperm from a prospective father or a known or unknown sperm donor, which is implanted in the surrogate by IVF.

A surrogate mother may or may not be genetically related to the child. Under the FLA, a surrogate mother is not the child's parent. The parents of the child are the intended parents, who will then be registered as the parents on the child's birth certificate.

Whenever surrogacy is used it is critical the parties involved enter into a written agreement prior to conception. Some of the contractual considerations involved with surrogacy agreements are set out above in the discussion regarding single fathers.

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69 So far, it has not been demonstrated that a female to male trans man can preserve eggs and later have the eggs inseminated and carry a Child, though that is theoretically possible.

## VI. Part Five: Looking Forward—Forseeable Issues and Challenges

Though the *FLA* regime with respect to the parentage of ART-conceived children was intended to provide straightforward answers to questions previously addressed piecemeal by the courts, the application of the new legislation will be anything but straightforward.

Assisted reproductive technology has outpaced legislation in Canada and internationally over the last 20 years. Courts have been obliged to answer novel questions without legislative guidance, and many questions remain unsettled. In most jurisdictions across Canada it is case law, not legislation, that must guide families and their counsel.

While the *FLA* addresses many of these issues for BC, there remain uncertainties and gaps that will inevitably need to be addressed through the courts or further legislation. Moreover, the birth of a child through ART is frequently an interjurisdictional endeavor, involving donors and intended parents from different provinces or countries, and ART families whose legal parentage status may clear under BC law will continue to face challenges to that status when living or travelling in other jurisdictions.

Some of the challenges and uncertainties we foresee include the following.

### A. Vital Statistics Agency Becomes the Gatekeeper of "Parentage"

As we discussed at the beginning of the paper, until passage of the *FLA* a child's legal parent(s) (i.e., the person or two people from whom she could inherit), her registered parents (i.e., the parent or parents on her birth certificate) and her social parents (the people who raised her) could potentially be different. The concepts of legal, registered, and social parents overlapped; but they were not necessarily congruent.

With the passage of Part 3 of the FLA, a determination that an individual is a "parent" of a child means:

- That the person is entitled to be registered at the Vital Statistics Registry as a parent of the child; and
- The person is a parent for all legal purposes under B.C. law.

As a practical matter, the Vital Statistics Agency receives applications and will approve or reject them, based on the legislation, and generally without a declaration of parentage from the court.

Prior to the *FLA*, the birth mother and her partner could both be registered as "parents" with the Vital Statistics Agency, and the child's birth certificate reflected each as "parent" of the child (for example, when a lesbian couple had a child through sperm donation). The donor's name did not appear. The birth mother's partner could be registered whether or not the two had been partners when the child was conceived. The relevant time was the date of registration of the birth.

In contrast, under Part 3 many factors go into determining whether an individual is a "parent," and therefore entitled to be registered under the *Vital Statistics Act*. Those factors include whether the parent had sex with a donor; whether there is a written agreement about a family with more than two parents; whether that agreement was made before conception; whether there is a surrogate and if so, whether the legislative requirements were met; and so on. The VSA is now the gatekeeper for determining whether the requirements for a determination of parentage have been met.

Some suggest that this could open the door for potential abuse of the system, if the court is not vetting the legitimacy of the parentage contracts. For example, how does the VSA know if the surrogate and intended parents in fact entered into the arrangement prior to the conception of the child? Whether the court would be in a better position to vet this, however, is also questionable. An administrative regime is much less expensive than a judicial one, and puts ART families closer to being able to afford the costs of conception.

The process for registering a birth has also changed. The process of registering an ART birth is clearly flagged on the Vital Statistics Agency website, and users are alerted that different forms are required. The Vital Statistics Agency must of necessity inquire about whether a child was conceived with ART or not, since there is a different result for the parentage of the child. Some families may find this more invasive.

However, the result is more certainty and congruency between the names on a child's birth certificate and the child's legal parents.

## B. Sex and the System: the "Bright Line" and Informal Arrangements

Some individuals who wish to be autonomous mothers, or couples who require sperm donation, including some lesbian or trans individuals, take the simple expedient step of having sex with the donor.

But if they follow that route, they come not under the ART provisions of Part 3, but under section 26-- the provisions relating to children NOT conceived with ART. That means the "donor" is not a donor and is instead a "parent". It also means, for example, that the birth parent cannot register their partner as co-parent when a child is born.

Sex is the "bright line". If you have a child through sexual intercourse the paternity presumptions apply to determine who the parent is. If you have a child through ART, the ART parentage provisions apply. Some question the fact that a child's rights, and the rights of their prospective parents, depend on whether the man donating sperm donated it into a vial and the turkey baster method was used, or directly to the woman. But that is the situation.[70]

The more informal methods used to conceive are no longer an easy option under the *FLA*. This will impact parties who act first and think about the law later. Consider the following example.

A lesbian couple and a gay couple decide that one of the men and one of the women will together make two babies, and will simply have sex to do so. It is affordable, because no clinic process is necessary, and it is easy. However, they may not be aware of the "bright line" and may not have sought legal advice in advance of conception. As a result, they will not end up with the legal family structure they intended.

The lesbian couple would not both be able to register as parents of their child, because they didn't know to conceive with the turkey baster method rather than through intercourse. In this case, the birth mother would be the parent on the birth certificate of their child. The lesbian partner would not be a parent.

With respect to the second child, whose prospective parents are the gay male couple, the second father also would not be able to register as the parent. The birth mother—she who gave birth to the child—is the child's legal parent unless she is supplanted by a section 29 surrogacy agreement. Section 29 permits the Vital Statistics Registry to register the intended parents as parents on the basis of their agreement only if that agreement was written and entered into in advance of conception. So, who are the parents? Not the intended parents (the gay male couple), who have no such agreement.

If the child was conceived by intercourse between one of the lesbians and one of the gay men, then they are the child's parents, because no ART was involved, regardless of anyone's intentions. The parties would be required to seek declarations of parentage or, later, adoption of the children to secure their intended family structure.

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70 Should such a situation develop, one could request a declaration of parentage. Although s. 26 says *On the birth of a child not born as a result of assisted reproduction, the child's parents are the birth mother and the child's biological father.*, the Act is a scheme which is intention-based and, arguably, the intention of the parents makes the child one born by ART. Though this is a stretch, it may be one way of moving toward reconciling the consequences of sex being the 'bright line' of parentage.

With the *FLA*, it is critical that parties seek legal advice prior to conception to ensure that their plan will end with the intended result.

## 1. Opting Out of Parenthood

One of the facets of the "bright line" is the principle that one cannot "opt-out" of being a parent. A person cannot have sex, conceive a child, and have no responsibility to that child.

This can be seen as both a benefit and a flaw.

For example, it may be seen as a flaw to a woman wishes to be an autonomous mother, in which case her simplest option is to have sex with a man with the agreement that he would not be the father and she will be the only parent—sperm donation through intercourse. This option is not available under the FLA because of the bright line, which makes the donor a parent under these circumstances. And once a parent, always a parent, unless there is a declaration or adoption order otherwise.

However the flip side of the coin means that people cannot "opt-out" of parenthood or abdicate responsibility, which is important public policy. For example, a man cannot go to the bar and have unprotected sex with a woman (who by default as the birth mother is a parent), and then upon finding out she was pregnant say he is not a father because he did not intend to be a parent. Although intention to parent is the key principle underlying the ART parentage regime, the bright line provides that where a person opts to have sex, they must also deal with the consequences and responsibilities that flow from that choice.

As well, under the *FLA,* where ART is used, a person cannot "opt-out" if they get cold feet after conception of the child where they had consented to be a parent to the child at the time of conception. The birth mothers partner is the child's parent in this case.

There have been questions with respect to whether a person can opt out of parenthood, where, for example their female partner wishes to have a child, but the male partner does not. Can a couple enter into an agreement that provides they will conceive using the turkey baster method, rather than sex, and the woman's partner will consequently not be the parent?

A pre-*FLA* case found that a donor insemination agreement cannot oust the jurisdiction of the court with respect to a determination of the best interests of the child. In *Doe v A.B.*[71] Jane and John Doe were partners. Jane Doe wanted a child; John Doe did not want to be a parent. So they created an agreement relieving John Doe from any parental rights and responsibilities (never executed) and Jane Doe got pregnant with assisted insemination through John Doe.

The Alberta Court of Appeal held that the settled intention of John Doe to continue living with Jane Doe while she raised the child thrust him inevitably into the role of parent. John Doe's intention not to be a parent would inevitably lead to the practicalities of responding to the needs of the child living in the same household.

The donor insemination agreement was ineffective in the face of the day-to-day role of the donor in the child's life after birth.

There has not been a case to test this issue in BC courts since the commencement of the *FLA*. However, the *Doe* case would likely be given some consideration. Furthermore, even if the woman's partner were not found to be a legal parent, they could nevertheless be found to have responsibility toward the child as a stepparent under the law.

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71 *Doe v. Alberta* [2007] A.J. No. 138; 2007 ABCA 50; 278 D.L.R. (4th) 1; [2007] 4 W.W.R. 12; 71 Alta. L.R. (4th) 14; 404 A.R. 153; 151 C.R.R. (2d) 32;

35 R.F.L. (6th) 265; 155 A.C.W.S. (3d) 1159

## C. Sperm Donors: Known v. Anonymous Donors

Single women wanting to conceive, infertile opposite-sex couples, lesbian couples, and some transgender couples use donated sperm for conception.

The choice is between a known and unknown sperm donors.

### 1. The Semen Regulations—the Bar on Using Known Donors

In Canada, the practical reality is that it is difficult to use sperm from a known donor, unless the prospective parents use the turkey-baster method at home. If they wish to or need to use the services of a fertility clinic, there is a significant bar to using known donor sperm.

The *Processing and Distribution of Semen for Assisted Conception Regulations* (the "Semen Regulations"), which came into effect in 1996 under the *Food and Drugs Act* set out health and safety requirements respecting sperm.[72] These regulations require sperm to be frozen and quarantined for 6 months and to meet sexually transmitted infection testing requirements, prior to use.

There is an exception to the rule: people seeking insemination of semen from their spouse or sexual partner are excluded from the requirement.

What this means is that a heterosexual couple can approach a clinic for ART assistance. But a lesbian couple, for example, with a known sperm donor who they trust, cannot, even though it would carry the same health risks as sexual intercourse or the at-home turkey baster method.

As a further bar, currently the only sperm facility is in Ontario. Therefore, if a couple has a know donor in BC, there is no way for them to donate their sperm and have it comply with the Sperm Regulations unless they travel to Ontario to do the donation.

The Sperm Regulations and lack of facilities make it logistically impossible for most couples to use a known donor and use fertility services.

### 2. Known Donors: The Risks

A known donor offers the intended parents the possibility that their child might know the donor. For example, sometimes lesbian couples use sperm from a known donor with an explicit expectation on everyone's part that the donor will play a non-parental but family-like role: an uncle, perhaps.

Prior to the *FLA*, for anyone inseminating with sperm from known donors, the big, unsettled, legal issue was whether the donor could ever make a claim for parental rights or be found to have parental responsibilities solely on the basis of having made a donation of sperm.

Lesbians, whether single or in couples, in particular may use sperm from a known donor – often a gay man – to inseminate. Their fear was that a "donor dad" might be given parental status in preference to a lesbian co-parent in a two-parent-only regime. The donor's fear was that he might be found to be financially responsible, for example if the mother(s) received social assistance, the government might make a subrogated claim for child support against the donor.

Prior to the FLA these fears were, and in other jurisdictions continue to be, warranted, based on the conflicting case law.

In *DeBlois v Lavigne* the sperm donor had signed a donor insemination agreement with a lesbian couple, relinquishing all of his parental rights. After birth of the child, the couple

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72 See the following article for more information and analysis: Epstein, Rachel "The Relationship that has no Name: Known Sperm Donors, the Canadian Semen Regulations, and LGBTQ" *Queering Motherhood,* edited by M. Gibson, Ontario, Demeter Press 2014.

refused to permit the donor to see the child. Notwithstanding the donor insemination agreement, he applied shortly after the birth of the child for interim access. At issue in the interim application was the effect of systemic delays on the outcome of the case if the donor was, or was not, able to see the child pending trial. In a 2012 decision, the court denied his interim application, applying the usual rule that the status quo be maintained pending trial of the matter. However, the court referred to the donor as the "father" of the child.[73] No trial decision in the case is reported.

In another much-criticized decision, the Supreme Court of Canada held that the biological father of a child may be registered as the child's parent over the objections of the child's mother.[74]

In January 2015 international media reported a Kansas court had ruled that a man who donated sperm to a lesbian couple was the child's father. The court reportedly granted the state's application that the man pay child support to recover social assistance paid to the lesbian co-parents, notwithstanding the objections of the co-parents and an agreement enetered into by all parties relieving the donor of financial responsibility.[75]

While the *FLA* addresses this issue, other jurisdictions may not recognize the non-parental status of the donor.

An unknown donor offers certainty that no one could challenge the parental rights of the intended parent(s), regardless of jurisdiction.

## D. Ownership of Genetic Material

Who owns genetic material? Sperm, eggs, and embryos can all be frozen. What happens if two prospective parents engage the services of a fertility centre, then later break up, leaving some of the genetic material in storage? What happens if a donor who was one of the prospective parents dies before the material is used?

Recently, Canadian courts have held that gametes and embryos are property in limited circumstances. The disposition of that property is subject to the ordinary law of gift or contract, and to division if owned by a couple and the relationship ends. (The writers are not aware of any Canadian cases regarding rights to frozen genetic material after the death of the donor.)

In *C.C. v A.W.*, an Alberta case, A.W. had contributed sperm from which embryos were created by IVF. Twins were born to C.C. after implantation of some of the embryos; other embryos remained. A.W. did not want to release the remaining embryos to C.C., because of disputes he had had with her with respect to access to the twins. The court found that the sperm was property. A.W. had gifted his sperm unreservedly; the embryos were C.C.'s property to use as she saw fit.[76]

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73 *DeBlois v Lavigne*, [2012] O.J. No. 3671; 2012 ONSC 3949

74 *Trociuk v British Columbia (A.G.)* 2003 SCC 34 (CanLII); 226 DLR (4th) 1; [2003] 7 WWR 391; 107 CRR (2d) 277; 36 RFL (5th) 429; 14 BCLR (4th) 12. The father was unacknowledged by the mother, and pursuant to the *Vital Statistics Act* the father was refused registration for that reason. The Supreme Court of Canada held that the registration scheme which provided no recourse to a father wanting to be registered infringed his rights on the basis of sex and therefore were unconstitutional and not saved by s. 1 of the *Charter*. For an analysis of this case, see Lori Chambers "In the Name of the Father": Children, Naming Practices and the Law in Canada (2010) 43 U.B.C. L. Rev 1

75 Online at http://www.independent.co.uk/news/world/americas/us-court-rules-sperm-donor-william-marotta-is-legal-father-and-must-pay-child-support-9079296.html

76 2005 ABQB 290

In *J.C..M. v A.N.A.*[77], a 2012 B.C. case, two women in a spousal relationship had together purchased "straws" of sperm from a single sperm donor. Each woman conceived and bore a child using sperm of that donor. They froze thirteen straws from the donor at Genesis Fertility Clinic. Then they separated. The issue was the disposition of the remaining thirteen straws of sperm.

After canvassing English and American case law regarding the classification of genetic material as property in various contexts, the court determined that the parties had the right to use the sperm straws for their benefit, and that they had a joint ownership interest in the sperm straws.[78] The straws were to be treated as property for the purpose of property division between the spouses. In the end, the court decided each party was entitled to some of the straws – J.C.M got seven, A.N.A got six; and J.C.M had to compensate A.N.A. for getting one more straw.

The interests of the parties' existing children, and any future children to be born as a result of the decision, was found not to be an appropriate issue for the court to consider.[79]

In *Lam v UBC* 2015 BCCA 2, the first appellate level case in Canada to consider the issue, sperm was found to be "property" for the limited purposes of the British Columbia *Warehouse Receipts Act*. [80] Men who had deposited sperm for storage with the Andrology Laboratory at the University of British Columbia sued for damages after a freezer malfunctioned, destroying the sperm. The men who deposited the sperm had cancer and had deposited their sperm for storage prior to undergoing radiation treatment.

Although the court in Lam was willing to classify genetic material as "property" for a limited purpose, and/or to consider that genetic material may be "owned" in some situations, the court was also careful to state that the court's characterization of sperm as property on the facts of that case should not automatically lead to sperm to be defined as property in other contexts. Madam Justice Bennett, in her concurring reasons, stated at paragraph 93:

> … Defining human sperm as property may bring with it a host of other legal rights and issues. Uncertainty exists with respect to the contexts in which human sperm could be considered property, and it is necessary to carefully circumscribe the limitations of the definition in this case.[81]

American Case Law

There have been a number of American decisions addressing competing rights to use gametes and frozen embryos in the context of family and estate disputes.[82]

Most of the American cases focus on rights to property upon separation or divorce. In one high profile case, however, *Hecht v. The Superior Court of Los Angeles County*, a testator's semen sample was found to be property for the purpose of being disposed of by will. The *Hecht* decision was discussed by the BC court in *JCM*, but that specific issue was not decided upon as it was not

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77 [2012] BCJ No 802; 2012 BCSC 584; 33 BCLR (5th) 140; 16 RFL (7th) 269 After separation, the child borne by each woman lived primarily with her. The issue of ownership of the straws arose because JCM got involved in another relationship, and wanted to have with her new partner a child genetically related to the child she had had with ANA.

78 Ibid. Para 64 and 75.

79 Ibid para 82-86.

80 *Lam v. UBC* 2015 BCCA 2. For helpful commentary on the impact of the case from an estates perspective see post by Kimberley Whalen at http://whaleyestatelitigation.com/blog/2015/02/is-sperm-property-relevant-to-estates-litigation/ )

81 *Lam*, supra, at para 93.

82 For a helpful overview, see "Children and Issues Arising under WESA", by Lauren Blake and Michelle L. Isaak, prepared for Continuing Legal Education Society of British Columbia in October 2014

necessary to consider on the facts of the case. The B.C. court did note, however, that in *Hecht* use of the sperm was limited to that intended by the testator (the recipient could not further dispose of it).[83]

After Death

Section 8 of the *Assisted Human Reproduction Act* and the accompanying regulations, provide that no one may use human reproductive material, or remove reproductive material from a donor's body after death, for the purpose of creating an embryo unless the donor gave express written consent for that use and/or removal.[84] The regulations specifically require there be a document indicating that consent, which is signed by the donor.

If genetic material constitutes property, are there circumstances when genetic material could be bequeathed by will or otherwise fall under the authority of the executor or administrator as property of the deceased's estate? Could a question ever arise as to whether a personal representative steps into the shoes of the deceased for the purpose of consenting to the use of the deceased's genetic material, in the event it cannot be ascertained whether the requisite consent was given by the deceased during their lifetime? Could a personal representative ever have authority to overriding that consent or lack of consent in certain circumstances?

Should the disposition of genetic material be taken into account when drafting wills, and specific directions given to avoid having stored genetic material or embryos fall into the residue of the estate?

These remain open questions. The outcome of future cases will depend on the specific facts involved. Consent and intention will likely be pivotal. Clear and careful planning through written contracts and testamentary documents reflecting those intentions may help minimize risk and uncertainty for individual families as the law evolves.

## E. Adult Children of ART: Is There a Right to Know Who Donated Sperm for Conception?

In *Pratten v. British Columbia* the B.C. Court of Appeal[85] held that a child born as the result of conception with sperm from an anonymous donor did not have a constitutional right to know her paternal lineage.

The plaintiff, Olivia Pratten, had been conceived in 1982 with sperm from an unknown donor. Her mother and father knew that the donor would remain anonymous. Pratten argued that the failure to legislate to permit children conceived by donor sperm to learn the identity of the sperm donor was constitutionally impermissible. She compared it to the right to know under the *Adoption Act*.

The B.C. Court of Appeal reversed the trial-level decision in her favour, holding that the creation of a scheme allowing adoptees to learn the identity of their birth parents did not mean that the legislature was obliged to extend that scheme to people conceived by ART.

## F. Regulation of Surrogacy: Payment of Expenses

The underlying philosophy of the *AHRA* is that reproductive material should not be commercialized. It is illegal to pay sperm or egg donors (s.7), and illegal to pay a surrogate to carry a child. It is also illegal to accept or offer consideration for arranging the services of a surrogate (s. 6).

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83 *Hecht v. The Superior Court of Los Angeles County,* 16 Cal. App. (4th) 836 (Ct. App. 1993), as cited in *J.C.M. v A.N.A* para 74.

84 *Assisted Human Reproduction Act* S.C. 2004, c. 2 s. 8(2) and 8(3)

85 *Pratten v British Columbia* 2012 BCCA 480

The *AHRA* is silent as to what expenses a surrogate can be reimbursed for. Section 12 provides for the reimbursement of expenses with receipts in accordance with the regulations, however, there are no regulations. The lack of guidance leaves a wide opening for varying interpretations of the lines.

Adding to the complexity is the fact that a violation of the *Act* is a criminal offence. A person who contravenes the prohibitions regarding the payment of surrogates, is liable on conviction on indictment to a fine of up to $500,000 and 10 years in prison (s. 60).

In 2013, a Canadian fertility agency owner was convicted on three counts under the Assisted Human Reproduction Act, in the first prosecution under the law. Leia Picard and her company—Canadian Fertility Consultants (CFC)— were fined $60,000 for federal offences that included illegally paying fees to women to donate eggs or act as surrogate mothers.[86]

Notwithstanding the legislative gaps, Health Canada's position is that a surrogate may be reimbursed for out-of-pocket costs directly related to the pregnancy[87], and the not-for-profit Canadian Standards Association Group is expected to be releasing Donor and Surrogate Reimbursement Guidelines in 2016.

It is anticipated that the CSA Group Guidelines will list categories of reimbursable expenses for egg donors and surrogates, including medical costs, legal advice, insurance, bedrest expenses and lost wages.

A surrogacy agreement should set out what expenses are compensable to avoid issues.

## G. Parentage Where There Is a Dispute in a Surrogacy Arrangement

Under the *FLA*, the intended parents can be registered as the child's parents at birth provided a written surrogacy agreement was entered into prior to conception and the surrogate consents after the birth.

In other jurisdictions a declaration or parentage or an adoption continues to be required in a surrogacy situation.

By their nature, surrogacy arrangements are fraught with uncertainty. There may be financial disagreements. There is always the possibility that the surrogate mother will bond with the child she is carrying, and not want to give it up. The surrogate's signature on a surrogacy agreement does not supplant the requirement that she consent, after the birth, to relinquish the child to the intended parents. The agreement itself evidence of the parties' intentions.

In these situations, the case law respecting surrogacy will continue to be important in BC.

An Alberta case, *H.L.W. and T.H.W.,* concerned the financial issues of compensation for reasonable expenses. H.L.W agreed to act as a surrogate mother for J.C.T and J.T. She conceived a child with JCT's sperm. The terms of the agreement included that HLW would have some ongoing contact with the child, and that JCT and JT would pay the expenses related to the pregnancy. Expenses escalated; tempers flared. HLW relinquished the child, but after birth petitioned for interim interaction with the child. The court refused the interim application, saying the intention of the parties was clear.[88] Here we see the court moving the case law in the

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86 See for more information, A. Motluk, "First prosecution under Assisted Human Reproduction Act ends in conviction, Canadian Medical Association Journal, Feb 4, 2014

http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3903755/

87 See Health Canada's webpage on surrogacy: http://www.hc-sc.gc.ca/dhp-mps/brgtherap/legislation/reprod/surrogacy-substitution-eng.php

88 *H.L.W. and T.H.W.* [200] BCJ No 2616; 2005 BCSC 1679. Here we see the court moving in the direction of intentionality, and away from genetic or biologic connection, in determining parentage.

direction of intentionality, and away from genetic or biologic connection, in determining parentage.

In *J.R. v L.H.* [89] a 2002 Ontario case, an opposite-sex couple J.R. and J.K. contracted with a surrogate mother, L.H. to carry a child conceived with J.R.'s egg and J.K's sperm, using IVF. Finding the declaration to be in the best interest of the twins who were born, the court declared J.R. and J.K. to be the children's only parents, and granted an order directing the Registrar General to register a Statement of Birth consistent with that declaration. The application was by consent.

In *K.G.D. v C.A.P.*, the court made a declaration of parentage in favour of a single gay man, whose child had been conceived with the help of a surrogate mother. He was successful in seeking half of his costs to obtain the declaration of parentage, because his situation was not provided for in Ontario's birth registration system.[90]

Not dissimilarly, in 2011 the Alberta Court held that the presumption of parentage provision in Alberta infringed the equality rights of a gay man in a conjugal relationship with the biological father of a child conceived with the assistance of a surrogate. The court issued a declaration of parentage for the non-biological co-parent.[91]

To the same effect is the 2003 B.C. case of *Rypkema*[92] The Vital Statistics Agency had refused to register the intended parents on the child's birth certificate, because the child had been delivered by the surrogate mother who was thus by definition the child's "mother" for purposes of registration of birth. The Rypkemas' application for an order directing the Vital Statistics Agency to register them as parents was granted. Though the same relief would have been available through a stepparent adoption, the court noted that the expense and trouble of an adoption were not justified. Registration would affirm the parent-child relationship, and would provide presumptive proof of the relationship.

## H. How Many Parents?

As discussed in more detail earlier in this paper, it remains to be seen how many parents may legally be recognized under the *FLA*, or the extent to which parental status under B.C. law will be accepted in other jurisdictions.

Although the FLA is the first province to provide for more than two parents through legislation, there is case law that provides authority for recognizing multi- parent families in other Canadian jurisdictions.

In *A.A. v B.B.*, the sperm donor and the birth mother were listed on the child's birth certificate as the child's parents. The child lived with A.A. and her lesbian partner, but the sperm donor was by agreement among all parties actively involved in the child's life. The parties did not want to supplant the donor by a stepparent adoption. They wanted the child's birth certificate to reflect the reality that the child had three parents. The Ontario Court of Appeal agreed.[93]

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89 *J.R. v. L.H.* [2002] O.J. No. 3998; [2002] O.T.C. 764; 117 A.C.W.S. (3d) 276

90 [2004] O.J. No. 3508

91 DWH v DJR [2011] AJ No 1982.

92 [2003] B.C.J. No. 2721; 2003 BCSC 1784; 233 D.L.R. (4th) 760; [2004] 3 W.W.R. 712; 22 B.C.L.R. (4th) 233; 47 R.F.L. (5th) 398; 127 A.C.W.S. (3d) 300. The same result was arrived at in *B.A.N and R.C.N* [2008] B.C.J. No. 1169; 2008 BCSC 808; [2009] 2 W.W.R. 522; 86 B.C.L.R. (4th) 106; 294 D.L.R. (4th) 564; 2008 CarswellBC 1298; 167 A.C.W.S. (3d) 342

93 *A.A. v B.B.* [2007] O.J. No. 2; 2007 ONCA 2; 83 O.R. (3d) 561; 83 O.R. (3d) 75; 278 D.L.R. (4th) 519; 220 O.A.C. 115; 150 C.R.R. (2d) 110; 35 R.F.L. (6th) 1;

2007 CarswellOnt 2. For an analysis of this case, see Bouchard, Donna "The Three-parent Decision: A Case Commentary on A.A.v B.C." 70 Sask L. Rev 459

The Court of Appeal held that the declaration was within the *parens patriae* jurisdiction of the court. The Children's Law Reform Act did not contemplate more than one mother for a child. However, given present social conditions and attitudes, there were gaps in the legislative scheme of the Act that the court could use its *parens patriae* jurisdiction to fill. It would be contrary to the best interests of the child to deny the legal recognition of both his mothers. The legislative gap was not deliberate, in that it was not a policy choice to exclude the children of lesbian mothers from the advantages of equality of status accorded to other children under the Act.

A live question with respect to multi-parent families, in BC and elsewhere, is how the obligations respecting child support interface with these more complex families. If there is a third parent who does not (and never intended to) live with the co-parenting couple and the child, is that third parent obligated to pay child support under the family laws, as would be the case in a separated family? This is yet to be determined.

## I. The Breakdown of Parenting or Spousal Relationships

The *FLA* regime provides certainty with respect to legal parentage where assisted reproduction is used. If the parties follow certain steps and rules, particular people will be legal parents. Their legal status is not a question.

Therefore, if the parents of a child conceived with ART break up, or their parenting arrangement otherwise fails, they will need to contend with determining guardianship, parenting responsibilities, and child support under the *FLA* after the birth of the child.

The clear requirements of the *FLA* will assist parents who, under the previous regime, would have experienced challenges upon the breakdown of their relationship due to their ambiguous legal status as parents. Some of these challenges will persist, even under the *FLA*, and in particular if there are cross-jurisdictional issues.

Some examples of potential challenges are:

### 1. Lesbian Co-parents

Previously between two lesbian co-mothers, it was not uncommon to see an assertion by the birth mother that she had more claim to custody of the child than did her non-biological co-mother, even if the co-mother was a "parent" on the child's birth certificate.[94]

After it became legally possible to do so, the best position for the non-biological co-mother to be in, legally, was to be an adoptive co-parent or obtain a declaration of parentage. This put her in the same legal position as the biological mother. However, lesbian co-parent had to get a declaration of parentage or an adoption order while she and her partner were on good terms. Once the co-parents separated and difficulties between them arose over parenting issues, a court could, and did in *K.G.T. v. P.D.*, refuse an adoption order in favour of the non-biological co-parent, even though it found as a fact that the birth mother would have consented to an adoption after birth.[95]

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94 Prior to amendments to the *Adoption Act* to permit same sex parents to adopt, and prior to amendments to the *Family Relations Act* to recognize same-sex parents, it was common for a biological parent to successfully resist even an access claim by the non-biological parent. Lesbian co-mothers were invisible to the law.

95 K.G.T. v. P.D.[2005] B.C.J. No. 2935; 2005 BCSC 1659; 21 R.F.L. (6th) 183. barbara findlay advises that prior to changes in the Family Relations Act in 1996 which recognized same sex partners as stepparents, ,she was unsuccessful in every application she made on behalf of non-biological co-mothers for custody or access.

Now, a same-sex co-parent is legally a parent under the *FLA*, so long as ART was used to conceive. Both mothers are by default under the law in BC, in the same legal position, regardless of which mother carried the child.

However, in other jurisdictions, the non-biological mother may be required to make a custody claim, as a stepparent where there is no declaration of parentage. Advancing such claims can be tricky: one could encounter homophobic assumptions to the significant disadvantage of the non-biological co-mother.

## 2. And Donor Makes Three

Under the *FLA*, parties can have an explicit three-parent arrangement, with a written agreement, which makes the donor a legal parent and in other jurisdictions *A.A. v B.C.* paved the way for "three-parent families" of the birth mother, the co-mother, and the donor. [96]

In many other cases, the parties may have an informal arrangement, in which the donor plays an ongoing role in the child's life, but is not a legal parent.

If unhappy differences arise between the donor and the parents, the donor might make an application for contact, for example if the child's parents break up or his continuing access to the child is threatened.

In those situations, the fact that the donor has been involved with the child on an ongoing basis carries much more weight than the simple fact of donation of sperm or egg in the court's determination of the best interests of the child and award of contact, both in BC and other jurisdictions.

Whatever arrangements parties made before or after a child is born about the child's parentage and the roles each of the parties will play in the child's life, a court faced with an application relating to the custody of, access to, or parentage of a child will take into account not only any agreement the parties have made, but the roles each party has actually played in the life of the child, and, outside BC, may refuse to give effect to the parties' agreement.

A 2009 Ontario case[97], *M.A.C. et al. v. M.K*[98], concerned the disintegration of a three-parent arrangement. The parties were a cohabiting lesbian couple and a gay man who had donated sperm. Their intention was that the gay man be recognized as their child's father and would see the child often. After the child was born the three signed an agreement embodying their intentions with respect to custody, access, support, and adoption. This arrangement continued happily for many years; but then relations between the lesbian couple and the father became strained. The couple made an application to adopt the child, relying on the clause in their agreement that the donor would consent to an adoption to request that his consent be dispensed with. The court refused the application, finding that the agreement was not a "domestic contract" within the *Family Law Act* and, even it was, it was not in the best interests of the child to sever the child's ongoing relationship with the father. The court noted that the non-biological mother could seek an order that she was a custodial parent, without severing the parental relationship between the donor and the child.

## J. Declarations of Parentage: Still Advisable?

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96 [2007] O.J. No. 2; 2007 ONCA 2; 83 O.R. (3d) 561; 83 O.R. (3d) ; 75; 278 D.L.R. (4th) 519; 220 O.A.C. 115; 150 C.R.R. (2d) 110; 35 R.F.L. (6th) 1; 2007 CarswellOnt 2

97 M.A.C. et al. v. M.K.[Indexed as: C. (M.A.) v. K. (M.)]94 O.R. (3d) 756

(Ontario Court of Justice). To the same effect is D. (M.) v. L. (L.)] 90 O.R. (3d) 127 (2008)

98 94 O.R. (3d) 756

Both declarations of parentage and adoption are routinely used in other provinces, depending on the factual circumstances and legislative framework of the jurisdiction where the child was born. In addition, ART families, particularly where they are not opposite-sex couples, may continue to face challenges respecting recognition of their parental status in other jurisdictions, either within Canada or internationally.

Although Part 3 of the *FLA* means adoptions and declarations of parentage are no longer required for ART families of children born in British Columbia, declarations of parentage may continue to be prudent in cases where the parents are concerned about the legal recognition of their parental status in other jurisdictions.

Many jurisdictions do not permit, or expressly prohibit, same sex couples to have children together, to register both parents on the birth certificate, or even to adopt a child together.

Canadian lesbian or gay travelers report that they are treated with more legitimacy and respect of their parental role if they have, in addition to a birth certificate with both their names on it, a court order of adoption or declaration of parentage.[99]

A female-to-male trans prospective parent may carry and give birth to a child, notwithstanding that he has completed his transition and may even have a birth certificate showing him as male. By virtue of the fact that he birthed the child, he meets the definition of "birth mother" notwithstanding his gender. In this situation, a declaration of parentage may be required because the family might have difficulties, especially if the family is planning to travel.

Since acceptance of same-sex and trans parented families is very uneven across the world, there is a good chance that the family could face challenges in other jurisdictions that are more homophobic and transphobic.

Conflict of laws have to stretch in new directions to deal with issues where sperm is provided from one province or country, an egg from another, perhaps a fertility clinic in a third jurisdiction and a birth in a fourth.[100] Courtney G. Joslin's article "Interstate Recognition of Parentage in a Time of Disharmony: Same Sex Families and Beyond" [101] describes the U.S. jurisprudence when a homophobic state does not consider itself bound by determinations in a non-homophobic state. She argues that the failure to give full faith and credit to the parental determinations of another state will be very complicated in an age of ART.

## VII. Conclusion

Legal parentage is important to establishing a child's identity, for example, family name, family relationships, and cultural heritage. Inheritance rights flow from the parent-child relationship and responsibilities relate to parentage including child support, guardianship.

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99 More on the risks of travelling as lesbian co-mothers: Courtney G. Joslin, ""Travel Insurance" Protecting Lesbian and Gay parent Families Across State Lines" (2010) 4 Harv L. & Pol Rev 31

100 "It is a conflicts professor's dream hypothetical and a parent's worst nightmare: a woman in one state gives birth to a baby with genetically-linked abnormalities after using sperm donated by a donor in a different state and after having pre-implantation genetic diagnosis done by a specialist in a third state." "Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflict of Laws" by Sonya Bychkov Green, outlines the myriad complexities of legal issues around reproductive technology, including for example lawsuits over the technologies themselves; over physician negligence; improper genetic diagnosis; sperm donations; egg donations; embryo donations; and surrogacy; improper genetic diagnosis; over parentage; over the relationship between parent and surrogate; over sperm donation; over embryos; over disposition of unused sperm, ova and embryos...24 Wis J.L. Gender, and Soc'y 25 (2009)

101 (2009) 70 Ohio S L. J.563

The *FLA* parentage regime has answered many of the questions raised by the previous gap in the law and the jurisprudence that resulted. It provides welcome clarification.

A "parent" under Part 3 is a "parent" for all the purposes of B.C. law: this is clear and sensible.

The "bright line" between parentage of a child conceived through sexual intercourse and ART provides a clear regime for determining a child's parent, based on the following general rules with respect to ART conceived children (with some exceptions):

- Intention to parent trumps genetic connection to the child.
- Written agreements play an important role in establishing parentage.
- The status of a donor is clear: a donor (sperm or egg) is never a parent, unless they have entered into a multi-family agreement prior to the conception of the child's birth.
- The birth mother and her partner (heterosexual, lesbian, transgender, etc) are the legal parents of the child, generally.
- A three (or more) parent family is possible, and if there is an agreement in writing made before conception, all will be parents. Though it will be used by a minority of potential parents, it is an important addition to the law.
- A surrogate is not a parent where the surrogate and the intended parents enter into a written agreement prior to the conception of the child and after the birth fo the child the surrogate relinquishes the child in writing to the intended parents. No declaration of parentage is required.
- A birth certificate, which formerly provided evidence but not proof of parentage, now shows who a child's legal parents are, where assisted reproduction is used.

The changes to the *FLA* have brought a welcome certainty to the law around children conceived by ART, although there are a multitude of foreseeable and unforeseeable issues that are bound to raise interesting and mind-boggling questions as the law and families evolve. Given the inter-jurisdictional facts of life for many ART families, the conflicts of laws questions will perhaps be the thorniest issues to resolve.

## VIII. Appendix "A" —Definition of Terms With Respect to Assisted Reproductive Technology

| | |
|---|---|
| **Egg donation** | Harvesting a fertile egg from one woman, which is then inseminated using IVF and implanted into a gestational carrier |
| **Intracytopasmic sperm injection** | A process used when the donor has poor sperm quality or a low sperm count, in which individual eggs are microscopically injected with individual sperm; the fertilized eggs are then implanted into the gestational carrier |
| **Intrauterine Insemination (IUI)** | Donated sperm is "washed" of seminal fluid and extraneous debris, and the remaining sperm is injected into the uterus. |
| **In Vitro Fertilization (literally, "in glass")** | An egg and sperm are acquired, and inseminated outside the body, then implanted into the gestational carrier to grow. Extra embryos may be frozen for future use. |
| **Ovulation induction and superovulation** | Administration of prescription medication to improve a woman's production of ova. |
| **Sperm donation** | The process of placing donated sperm (either fresh or frozen) into a woman's uterus at the time of ovulation. Donated sperm used by clinics are quarantined for six months and tested to be sure they are free of diseases such as HIV and other transmissible conditions. |
| **Surrogacy** | Surrogacy is when an embryo is carried to term by a woman who will not be the child's prospective parent. The egg may either by produced by the surrogate, in which case donor insemination of sperm is used, or eggs from one of the partners, in which case IVF is used. |

# Appendix B—Family Law Act, Part 3, Parentage

## Division 1 — General Matters

**Interpretation**

20(1) In this Part:

**"assisted reproduction"** means a method of conceiving a child other than by sexual intercourse;

**"birth mother"** means the person who gives birth to, or is delivered of, a child, regardless of whether her human reproductive material was used in the child's conception;

**"donor"** means a person who, for the purposes of assisted reproduction other than for the person's own reproductive use, provides

- his or her own human reproductive material, from which a child is conceived, or
- an embryo created through the use of his or her human reproductive material;

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

**"human reproductive material"** means a sperm, an ovum or another human cell or human gene, and includes a part of any of them;

**"intended parent" or "intended parents"** means a person who intends, or 2 persons who are married or in a marriage-like relationship who intend, to be a parent of a child and, for that purpose, the person makes or the 2 persons make an agreement with another person before the child is conceived that

(2) the other person will be the birth mother of a child conceived through assisted reproduction, and

(3) the person, or the 2 persons, will be the child's parent or parents on the child's birth, regardless of whether that person's or those persons' human reproductive material was used in the child's conception.

(2) A child born as a result of assisted reproduction is deemed to have been conceived on the day the human reproductive material or embryo was implanted in the birth mother.

**Void and voidable marriages**

21(1) For the purposes of this Part, if

(a) 2 persons go through a form of marriage to each other, with at least one of them doing so in good faith,

(b) the 2 persons live together during the marriage, and

(c) the marriage is void,

the 2 persons are deemed to have been married during the period they were living together, and the marriage is deemed to have ended when the persons stopped living together.

(2) For the purposes of this Part, if a voidable marriage is declared a nullity, the persons who went through the form of marriage are deemed to be married until the date of the declaratory order of nullity.

**Effect of Part**

22 This Part does not affect a disposition of property under an enactment or instrument before the date this section comes into force.

## Division 2 — Determining Parentage

**Parentage to be determined by this Part**

23(1) For all purposes of the law of British Columbia,

a person is the child of his or her parents,

a child's parent is the person determined under this Part to be the child's parent, and

the relationship of parent and child and kindred relationships flowing from that relationship must be as determined under this Part.

(a) For the purposes of an instrument or enactment that refers to a person, described in terms of his or her relationship to another person by birth, blood or marriage, the reference must be read as a reference to, and read to include, a person who comes within the description because of the relationship of parent and child as determined under this Part.

**Donor not automatically parent**

24(1) If a child is born as a result of assisted reproduction, a donor who provided human reproductive material or an embryo for the assisted reproduction of the child

(i) is not, by reason only of the donation, the child's parent,

(ii) may not be declared by a court, by reason only of the donation, to be the child's parent, and

(iii) is the child's parent only if determined, under this Part, to be the child's parent.

(2) For the purposes of an instrument or enactment that refers to a person, described in terms of his or her relationship to another person by birth, blood or marriage, the reference must not be read as a reference to, nor read to include, a person who is a donor unless the person comes within the description because of the relationship of parent and child as determined under this Part.

**Parentage if adoption**

25 If a child is adopted, sections 26 to 30 of this Act do not apply and the child's parents are as set out in the *Adoption Act*.

**Parentage if no assisted reproduction**

26(1) On the birth of a child not born as a result of assisted reproduction, the child's parents are the birth mother and the child's biological father.

(2) For the purposes of this section, a male person is presumed, unless the contrary is proved or subsection (3) applies, to be a child's biological father in any of the following circumstances:

(a) he was married to the child's birth mother on the day of the child's birth;

(b) he was married to the child's birth mother and, within 300 days before the child's birth, the marriage was ended

- by his death,
- by a judgment of divorce, or
- as referred to in section 21 *[void and voidable marriages]*;

(c) he married the child's birth mother after the child's birth and acknowledges that he is the father;

(d) he was living with the child's birth mother in a marriage-like relationship within 300 days before, or on the day of, the child's birth;

(e) he, along with the child's birth mother, has acknowledged that he is the child's father by having signed a statement under section 3 of the *Vital Statistics Act*;

(f) he has acknowledged that he is the child's father by having signed an agreement under section 20 of the *Child Paternity and Support Act*,

R.S.B.C. 1979, c. 49.

(3) If more than one person may be presumed to be a child's biological father, no presumption of paternity may be made.

**Parentage if assisted reproduction**

27(1) This section applies if

(a) a child is conceived through assisted reproduction, regardless of who provided the human reproductive material or embryo used for the assisted reproduction, and

(b) section 29 *[parentage if surrogacy arrangement]* does not apply.

(2) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's birth mother is the child's parent.

(3) Subject to section 28 *[parentage if assisted reproduction after death]*, in addition to the child's birth mother, a person who was married to, or in a marriage-like relationship with, the child's birth mother when the child was conceived is also the child's parent unless there is proof that, before the child was conceived, the person

(a) did not consent to be the child's parent, or

(b) withdrew the consent to be the child's parent.

**Parentage if assisted reproduction after death**

28(1) This section applies if

(a) a child is conceived through assisted reproduction,

(b) the person who provided the human reproductive material or embryo used in the child's conception

(i) did so for that person's own reproductive use, and

(ii) died before the child's conception, and

(c) there is proof that the person

(i) gave written consent to the use of the human reproductive material or embryo, after that person's death, by a person who was married to, or in a marriage-like relationship with, the deceased person when that person died,

(ii) gave written consent to be the parent of a child conceived after the person's death, and

(iii) did not withdraw the consent referred to in subparagraph (i) or (ii) before the person's death.

(2) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's parents are

(a) the deceased person, and

(b) regardless of whether he or she also provided human reproductive material or the embryo used for the assisted reproduction, the person who was married to, or in a marriage-like relationship with, the deceased person when that person died.

**Parentage if surrogacy arrangement**

29(1) In this section, **"surrogate"** means a birth mother who is a party to an agreement described in subsection (2).

(2) This section applies if,

(a) before a child is conceived through assisted reproduction, a written agreement is made between a potential surrogate and an intended parent or the intended parents, and

(b) the agreement provides that the potential surrogate will be the birth mother of a child conceived through assisted reproduction and that, on the child's birth,

- the surrogate will not be a parent of the child,
- the surrogate will surrender the child to the intended parent or intended parents, and

- the intended parent or intended parents will be the child's parent or parents.

(3) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (2), a person who is an intended parent under the agreement is the child's parent if all of the following conditions are met:

(a) before the child is conceived, no party to the agreement withdraws from the agreement;

(b) after the child's birth,

- the surrogate gives written consent to surrender the child to an intended parent or the intended parents, and
- an intended parent or the intended parents take the child into his or her, or their, care.

(4) For the purposes of the consent required under subsection (3)(b)(i), the Supreme Court may waive the consent if the surrogate

(a) is deceased or incapable of giving consent, or

(b) cannot be located after reasonable efforts to locate her have been made.

(5) If an intended parent dies, or the intended parents die, after the child is conceived, the deceased intended parent is, or intended parents are, the child's parent or parents if the surrogate gives written consent to surrender the child to the personal representative or other person acting in the place of the deceased intended parent or intended parents.

(6) An agreement under subsection (2) to act as a surrogate or to surrender a child is not consent for the purposes of subsection (3)(b)(i) or (5), but may be used as evidence of the parties' intentions with respect to the child's parentage if a dispute arises after the child's birth.

(7) Despite subsection (2)(a), the child's parents are the deceased person and the intended parent if

(a) the circumstances set out in section 28(1) *[parentage if assisted reproduction after death]* apply,

(b) before a child is conceived through assisted reproduction, a written agreement is made between a potential surrogate and a person who was married to, or in a marriage-like relationship, with the deceased person, and

(c) subsections (2)(b) and (3)(a) and (b) apply.

**Parentage if other arrangement**

30(1) This section applies if there is a written agreement that

(2) is made before a child is conceived through assisted reproduction,

(3) is made between

(a) an intended parent or the intended parents and a potential birth mother who agrees to be a parent together with the intended parent or intended parents, or

(b) the potential birth mother, a person who is married to or in a marriage-like relationship with the potential birth mother, and a donor who agrees to be a parent together with the potential birth mother and a person married to or in a marriage-like relationship with the potential birth mother, and

(4) provides that

(a) the potential birth mother will be the birth mother of a child conceived through assisted reproduction, and

(b) on the child's birth, the parties to the agreement will be the parents of the child.

(a) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's parents are the parties to the agreement.

(b) If an agreement described in subsection (1) is made but, before a child is conceived, a party withdraws from the agreement or dies, the agreement is deemed to be revoked.

**Orders declaring parentage**

31(1) Subject to subsection (5), if there is a dispute or any uncertainty as to whether a person is or is not a parent under this Part, either of the following, on application, may make an order declaring whether a person is a child's parent:

- the Supreme Court;
- if such an order is necessary to determine another family law dispute over which the Provincial Court has jurisdiction, the Provincial Court.

(2) If an application is made under subsection (1), the following persons must be served with notice of the application:

(a) the child, if the child is 16 years of age or older;

(b) each guardian of the child;

(c) each adult person with whom the child usually resides and who generally has care of the child;

(d) each person, known to the applicant, who claims or is alleged to be a parent of the child;

(e) any other person to whom the court considers it appropriate to provide notice, including a child under 16 years of age.

(3) To the extent possible, an order under this section must give effect to the rules respecting the determination of parentage set out under this Part.

(4) The court may make an order under this section despite the death of the child or person who is the subject of the application, or both.

(5) An application may not be made respecting a child who has been adopted.

**New evidence**

32(1) This section applies if evidence becomes available that was not available at the time an application for a declaration of parentage under section 31 *[orders declaring parentage]* was heard.

(2) On application, a court may confirm or set aside an order made under section 31, or make a new order under that section.

(3) The setting aside of an order under subsection (2) of this section does not affect

(a) rights or duties that have already been exercised, or

(b) property interests that have already been distributed.

**Parentage tests**

33(1) In this section, **"parentage tests"** are tests used to identify inheritable characteristics, and include

(a) human leukocyte antigen tests,

(b) tests of the deoxyribonucleic acid (DNA), and

(c) any other test the court considers appropriate.

(2) On application by a party to a proceeding under this Part,

(a) the Supreme Court, or

(b) if necessary for the purposes of making an order under section 31 *[orders declaring parentage]*, the Provincial Court,

may order a person, including a child, to have a tissue sample or blood sample, or both, taken by a medical practitioner or other qualified person for the purpose of conducting parentage tests.

(3) An order under subsection (2) of this section may require a party to pay all or part of the cost of the parentage tests.

(4) If a person named in an order under subsection (2) of this section fails to comply with the order, the court may draw from that failure any inference that the court considers appropriate.

## Division 3 — Orders Made Outside British Columbia

**Definitions**

34 In this Division:

**"extraprovincial declaratory order"** means an order of an extraprovincial tribunal that declares whether a person is a child's parent;

**"extraprovincial tribunal"** means a court or tribunal, outside British Columbia, having authority to make orders declaring whether a person is a child's parent.

**Recognition of Canadian extraprovincial declaratory orders**

35(1) Subject to subsection (3), a court must recognize an extraprovincial declaratory order made in Canada.

(a) On recognition by a court, an extraprovincial declaratory order made in Canada has the same effect as if it were an order made under section 31 *[orders declaring parentage]*.

(b) A court may decline to recognize an extraprovincial declaratory order made in Canada and make an order under section 31, if

- evidence becomes available that was not available during the proceeding at which the extraprovincial declaratory order was made, or
- the court is satisfied that the extraprovincial declaratory order was obtained by fraud or duress.

**Recognition of non-Canadian extraprovincial declaratory orders**

36(1) Subject to subsection (3), a court must recognize an extraprovincial declaratory order made outside Canada if, at the time the extraprovincial declaratory order or the application for the order was made, the child or at least one of the child's parents

- was habitually resident in the jurisdiction of the extraprovincial tribunal, or
- had a real and substantial connection with the jurisdiction of the extraprovincial tribunal.

- On recognition by a court, an extraprovincial declaratory order made outside Canada has the same effect as if it were an order made under section 31 *[orders declaring parentage]*.

- A court may decline to recognize an extraprovincial declaratory order made outside Canada and make an order under section 31, if
  - evidence becomes available that was not available during the proceeding at which the extraprovincial declaratory order was made,
  - the court is satisfied that the extraprovincial declaratory order was obtained by fraud or duress, or
  - the extraprovincial declaratory order is contrary to public policy.