ACCESS TO JUSTICE
& LAW REFORM
INSTITUTE
OF
NOVA SCOTIA

Parentage Act

Discussion Paper - October 2022

ACCESS TO JUSTICE & LAW REFORM INSTITUTE OF NOVA SCOTIA

Discussion Paper

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Access to Justice & Law Reform Institute of Nova Scotia

October 2022

WHAT DO YOU THINK?

The Access to Justice & Law Reform Institute of Nova Scotia is interested in what you think about the proposals and questions in this Discussion Paper.

This Discussion Paper does not represent the final views of the Institute. It is intended to encourage discussion and public participation in the work of the Institute, and in the reform and improvement of the law. Your comments will assist us in preparing a Final Report to the Government of Nova Scotia. The Final Report will make recommendations on how the law of parentage should be introduced to better serve the needs of Nova Scotians.

If you would like to comment on the Discussion Paper, you may:

- Send an email to Sarah Burton at: sarahb@lawreform.ns.ca
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In order for us to fully consider your comments before we prepare our Final Report, please submit your comments to us by:

30 January 2023

Please note that the Final Report will list the names of individuals and groups who make comments or submissions on this Discussion Paper. Unless comments are marked 'confidential', the Institute will assume that respondents agree to the Institute quoting from or referring to comments given. Respondents should be aware that the Nova Scotia *Freedom of Information and Protection of Privacy Act* may require the Institute to release information, including personal information, contained in submissions.

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act to Establish an Independent Law Reform Commission*. The Commission restructured as the Access to Justice & Law Reform Institute, an incorporated non-profit, in January 2019.

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EXECUTIVE SUMMARY

This Discussion Paper makes proposals and asks questions for discussion on how Nova Scotian law should identify a child's parents from the moment of birth – known as legal parentage. While subject to change through formal procedures such as adoption, for most people legal parentage is an automatic and immutable status upon which their identity is built. For children, rights based on kinship, such as citizenship, inheritance, and status flow via parentage. For parents, legal parentage provides the immediate presumptive status from which they are given standing to provide the parenting, care and support of children.

In light of this foundational role, it is vital for parentage to reflect the social landscape within which Nova Scotians live, and the various ways families are created. It is also critical that parentage laws be accessible, understandable, and non-discriminatory.

Nova Scotia is the only jurisdiction in Canada that lacks parentage legislation. At present, our parentage laws are based on two archaic common law presumptions: the woman who gives birth to a child is that child's mother, and her husband is the father. Mechanisms to prove (or disprove) parentage outside of these presumptions are largely based on biology – such as blood or genetic testing.

There are four overarching problems with this outdated regime. First, it does not recognize all families living in Nova Scotia today. Many people have children outside of these tight constraints, including members of the 2SLGBTQIA+ community. At present, people outside the scope of our parentage laws must ask the Registrar of Vital Statistics to be listed on birth registry documents. This process is doubly problematic because it (1) cloaks the Registrar with a great deal of power over family autonomy, without clear or easy paths to challenge their decision; and (2) does not actually confer legal parentage. As explored in more detail below, birth registry documents do not bestow parentage. As such, many non-traditional families who follow this route are lead to believe they hold rights they do not in fact possess. In other words, this current regime is problematic from the perspective of equality, the rule of law, and access to justice.

Second, existing rules fail to account for parentage in cases of assisted conception. Canadians are increasingly using sperm, egg and embryo donation to have children. These technologies separate the link between biology and parentage in a way that is not contemplated by our law. They also stretch the boundaries of how and when children can come into the world. This puts intended parents in a precarious situation vis-à-vis their children, and jeopardizes the substantive legal rights that flow from kinship to children.

Third, existing mechanisms to account for children born via surrogacy are onerous and outdated. While Nova Scotia does have a method to recognize parents via surrogacy, these laws arguably place a great deal of risk with the surrogate, exclude parties who lack viable genetic material, and mandate judicial oversight in every case.

Fourth, Nova Scotia's parentage regime is built on a two-parent maximum that requires re-examination. Family forms are changing in Nova Scotia – and legal reforms should contemplate this reality.

This Discussion Paper looks at these, and many other issues. In doing so, we take the position that modern parentage laws should be able to account for all the ways that children come into the world – including, sperm, egg and embryo donation, surrogacy, sexual intercourse inside and outside of marital relations, posthumous conception, and multiple parent units. This will require rethinking traditional notions such as marriage, conjugality and bloodline, which have been used to marginalize some Nova Scotian families.

Chapters 1-3 situate this project in a historical, social and legal context. Chapter 1 defines legal parentage, sets out why it matters, and what the law is today. Chapter 2 provides the social and legal background which situates the project within Nova Scotia's legal regime and explains why reforms are necessary now. Chapter 3 then proposes some overarching principles of reform to guide the project.

Chapters 4-11 review substantive issues under parentage law and propose for discussion parentage laws in Nova Scotia that will:

- Treat birth parents and their partners as parents where egg, sperm or embryo donation is used to conceive;
- Prevent egg, sperm or embryo donors from asserting parentage based purely on genetic factors;
- Clarify when a person is a sperm donor, and when a person is a parent;
- Simplify the recognition of intended parents via surrogacy;
- Provide a path to parentage of posthumously conceived children;
- Provide a path by which a child may have more than two legal parents;
- Provide unmarried parents with the same legal recognition as married parents;
- Remove gendered language from our parentage laws;
- Provide clarity on how to recognize parentage of children born outside of Nova Scotia; and
- Clarify how a court ought to address interjurisdictional parentage disputes.

The Law Reform Institute takes the position that, as social and cultural understandings of parentage change, so too should the law's response. This Discussion Paper addresses longstanding gaps in Nova Scotia's parentage law, and seeks to bring the law in line with modern realities of family creation in our Province. The current scheme imposes burdens on parents from non-traditional families, which disproportionately impacts 2SLGBTQIA+ families. The Institute looks forward to exploring these concerns below and developing recommendations to bring the law in line with the Province's commitment to equality.

QUESTIONS AND PROPOSALS FOR DISCUSSION

Chapter 3: Principles of Reform

Proposed Principles of Reform:

We propose that reform should be guided by the following principles:

- A relational, child-centred approach
- Functional / intentional parentage
- Substantive equality including a consideration of intersectionality, gender-based analysis including violence and historical racism
- Harmonization
- Clarity and certainty
- Access to justice

Chapter 4: Sperm, Egg and Embryo Donation

Proposals for Discussion:

In cases of conception via sperm, egg or embryo donation, the person who gives birth is a parent of the child.

In cases of sperm, egg and embryo donation, the parentage of an "other parent" should be dictated by intention to parent.

Where a child is conceived via egg, sperm or embryo donation, Nova Scotia's parentage law should deem the spouse or partner (as defined at Chapter 6.4.1) of a birth parent at the time of conception or birth as a parent of the child born.

A parentage law should state that the birth parent's spouse or partner is not a parent if they did not consent to be a parent at the time of conception, or that if they had provided consent, they withdrew it prior to conception.

The law should clarify that the status that accrues to a non-birth parent crystallizes at the moment of birth, and does not give the non-birth parent a say over the birth parent's bodily autonomy.

Nova Scotia's parentage statute should state that sperm, egg or embryo donors cannot claim parental status purely by virtue of their donation.

Courts should retain discretion to review parentage of persons who would otherwise be classified as donors in exceptional cases.

Nova Scotia parentage law should recognize that sperm donation may occur via sexual intercourse.

Sperm donation via sexual intercourse should only be recognized where the intended parents and the donor enter a preconception written agreement setting out their intentions.

Regulations should include standard form agreements to donate sperm via sexual intercourse.

Questions for Discussion:

Should parentage laws prohibit current intimate partners from entering an agreement to donate sperm via sexual intercourse?

Should parentage laws impose a mandatory cooling-off period or require independent legal advice before recognizing an agreement to donate sperm via sexual intercourse?

Chapter 5: Surrogacy

Proposals for Discussion

Nova Scotia should implement a tiered approach to recognize parentage of children born via surrogacy:

- Where the parties have a preconception written agreement, and have obtained preconception implications counselling and independent legal advice, the intended parents should be recognized as the child's only parents on birth, subject to the surrogate objecting to this during a specified post-birth window (the "Intended Parent Tier")

- Where one of a preconception written agreement, implications counselling and independent legal advice are not satisfied, but the surrogacy is gestational, the intended parents and surrogate ought to share parenting rights and responsibilities until the surrogate provides post-birth confirmation of her intention not to be a parent of the child born (the "Sharing Tier")

- Where one of a preconception written agreement, implications counselling and independent legal advice are not satisfied and the surrogacy is traditional, the intended parents and surrogate must have parentage transferred from the surrogate to the intended parents by a judicial declaration post-birth (the "Judicial Tier").

In any case where a dispute arises, the intended parents and surrogate must have parentage determined by a judge after the child is born.

Standard form surrogacy agreements should be provided in regulations to a parentage law.

Public legal education should be provided to self-represented parties who are having parentage determined by a judge.

In order to access the Intended Parent Tier, the parties must have a written preconception agreement.

In order to access the Intended Parent Tier, surrogates and intended parents must obtain independent legal advice prior to signing a pre-conception surrogacy agreement.

In order to access the Intended Parent Tier, surrogates and intended parents must obtain implications counselling prior to signing a pre-conception surrogacy agreement.

Nova Scotia should not require parties to a surrogacy to obtain approval for the surrogacy from an independent regulatory body in order to access the Intended Parent Tier.

A surrogate should be given a 14-day post-birth window to object to parentage under the Intended Parent Tier.

Under the Sharing Tier, the surrogate must give post-birth consent in writing confirming her intention not to be a parent of the child born.

Under the Sharing Tier, the surrogate's post-birth consent confirming non-parentage must not be given before the child is 7-days old.

Under the Sharing Tier, intended parents may apply to court to waive the surrogate's consent where consent has not been given because the surrogate has died, is incapacitated, cannot be located, or has refused to provide consent.

Under the Sharing Tier, parentage legislation should clarify that once the surrogate's non-parentage is confirmed by consent or by court order, the parentage relationship between surrogate and child is deemed to never have existed.

Under the Sharing Tier, when the surrogate has not provided post-birth consent because they have died, parentage legislation should state that the surrogate's family members do not have standing to challenge the intended parents' application to waive this consent.

Under the Sharing Tier, legislation should provide that, if the surrogate has not provided consent confirming non-parentage 30-days after the child is born, parentage must be settled judicially.

Surrogacy agreements should be enforceable as against intended parents, but not surrogates.

Surrogacy agreements should be admissible as evidence of all parties' pre-conception intent.

A surrogate's spouse or partner should not be a party to a surrogacy agreement.

Parentage law should state that a surrogate's spouse or partner does not receive a presumption or status of parentage at birth.

Nova Scotia should not require that a child born by way of surrogacy have a genetic link to at least one intended parent.

Nova Scotia should not inquire into the relationship status of intended parents via surrogacy.

Nova Scotia should not impose a specific relationship requirement on intended parents via surrogacy.

Questions for Discussion:

In the event a surrogate is incapacitated during her window to object under the Intended Parent Tier how should the process proceed?

How should Nova Scotia law assign parentage in situations where conception occurs outside of Nova Scotia, but the child is born in Nova Scotia?

Chapter 6: Parentage Via Sexual Relations

Proposals for Discussion:

Biology should remain the foundation of parentage where conception occurs via sexual intercourse.

Nova Scotia should extend a presumption of parentage to the common law partner of a birth parent.

A common law partner should be defined as including persons cohabiting in conjugal relationship with a birth parent.

There should be no specific duration threshold imposed on persons to qualify as a common law partner for the purpose of parentage.

A presumption of parentage should extend to a person who is cohabiting in a conjugal relationship with the birth parent at or within 300 days of birth.

Nova Scotia should recognize the parentage of persons who sign a statutory declaration affirming their parentage.

Nova Scotia should recognize the parentage of persons who have had legal parentage determined in other court proceedings.

Nova Scotia should recognize the parentage of persons who have obtained a parentage test confirming their biological parentage.

Recognition of the parentage of persons who sign a statutory declaration, have had legal parentage determined in other court proceedings, or who have obtained a parentage test should be rebuttable based on contrary evidence as to biological parentage.

Chapter 7: Multiple-Parent Families

Proposals for Discussion:

Parentage legislation should address a judge's authority to order a child has more than two legal parents.

Nova Scotia's parentage law should permit a judge to declare a child has more than two parents.

Nova Scotia's parentage law should have an administrative path for some multiple-parent families to be recognized without judicial involvement.

In order to access the multiple parent administrative path, all intended parents must have reached an agreement prior to conception.

In order to access the multiple parent administrative path, all intended parents must have signed a written agreement setting out their shared intentions.

In order to have multiple parentage recognized administratively, there must be four or fewer intended parents.

Nova Scotia legislation should not expressly limit the types of relationships or methods of conception that must exist before a child can have more than two parents recognized administratively.

Nova Scotia law should state that if there are more than two persons living in a conjugal common law relationship at conception or birth, and they form intention to parent during gestation, the parties may apply to a judge to recognize the parentage of more than two persons.

Question for Discussion:

Should Nova Scotia parentage law recognize parentage where intention to parent was formed after birth of the child?

Chapter 8: Posthumous Conception

Proposals for Discussion:

Nova Scotia's parentage law should recognize parentage in cases of posthumous conception.

Parentage of posthumously conceived children should be recognized only where the deceased provided express written consent to be a parent of a child born.

The express consent required to recognize parentage of a posthumously conceived child should be added to existing forms that must be completed to use posthumously conceived reproductive material.

The Province of Nova Scotia should consider the implications of posthumously conceived parentage in estate administration legislation.

Where a deceased person provided express written consent to be a parent of an after-born child, they should automatically be recognized as a parent of the child.

Where a deceased person did not provide express written consent to be a parent of an after-born child, their parentage should only be recognized if their qualifying surviving spouse or partner obtains a judicial declaration of their parentage.

Where a judicial declaration is required, the application should be made within 90 days after the child is born, but a judge should be permitted to extend this time frame where necessary.

It should be possible for a posthumously conceived child to have more than 2 parents (the deceased person, the deceased person's surviving spouse, and at least one other party).

Chapter 9: General Declaratory Powers

Proposals for Discussion:

Parentage legislation should allow judges to make orders declaring parentage.

General declarations of parentage should not be available in cases where the child in question has been adopted.

There should be no further restrictions on when general declaratory powers may be issued.

Chapter 10: Interjurisdictional Matters

Questions for Discussion:

Should Nova Scotia have specific rules for assuming jurisdiction in the context of parentage disputes?

If so, should Nova Scotia law state that it can always assume jurisdiction over cases where the child was born in Nova Scotia?

What choice of law rule should exist for parentage disputes?

Should Nova Scotia replace domicile as the choice of law rule governing parentage disputes?

If so, should the choice of law for parentage disputes be habitual or ordinary residence? What do you think of our proposed language for an individualized parentage choice of law rule?

Should Nova Scotia's parentage law include a provision on recognizing foreign birth certificates?

Proposals for Discussion:

Nova Scotia should recognize and enforce parentage declarations issued in other Canadian provinces or territories in line with the dominant Canadian approach: it ought to be enforced unless new evidence becomes available that was not available during the original proceeding, or unless the original declaration was obtained by fraud or duress.

Nova Scotia should recognize and enforce parentage declarations issued outside of Canada where the original jurisdiction had a real and substantial connection to the original jurisdiction, or where either the child or a parent was habitually resident in that jurisdiction.

Nova Scotia should not, as a matter of course, require legal opinions from the issuing and receiving jurisdictions in order to recognize and enforce a foreign judgment.

Nova Scotia should require foreign parentage orders to be translated into one of Canada's official languages in order to be recognized and enforced in our province.

Chapter 11: Other Issues

Proposals for Discussion:

Parentage legislation should use the word "parent" and "birth parent" instead of "father", "mother" and/or "birth mother".

Nova Scotia's new parentage laws should be applied when interpreting legislative enactments, no matter when the events leading to that interpretation arose.

Parentage legislation should expressly state that it does not impact prior dispositions of property or instruments created before the laws were passed.

Questions for Discussion:

Should Nova Scotia's parentage laws be introduced as a stand-alone piece of legislation, or be incorporated into the *Parenting and Support Act*?

Do you agree with the proposed consequential amendments? Why or why not?

Do you know of any other Acts that may need to be amended

1 Introduction

1.1 What is Legal Parentage?

Parentage is a legal status that sets out who your parents are at birth. For most people, it is a lifelong, immutable status that arises automatically and forms the foundation of their legal identity.[1]

For children, rights based on kinship, such as name,[2] citizenship,[3] status under the *Indian Act*,[4] lineage,[5] and inheritance rights[6] flow out of parentage. For parents, parentage additionally provides an immediate presumptive status from which they are given privileged standing to provide the care and support of children.[7] The status of parent is the means by which an adult is given presumptive authority to make decisions on behalf of children and to exclude others from making those decisions. It carries important support obligations,[8] and provides presumptive status to make health[9] and education[10] decisions in a child's life, obtain vital identity documents such as a passport, birth certificate and a social insurance number,[11] provide consent to future adoption,[12] deal with a child's property,[13] appoint a guardian for a child in case of the parent's death,[14] bring or defend a court action in the name of a child,[15] be consulted and heard on

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[1] *AA v BB*, 2007 ONCA 2 at para 14.
[2] *Vital Statistics Act* RSNS 1989, c 494 [*VSA*], ss 4, 10; *AA v BB*, *supra* note 1.
[3] While Citizenship in Canada flows to all persons born on Canadian soil (*jus soli*), it can also flow to persons born to Canadian parents on foreign soil (*jus sanguines*). See *Citizenship Act,* RSC 1985, c C-29, ss 3(1)(b)(g)(o)(p)(q), 3(1.1), 3(1.2), 3(1.3), 3(1.4).
[4] *Indian Act,* RSC 1985, c. I-5, ss 5(6), 6.
[5] *AA v BB*, *supra* note 1.
[6] *Intestate Succession Act*, RSNS 1989, c 236 s 2(b) [*ISA*]; Access to Justice and Law Reform Institute of Nova Scotia, *Discussion Paper: Intestate Succession Act* (Halifax: AJLRINS, 2017) at 150 [ISA Discussion Paper]; see also *Re: Marshall Estate*, 2009 NSCA 25; *Testators' Family Maintenance Act*, RSNS 1989, c 465 s 2(a), 3(1) [*TFMA*]; *Fatal Injuries Act*, RSNS 1989, c 16, s 2(a).
[7] Carol Rogerson, "Determining Parentage in Cases Involving Assisted Reproduction: An Urgent Need for Provincial Legislative Action" in Trudo Lemmens, Ian Lee and Cheryl Milne, eds, *Regulating Creation: The Law, Policy and Ethics of Human Reproduction* (Toronto: University of Toronto Press, 2017) at 94 [Rogerson].
[8] *Parenting and Support Act* RSNS 1989, c 160, ss 9, 27 [*PSA*].
[9] *Hospitals Act*, RSNS 1989, c 208, s 54; *PSA, ibid* at s 17A.
[10] *Education Act*, SNS 1995-96, c 1, s 3(1)(t).
[11] Access Nova Scotia, *Apply for a Birth Certificate* online: <https://beta.novascotia.ca/apply-birth-certificate>; Government of Canada, *Applying for a Social Insurance Number* online: <https://www.canada.ca/en/employment-social-development/services/sin/reports/apply.html>; Government of Canada, *How to Apply for Your Child's Passport* online: <https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/children/apply.html>
[12] *Children and Family Services Act*, SNS 1990, c 5, ss 67, 68 [*CFSA*].
[13] *Guardianship Act*, SNS 2002, c 8, s 3.
[14] *Ibid,* s 19.
[15] *Ibid,* s 7; Nova Scotia Civil Procedure Rules Royal Gaz Nov 19, 2008 36.01(1)(b),(c), 36.06.

proceedings involving child welfare,[16] be involved in their child's criminal prosecutions or interactions with police,[17] and to have the presumptive right to participate in the child's life.[18]

Legal parentage differs from other family law concepts such as adoption, parenting time and decision-making responsibility, and child welfare. For example:

- Adoption is the legal mechanism by which parentage may be transferred. It is premised on the notion that a child already has parent(s) whose status was relinquished and legally transferred to others. Legal parentage predates adoption and does not depend on consent or approval from external bodies.
- Parental rights and responsibilities can arise via the relationships that develop over time between a child and a caregiving adult.[19] Concepts such as parenting time and decision-making responsibility differ from legal parentage in that they are not presumptive, automatic, exclusive, comprehensive, and ultimately rest on judicial discretion.[20] Parenting time and decision-making responsibility also do not alter the non-custodial aspects of parentage, such as inheritance rights.

While questions of parentage engage the wider umbrella of family law, legal parentage is focused on the following question: at the moment a child is born, who is their parent?

1.2 Legal Parentage in Nova Scotia

The foundation of Nova Scotia's current law is the common law which provides that:

- The woman who gives birth to a child is the child's mother (the presumption of maternity); and
- Her husband is presumed to be the father (the presumption of paternity).[21]

The presumption of maternity is conclusive – the woman who gives birth to a child is always the child's mother. The presumption of paternity is based on a presumed biological connection. It can be rebutted by evidence that the husband could not be the biological contributor to the child.[22] In

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[16] *CFSA, supra* note 12 at ss 3(r), 12A, 17, 21, 27, 29, 36, 41.
[17] *Youth Criminal Justice Act*, SC 2002, c 1, s 26; Canada, Department of Justice, "If Your Child is In Trouble with the Law" (online) https://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/sheets-feuillets/child-enfan.html (accessed June 18, 2020).
[18] *AA v BB, supra* note 1.
[19] *Chartier v Chartier*, [1999] 1 SCR 242. Nova Scotia has codified certain aspects of this doctrine: The *PSA, supra* note 8 at s 2(i)(ii) defines "parent" as including:…a person who has demonstrated a settled intention to treat a child as the person's own child, but does not include a foster parent under the *Children and Family Services Act*…".
[20] Rogerson, *supra* note 7 at 96.
[21] Law Reform Commission of Nova Scotia, *The Legal Status of the Child Born Outside of Marriage in Nova Scotia* (Halifax: NSLRC, 1995) at 6 [NSLRC Legitimacy Report].
[22] See Ontario Law Reform Commission, *Report on Family Law, Part III: Children* (Ministry of the

modern times, the presumption of paternity tends to be affirmed or rebutted based on biological evidence such as blood or genetic testing.

There are some statutory provisions that modify the common law. For example, some people who are not presumed parents can nonetheless have their parentage declared by a judge. In Nova Scotia, this happens in two ways:

- A person can undertake a paternity test (a genetic test) which can prove that a person is, in law, a child's father.[23]
- Intended parents to a surrogacy can apply to court to receive a judicial declaration stating that they are the child's parents and the surrogate is not a parent.[24]

In addition, there are laws and statutory provisions that address the issue of "legitimacy" – i.e., the status of a child as based on the marital status of their parents. Pursuant to the *Canadian Charter of Rights and Freedoms,* it is unconstitutional to treat children differently based on the marital status of their parents.[25] Separately, Nova Scotia has statutory provisions which "legitimate" children if their parents marry after they are born, or if their parents were in "void" or "voidable" marriages when they were born.[26]

1.3 Legal Parentage in Other Jurisdictions

With the exception of Nova Scotia, every province and territory in Canada has passed what is known as "child status", "parentage", or (in Quebec) "filiation" laws. All of these laws systematically remove distinctions based on marriage (the issue of legitimacy). In addition, several of these statutes address parentage in cases of assisted reproduction and/or surrogacy.

At base level, all jurisdictions other than Nova Scotia have "first wave" parentage statutes, which are aimed at eliminating the legal relevance of legitimacy. These laws centre biology as the

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Ontario Attorney General: Toronto, 1973) [OLRC 1973 Report] at 8, citing *Preston-Jones v Preston Jones*, [1951] AC 391; *Himmelman v Himmelman* (1959) 19 DLR (2d) 291. *See also* Sir William Blackstone, *Commentaries on the Laws of England* Book 1, Ch XVI (Oxford: Clarendon Press, 1765) at 442-45 ("[Generally, during the coverture access of the husband shall be presumed, unless the contrary can be shown; which is such a negative as can only be proved by shewing him to be elsewhere: for the general rule is, *praesumitur pro legitimatione.")* [Blackstone's Commentaries].

[23] *VSA, supra* note 2 at ss 11B, C.

[24] Birth Registration Regulations, NS Reg 390/2007, s 5: A judge may make a declaratory order with respect to parentage where (1) a surrogacy arrangement was initiated by the intended parents; (2) a surrogacy arrangement was planned before conception; (3) the woman who is to carry and give birth to the child does not intend to be the child's parent; (4) the intended parents intend to be the child's parents; and (5) one of the intended parents has a genetic link to the child [Birth Regulations].

[25] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 15 [*Charter*]; *Tighe v McGillivray Estate* (1994) 127 NSR (2d) 313 (NSCA); *Surette v Harris Estate* (1989) 91 NSR (2d) 418 (TD).

[26] *PSA*, *supra* note 8 at ss 47-51.

primary marker of parentage. They extend marital presumptions of parentage (the mother's husband is the father) to some non-married people (the mother's conjugal partner is the father). They also state that a person can be presumed to be a parent if they take certain positive steps, such as acknowledging paternity on a birth registration. In all cases, biology can be used to rebut these presumptions. Carol Rogerson summarized this first wave of parentage legislation as being characterized by the following assumptions:

> A child will have two parents of the opposite sex – one mother (easily identified by the act of birth), and one father (whose identification may be more difficult) – and then [will] go on to provide certain presumptions (rebuttable by blood tests or other evidence) for determining paternity….These presumptions are generally based on a man being the mother's partner (through marriage or cohabitation) at the time of conception or birth or, alternatively, upon acknowledgment of paternity under provincial vital statistics legislation.[27]

First wave parentage laws are heteronormative and biologically-focused. They do not recognize parentage for many 2SLGBTQIA+ families. They also do not contemplate families that are created using assisted reproductive technologies (ART) like sperm, egg or embryo donation, or surrogacy.

This gap in the law led to second wave reforms. While biology was the focus of first wave laws, **intention to parent** forms the foundation of parentage in cases of ART and/or surrogacy. The Ontario Superior Court of Justice summarized the evolution of this principle in the following terms:

> 45 These [parentage] decisions spanning 34 years demonstrate the court's efforts to address advances in reproductive science but, perhaps more importantly, changing societal norms. Under the former *CLRA*, the definition of "parent", with some exceptions, focused more on who contributed sperm and who contributed ova. The focus in the *Vital Statistics Act*, R.S.O. 1990, c. V.4 ("*VSA*") was on who delivered the child. Although biology is still an important factor, the case law demonstrates a shift toward intent. Who intends to act as the child's parent? What did the proposed parents or proposed non-parents intend to be a child's family unit? These cases and others also emphasize the importance to the child in having a clear, legal definition as to his or her family unit. [emphasis added][28]

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[27] Rogerson, *supra* note 7 at 97.

[28] *RMR v MJ* 2017 ONSC 2655 at para 45. See also *MAW v STN* 2014 ONSC 5420 at para 24: "What is the basis of a parentage declaration? In these changing times, court decisions on parentage focus less on the biological connection between child and parent and more on the substance of the relationship."
In *Rypkema v. British Columbia*, [2003] BCJ No. 2721 (BC SC), the court considered that all the parties intended the biological parents (who were not the gestational carrier and her husband) to be the child's parents.

A number of Canadian provinces (British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Prince Edward Island) have passed "second wave" parentage laws.[29] In 2022, Quebec attempted to overhaul its legislative approach to filiation and surrogacy via Bill 2 – a large piece of legislation aimed at reforming family law. Given its controversial nature, these reforms were ultimately dropped from the bill.[30]

Part 1 of Ontario's *Children's Law Reform Act* (CLRA) is emblematic of a comprehensive second wave law.[31] It contains all first wave reforms (removes legal distinctions based on legitimacy, and assigns parentage as a result of sexual intercourse). In addition, it assigns parentage in cases of egg, sperm and embryo donation, surrogacy, posthumous conception, and multiple-parent families. It also deals with the recognition of parentage for children born outside of Ontario.

Other Canadian jurisdictions have enacted piecemeal "second wave" reforms to accommodate some instances of ART and/or surrogacy within their existing legislation.[32] The only jurisdictions that do not legislatively contemplate parentage by way of ART and/or surrogacy are New Brunswick and Nunavut.[33]

Canadian law reform bodies have also been focused on modernizing parentage laws. In 2010, the Uniform Law Conference of Canada released working papers, culminating in a model *Uniform Act*, addressing modern parentage issues.[34] Over the past ten years, the Law Reform Commission

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[29] *Family Law Act*, SBC 2011, c 25 [BC *FLA*]; *Family Law Act*, SA 2003, c F-4.5 [Alta *FLA*]; Saskatchewan Children's Law Act, SS 2020, c 2 [Sask *CLA*]; Manitoba *Family Maintenance Act*, CCSM c F20 [Man *FMA*]; Civil Code of Québec, CQLR c CCQ-1991, 538-542 [Que Civil Code]; *Children's Law Reform Act*, RSO 1990, c C.12 [Ont *CLRA*]; Prince Edward Island *Children's Law Act*, RSPEI 1988, c C-6.1 [PEI *CLA*].
[30] The Canadian Press "Quebec adopts sweeping family law reform with changes for non-binary people, kids' rights" *CTV Montreal* (8 June 2022). Bill 2, An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status, 2nd sess, 42nd Leg, Quebec (2021). For text of the original bill with provisions on filiation and surrogacy, see (online) <http://www.assnat.qc.ca/Media/Process.aspx?MediaId=ANQ.Vigie.Bll.DocumentGenerique_177763en&process=Default&token=ZyMoxNwUn8ikQ+TRKYwPCjWrKwg+vIv9rjij7p3xLGTZDmLVSmJLoqe/vG7/YWzz> [Quebec Bill 2].
[31] Ont *CLRA, supra* note 29 at Part 1.
[32] Newfoundland and Labrador: *Children's Law Act*, RSNL 1990, c C-13 [Nfld *CLA*]: a specific presumption of parentage is created to permit the spouse or conjugal partner of a woman who is artificially inseminated to be recognized as a father (s 12); Northwest Territories: The *Children's Law Act,* SNWT 1997, c 14 [NWT *CLA*]: specific presumptions are created deal with assisted reproduction and birth mothers who are surrogates (s 8.1)*;* Yukon *Children's Law Act,* RSY 2002, c 31 [Yk *CLA*]: deals with parentage by way of artificial insemination (s 13). .
[33] *Family Services Act*, SNB 1980, c F-2.2 [NB *FSA*]]. See also, however, *AA v New Brunswick (Human Rights Commission*), [2004] NBHRBID No 4, 2004 CarswellNB 395 (NBESTD); *Children's Law Act*, SNWT (Nu) 1997, c 14 [Nun *CLA*].
[34] *Uniform Child Status Act* (2010), online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/2010- halifax-ns/573-civil-section-documents-2010/810-uniform-child-status-act> [*Uniform Act*]; Uniform Law Conference of Canada: Civil Law Section, Assisted Human Reproduction: Report of the Joint ULCC-CCSO Working Group (Ottawa, ULCC, 2009), online: https://www.ulcc.ca/images/stories/2009_en_pdfs/2009ulcc0013.pdf [ULCC Working Group].

of Saskatchewan,[35] the Manitoba Law Reform Commission, [36] the British Columbia Government,[37] the Alberta Law Reform Institute[38] and the Quebec Comité consultatif sur le droit de la famille[39] have all released papers addressing the parentage issues raised by ART and/or surrogacy.

Internationally, the Victorian[40] and New Zealand[41] law reform commissions, as well as a joint report by the Law Commission of England and Wales and Scottish Law Reform Commission ("Joint Law Commission")[42] have, or are in the process of, reviewing laws that deal with ART and/or surrogacy. In the United States, the Uniform Law Commission recently released a *Uniform Parentage Act (2017)* to address parentage by way of ART and/or surrogacy, which at the time of writing, had already been introduced or enacted in 10 states.[43]

While individual recommendations vary, these projects share similar conclusions – parentage laws must become more inclusive to recognize the different ways children come into the world. Biology and relationships may remain central determinants of parentage, but intent to parent is

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[35] Law Reform Commission of Saskatchewan, *Final Report: Assisted Reproduction and Parentage* (Saskatoon: LRCS, 2018) [Saskatchewan Final Report].
[36] Manitoba Law Reform Commission, *Issues Paper: Assisted Reproduction: Legal Parentage and Birth Registration* (Broadway: MLRC, 2014) [Manitoba Issues Paper].
[37] British Columbia, Ministry of Attorney General: Justice Services Branch, *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (BCAG: 2010) [BC White Paper].
[38] Alberta Law Reform Institute, *Final Report 106: Assisted Reproduction After Death: Parentage and Implications* (Edmonton: ALRI, 2015) [ALRI Report].
[39] Comité consultatif sur le droit de la famille, *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales* (Quebec: Ministère de la Justice du Québec, 2015) [Comité].
[40] See also Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (Melbourne: VLRC, 2007) [Victorian Final Report].
[41] New Zealand Law Commission, *Report 88: New Issues in Legal Parenthood* (Wellington: NZLC, 2005) online: New Zealand Law Commission: <http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R88.pdf> [New Zealand 2005 Report]; New Zealand Law Commission, Report 146: Te Kōpū Whāngai: He Arotake / Review of Surrogacy (Wellington: NZLC, 2022) online: < https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-Report146-Review-of-Surrogacy.pdf> [New Zealand 2022 Report]
[42] Law Commission of England and Wales & Scottish Law Commission, *Scottish Law Commission Discussion Paper 167/Law Commission Consultation Paper 244: Building families through surrogacy: A new law – A joint consultation paper* (London: OGL, 2019) online: <https://www.scotlawcom.gov.uk/files/1015/5980/7782/Joint_consultation_paper_on_Building_families_through_surrogacy_-_a_new_law_LCCP_244_SLCDP_167.pdf > [Joint Law Commission Report].
[43] Uniform Law Commission, *Uniform Parentage Act (2017),* online: <https://www.uniformlaws.org/viewdocument/final-act-with-comments-61?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f&tab=librarydocuments> [*UPA 2017*]. For a list of states which have enacted or adopted versions of the *UPA 2017,* see: Uniform Law Commission, *Parentage Ac*t, online: https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f>. The Uniform Law Commission reports that a version (or substantially similar version) of the *UPA (2017)* has been enacted in California, Vermont, Washington, Rhode Island, Colorado, Connecticut and Maine. Versions have been introduced in Pennsylvania, Hawaii, and Massachusetts (as of publication).

also a critical marker of parentage – especially where ART and/or surrogacy are used to conceive a child.

1.4 The Distinction Between Parentage and Birth Registration

Legal parentage is often conflated with birth registration. This is not surprising - most people first become aware of the legal ramifications of parentage when registering the birth of a newborn, and the birth certificate obtained from this process often serves as proof of parentage for tasks like registering their child for school, or obtaining a passport. Disputes about parentage may arise when the Registrar of Vital Statistics refuses to list someone on a birth registry. In the absence of any parentage legislation, the Registrar's decision (and the rules she follows in making it) become the subject of scrutiny. As a result of these practicalities, many people mistakenly view birth registration as a process which *bestows* parentage. This is evidenced by the fact that, in our province, disagreements about parentage laws tend to be framed as a fight over who can be listed on a birth certificate.[44]

But while there is a relationship between birth registration and parentage, they are different concepts. Parentage is a legal status: it exists notwithstanding any registration. Birth registration is an administrative system. It records, but does not establish, legal parentage. In the event the birth registry contains an error (for example, if a biological or genetic test reveals a man listed on the birth registration does not share a direct biological connection to the child born), the registry will be changed.

The distinction between a *legal status* and *evidence of that status* may seem subtle, but it is important. Being listed on a birth certificate does not guarantee the substantive rights that flow from parentage. This issue was best explained to us by the public trustee's office in the context of intestacy. Intestacy is a regime that distributes a person's estate to their "lawful lineal descendants" (at the time of writing - biological or adopted relations) on death without a will.[45]

Anecdotally, the Institute has heard that the public trustee's office may look to a birth certificate as a first step to locate parentage to distribute an estate. However, all it takes is one person to dispute the accuracy of the birth certificate to negate its evidentiary value. In those cases, biological testing must be performed to locate legal parentage.

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[44] See, for example, CBC News, "Birth registration discriminatory, lesbian couple says" *CBC News* (17 Sept 2007) online: https://www.cbc.ca/news/canada/nova-scotia/birth-registration-discriminatory-lesbian-couple-says-1.647243. See also, in relation to the Birth Regulations (*supra* note 24) see Nova Scotia Rainbow Action Project, *2008 Annual Activity Report: Community – A Work in Progress* at 5 online: <http://nsrap.ca/wordpress/wp-content/uploads/2010/11/2008AnnualReport_-_NSRAP.pdf>; Carolyn Ray, "Halifax mom shocked by form for 'unmarried mother' to confirm baby's dad" *CBC News* (7 Nov 2019) online: <https://www.cbc.ca/news/canada/nova-scotia/unmarried-halifax-mom-letter-vital-statistics-1.5350634>.

[45] *ISA, supra* note 6 at s 2(b).

This also means that being listed on a birth certificate does not immunize a person from being displaced based on parentage laws. For example, birth registration rules permit some same-sex partners to be listed as parents on a birth registration.[46] There is nothing, however, to prevent a sperm donor from successfully asserting parentage via biological testing. In that case, the donor's name would appear as a parent, and the non-gestational same sex partner's name would be removed. Regardless of what the birth registration says – in the eyes of Nova Scotia's current parentage law, the sperm donor is the parent.

Indeed, again anecdotally, we have heard this is the reason that Nova Scotia's birth registration rules do not permit same-sex couples who use a known sperm donor to be listed on a birth registration.[47] While it is safe to assume an anonymous donor will not come forward and assert parentage, the same cannot be assumed for a donor known to the parents.

In short, attacking birth registration rules, while understandable, does not and cannot solve the underlying problems of legal parentage. Making birth registration rules more inclusive without addressing underlying parentage is like building a house without a foundation. The house may look fine, and it may function on a day-to-day basis. Over time, however, cracks will emerge, and significant work will be required to fix them.

1.5 Discriminatory Impacts of Parentage Law

Whether they know it or not, everyone is impacted by parentage law. Every child born in Nova Scotia has a legal parent at birth, regardless of whether or not that person assumes a caregiving role going forward. That original automatic status situates the child in the world around them and crystalizes, for most people, lifelong legal relationships and entitlements. Despite its ubiquitous nature, many people proceed through life unaware of parentage law, or its impact on them. These people are more likely to fall within Nova Scotia's dominant sexual, cultural and religious populations (heterosexual settler populations).

For other people, legal parentage exists in the foreground, and can present many hurdles to their family stability. Being left out of parentage laws can negatively impact feelings of dignity and worth, upend their understanding and relationship with their children, impose significant financial and administrative burdens, and require specialized legal advice to work through - all of which raise significant barriers to justice.

This is a problem that intersects with, and is amplified by, other marginalized statuses. Persons who fall outside binary heteronormative roles, and who are more likely rely on ART to conceive are more likely face these barriers. As a group, the 2SLGBTQIA+ community bears a disproportionate burden under the current law. Many parents in this community must rely on

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[46] Birth Regulations, *supra* note 24 at s 3.
[47] *Ibid* at s 2(b), 3: "assisted conception" means conception that occurs as a result of artificial reproductive technology, using an anonymous sperm donor.

ART and/or surrogacy if they wish to conceive rather than adopt their children.[48] As a group, parents within this community are more reliant on statutory rules of parentage, as the common law does not fully contemplate or recognize their status.[49]

There is ample case law, evidence, and commentary demonstrating that outdated parentage laws discriminate against 2SLGBTQIA+ families. Fiona Kelly has explained this trend in relation to lesbian or single women families:

> [T]he scarcity of [parentage legislation relevant to the lesbian community in Canada] poses few issues for opposite-sex couples, as they are typically able to rely on traditional presumptions of paternity to establish the legal parentage of the mother's male partner, to the extent his parentage is even questioned. Lesbian couples and single women have no such luxury.[50]

Charges of discrimination against 2SLGBTQIA+ families are driving legislative reforms to parentage law in other Canadian jurisdictions.[51] Canadian courts outside Nova Scotia have found parentage laws unconstitutional for discriminating against 2SLGBTQIA+ families,[52] and

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[48] For a discussion of single and gay men's experiences with surrogacy, see Daniel Sperling, "Male and Female He Created Them: Procreative Liberty, Its Conceptual Deficiencies and the Legal Right to Access Fertility Care of Males" (2011) 7:3 Intl J of L in Context 375.

[49] *HDW v RDJ*, 2011 ABQB 608 at para 47. Additional reasons at 2011 ABQB 791, aff'd on appeal 2013 ABCA 240.

[50] Fiona Kelly, "Equal Parents, Equal Children: Reforming Canada's Parentage Laws to Recognize the Completeness of Women-led Families"[2013] 64 UNB LJ 263 at 255 [Kelly: Equal Parents, Equal Children]. While Kelly's comments were directed as women-only families, the same is true other members of the 2SLGBTQIA+ community.

[51] Marney Blunt "Manitoba legislation a barrier for couples having children through surrogates, donors" (12 June 2020) *Global News* online: https://globalnews.ca/news/7055747/manitoba-legislation-providing-barriers-for-couples-having-children-through-assisted-reproduction/; *Grand v Ontario (Attorney General)*, 2016 ONSC 3434 (Ont SCJ). In response to advocacy within the 2SLGBTQIA+ community, the Minister of Immigration, Refugees and Citizenship amended the interpretation of "parent" under the *Citizenship Act* RSC 1985, c C-29 to reflect parentage of non-genetic parents who are their child's legal parent at birth to pass down Canadian citizenship to their children born abroad in the first generation. (Immigration, Refugee and Citizenship Canada, "Citizenship change benefits couples with fertility issues and same-sex couples" *Newswire* (9 July 2020) online: https://www.newswire.ca/news-releases/citizenship-change-benefits-couples-with-fertility-issues-and-same-sex-couples-825802166.html). See also footnote 52.

[52] *Grand v Ontario (Attorney General)*, 2016 ONSC 3434 (Ont SCJ) (resolved by way of minutes of settlement – for a summary see Dave Snow, "Litigating Parentage: Equality Rights, LGBTQ Mobilization and Ontario's All Families Are Equal Act" (2017) 32 Can JL & Soc 329); *HDW v RDJ*, *supra* note 49, *AA v BB, supra* note 1; Rachel Bergen, "Manitoba says it will amend parental rights law judge found discriminates against LGBTQ families" CBC News (3 Nov 2021) online: < https://www.cbc.ca/news/canada/manitoba/parental-rights-law-lgbtq-manitoba-fertility-1.6236040>. See also (in relation to Vital Statistics Legislation) *Gill and Maher, Murray and Popoff v. Ministry of Health*, 2001 BCHRT 34 (CanLII); *AA v New Brunswick (Human Rights Commission*), [2004] NBHRBID No 4, 2004 CarswellNS 395 (NBE STD); *Rutherford v. Ontario (Deputy Registrar General),* 270 DLR (4th) 90, 30 RFL (6th) 25 (Ont SCJ).

provincial governments have acknowledged the discrimination inherent in pre-reformed parentage laws.[53]

Nova Scotia's position is even more problematic, and more vulnerable to charges of discrimination, than other outdated regimes. Because Nova Scotia lacks any parentage legislation, we have been dealing with claims by permitting certain 2SLGBTQIA+ parents (i.e. those who use anonymous sperm donors) to list their names on a birth registration.[54] For the reasons outlined above, birth registration does not bestow the status of legal parentage. The act of registration, however, places these families under a misconception that they have a status which they do not, in fact, possess.

In other words, our law is masking a disparity in legal status as between 2SLGBTQIA+ and heterosexual, cis-gender families. This is even further complicated by the fact that our band-aid approach is itself under-inclusive, as, at the time of writing, many 2SLGBTQIA+ families (for example, those who use known sperm donors) are not even permitted to list their name on a birth registration.

In addition to the 2SLGBTQIA+ community, several other communities may also be disproportionately impacted by narrow, outdated, or underinclusive parentage laws, including:

- Unmarried couples: to the extent that unmarried parents are required to undergo additional processes not required of married couples to demonstrate their parentage of children, this is open to the charge of discrimination.
- Disabled persons: to the extent that Nova Scotia's law makes it more difficult for persons who struggle with infertility or other with reproductive disabilities to be recognized as parents, it is open to charges of discrimination.
- Multi-parent families: non-normative or multiple-parent family models are increasingly being recognized as an accepted family model. Nova Scotia's 2-parent maximum may be subject to a charge of discrimination.
- Children within all of these families: Children conceived into any of the above families have an equal right to a secure and stable family life as does a child conceived via traditional methods, or into nuclear families. Viewing a child's rights as being contingent

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[53] See, for example, the Minutes of Settlement from *Grand, ibid*: "1. The Respondent, the Attorney General of Ontario, consents to a declaration that the CLRA violates section 15 of the *Canadian Charter of Rights and Freedoms* in a manner that cannot be justified in a free and democratic society under section 1 of the *Charter* to the extent that the legislation does not provide equal recognition and the equal benefit and protection of the law to all children, without regard to their parents' sexual orientation, gender identity, use of assisted reproduction or family composition." Ontario Legislative Assembly, Orders of the Day "All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016 / Loi de 2016 sur l'égalité de toutes les familles (modifiant des lois en ce qui concerne la filiation et les enregistrements connexes) *Official Report of Debates (Hansard)* (3 October 2016) at 528.

[54] Birth Regulations, *supra* note 24, ss 2(b), 3.

on the circumstances of one's birth or the structure of their family risks creating a new class of illegitimacy.

In addition, people whose legal identity, rights, and communities are defined by parentage, such as Indigenous persons with status under the *Indian Act,* encounter parentage in a way that many other Nova Scotians do not. Legal parentage can be viewed as a cite of colonialism, in which certain family forms (rigid first generation nuclear biological descendants) are protected and prioritized over others (more fluid multi-generational community constructions). We have heard, for example, that in Mi'kmaq communities it much more common to see families constructed by a wider net of biological links and intention to parent.

In short, there is a strong case to be made that our parentage laws discriminate against a variety of already marginalized families. Dismantling these intersecting layers of marginalization and discrimination is an ambitious task. As explored in this paper, some paths are more ambitious than others. At this stage, however, it is important to highlight that parentage law reform is an important part of a wider societal effort to address a homophobic, transphobic, and colonial past and to reconcile with contemporary and historically marginalized communities.

1.6 Conclusion

This introductory chapter has sought to introduce the concept of legal parentage and sort out what the current state of parentage law in Canada is today. In the remaining chapters, we will discuss how Nova Scotia can and should respond to modern realities of parentage by re-evaluating the foundational assumptions of the common law. In doing so, we will address some of the developments that have occurred over the past 15 years in Canadian courts, for example:

- A lesbian couple conceives of a child using the sperm of a friend who wishes to remain involved in the child's upbringing;[55]
- A single woman has sexual intercourse with a former romantic partner under the understanding that he is a sperm donor;[56]
- A man provides sperm to two women in a relationship on the understanding that he will be the parent of one child, and they will parent the other – but only one woman becomes pregnant;[57]
- Two men and a woman in a polyamorous relationship have a child and refuse to undergo biological testing to determine which male is genetically linked to the child;[58] and

[55] *AA v BB*, *supra* note 1.
[56] *R (MR) v M(J), supra* note 28.
[57] *ML v JC*, 2017 ONSC 7179.
[58] *Re CC,* 2018 NLSC 71.

- A couple use a surrogate and a donated egg to conceive, but later separate and the father opposes his ex-partner's status in relation to the child born.[59]

The outcomes of these cases (and many others) cannot be adequately determined based on common law presumptions or a genetic test. The judicial outcomes depend on the existence, or lack thereof, of modern parentage legislation.

[59] *Droit de la famille — 212386*, 2021 QCCS 5233 (CanLII).

2 Legal Parentage in Historical, Legal and Social Context

This Chapter situates this project within the historical, legal and social realities of Nova Scotia. Part one briefly summarizes the long history of parentage law, which continues to ground the substantive law today. Part two describes the legislative parameters for parentage law in Nova Scotia. There are three sub-groups under this umbrella: (1) the three provincial statutes that touch on parentage (the *Vital Statistics Act*, the *Parenting and Support Act*, *Judicature Act* and the *Children and Family Services Act*); (2) the federal *Assisted Human Reproduction Act*, and (3) the human rights obligations with which a parentage law must comply. The last part of Chapter 2 provides an overview of the changing social realities that impact parentage, including an overview of data on rates of assisted conception, as well as expanding family forms.

2.1 History of Parentage Laws

Parentage laws date back to Roman times, which were governed by the legal maxims: *mater semper certa est* ('the mother is always certain')[60] and *pater est quem nuptiae demonstrant* ('the nuptials show who is the father').[61] At a time before blood and DNA testing was available, gestation and marriage served as the most common insignia by which a biological connection could be presumed.[62]

The presumption of maternity was conclusive – the woman who gave birth to a child was always the child's mother. The presumption of paternity was a strict rebuttable presumption that could only be defeated by sufficient evidence that the husband *could not* have fathered the child.[63]

These principles found their way into common law systems via the 13th century ecclesiastical courts of England.[64] Parent-child status in medieval England was reserved for children born

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[60] Daniel Greunbaum, "Foreign Surrogate Motherhood: mater semper certa erat" (2012) 60:2 The American Journal of Comparative Law 475 at 475, discussing *Paulus*' statements in the Digest of jurisdictic writings on Roman Law compiled Emperor Justinian I in the 6th Century CE. See also: Joint Law Commission Report, *supra* note 42 at 7.42.
[61] Gage Raley, "The Paternity Establishment Theory of Marriage and its Ramifications for Same-Sex marriage in Constitutional Claims" (2011) 19:1 *Virginia Journal of Social Policy & the Law* 133 at 142.
[62] NS Legitimacy Report, *supra* note 21 at 8. Blackstone's Commentaries, *supra* note 22 at 448 ("It is a principle of law, that there is an obligation on every man to provide for those descended from his loins.")
[63] The burden of proof used to be beyond a reasonable doubt, but is now recognized to be on the balance of probabilities. See Ontario Law Reform Commission, *Report on Family Law, Part III: Children* (Ministry of the Ontario Attorney General: Toronto, 1973) [OLRC 1973 Report] at 8, citing *Preston-Jones v Preston Jones*, [1951] AC 391; *Himmelman v Himmelman* (1959) 19 DLR (2d) 291. *See also* Blackstone's Commentaries, *supra* note 22 at 442-46 ("[Generally, during the coverture access of the husband shall be presumed, unless the contrary can be shewn; which is such a negative as can only be proved by shewing him to be elsewhere: for the general rule is, *praesumiturpro legitimatione.")*.
[64] Sir Frederick Pollock and Sir William Maitland, *The History of English Law before the time of Edward I,* 2d ed, vol 1 (Cambridge: Cambridge University Press, 1905) at 107, 127. Blackstone's Commentaries,

within the confines of a married relationship. Illegitimate children were *fillius nullius,* meaning the son of nobody, and were not given any of the rights, privileges, or status of the family.[65] They could not, for example, inherit property from their parents on death. Likewise, parents of illegitimate children were given no right to custody or guardianship over them.[66]

Parentage laws throughout the Middle Ages were characterized by the battle between ecclesiastical and common law courts over the impact of subsequent marriages on legitimacy.[67] As the law developed over centuries, legislative reforms began popping up to deal with discrete issues under the umbrella of parentage. For example, illegitimate children under the doctrine of *fillius nullius* often became the financial responsibility for the church, and later the state. As a result, *Poor Law* Acts in England and Wales - and later Nova Scotia - imposed putative fathers, mothers, and indeed, extended families, with financial responsibilities for the maintenance of illegitimate children based on a presumed biological paternity.[68] This legislation evolved and expanded in Nova Scotia and forms the foundation of support legislation today.[69]

Legal parentage was significantly impacted by modern science in the 20th century. For the first time, it was possible to use blood group testing to definitively locate the persons with whom a

supra note 22 at 446.

[65] J Wilson & M Tomlinson, *Children and the Law*, 2d ed (Toronto: Butterworths, 1986) at 202. See also, NSLRC Legitimacy Report, *supra* note 21 at 3; OLRC 1973 Report *supra* note 64 at 1-3; Ginger Frost "'Revolting to Humanity': oversights, limitations, and complications of the English Legitimacy Act of 1926" 20:1 Women's History Review 31 at 37. See, also, however: Jenny Bourne Taylor "Bastardy and Nationality: The curious case of case of William Shedden and the 1858 Legitimacy Declaration Act" (2007) 4:2 Cultural and Social History 171 at 176.

[66] NSLRC Legitimacy Report, *supra* note 21 at 3.

[67] *Ibid* at 4. See also, Blackstone's Commentaries, *supra* note 22 at 444-445.

[68] Taylor, *supra* note 65 at 174; OLRC 1973 Report, *supra* note 63 at 2; *Poor Law Act*, (1576) 18 Eliz., c. 3 (UK); Upper Canada, *Bastardy Act* (1809) 49 Geo. 3, c. 68*; An Act for the Amendment and better Administration of the Laws relating to the Poor in England and Wales* (1834) 4 & 5 Will. 4 c. 76; *An act to make the remedy in cases of seduction more effectual, and to render the fathers of illegitimate children liable for their support* (1837) 7 William 4, c 8; *Maintenance of Bastards Act*, SNS 1851, c 91, *The Bastardy Act* RSNS 1900 c 51; *Of the Maintenance of Illegitimate Children Act* RSNS 1923 c 49.

[69] NSLRC Legitimacy Report, *supra* note 21 at 5-6. *Children of Unmarried Parents Act*, SNS 1951, c 3; *Family Maintenance Act,* RSNS 1989, c. 160*; Maintenance and Custody Act,* RSNS 1989, c 160*; Parenting and Support Act,* RSNS 1989, c 160.

child shares a biological link.[70] In the 1950's, Canadian case law started referring approvingly to blood group testing in the context of locating biological paternity.[71]

The discovery of biological testing did not, however, displace the common law presumptions. People at a hospital are not, for example, required to provide DNA samples proving their biological connection to a newborn in order to be considered their parents. Instead, biological testing became useful as evidence where either (1) the presumption of paternity is in doubt or, (2) where no presumption applies and there is a need to locate biological paternity.

Nova Scotia's current parentage laws reflect this historical and scientific evolution. The common law presumptions have not been overridden, and remain the foundation of our parentage laws today. Various statutes supplement the common law to permit a judge to make a declaration of parentage in light of blood, genetic, or other testing as evidence of biological paternity.[72] Most recently, Nova Scotia's parentage laws were amended to permit a judge to issue a declaration of parentage in cases where a child is born via surrogacy. These surrogacy rules, along with adoption laws, are the only aspects of our parentage law that are not based on presumed biological connections.

2.2 Legal context

This section sets out the legislative framework within which a parentage law must operate. First, it details three provincial statutes that modify the common law rules of parentage: the *Vital Statistics Act,* the *Parenting and Support Act, Judicature Act* and the *Children and Family Services Act*. Second, it describes the federal *Assisted Human Reproduction Act*. The federal Act does not set out rules for legal parentage, but is relevant to this project insofar as it regulates assisted conception and surrogacy. Lastly, this section describes the various human rights obligations that with which a parentage law will need to comply.

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[70] Nova Scotia legislation did not allow blood tests to affirmatively prove genetic paternity until 2017. Compare the current version of this section: "…[T]he court may order that the mother, the child and a possible father undergo such blood test, genetic test or other test as is considered appropriate by the court to determine whether the possible father (a) is the father of the child…" (*Parenting and Support Act*, RSNS 1989, c 160, s 27(1)) with the pre-2017 amended version "…[The Court] may order the mother, her child and the possible father to submit to one or more blood-grouping tests to be made by a duly-qualified medical practitioner … in the order to determine whether or not the possible father can be excluded as being the father of the child" [emphasis added] *Maintenance and Custody Act,* RSNS 1989, c 160 27 (1)).

[71] See, for example, *Welstead v Brown,* [1952] 1 SCR 3, 102 CCC 46; *R v Willar*, [1955] 1 DLR (2d) 756; *(New Brunswick County Court) Wikstrom v Children's Aid Society of Winnipeg (City),* [1955] 5 DLR 45, 63 Man R 272 (Man CA); *L v L*, [1943] 2 WWR 136, [1943] 3 DLR 222 (Alta QB).

[72] NS *VSA, supra* note 2 at ss 11A-C; *PSA, supra* note 8 at s 27.

2.2.1 Provincial Legislation

(a) The Vital Statistics Act and its Birth Regulation

The *Vital Statistics Act* (the "VSA") collects data on births, deaths, marriages and registered domestic partnerships in the Province of Nova Scotia.[73] The Birth Registration Regulations (the "Birth Regulations") are regulations passed under the VSA.[74] Together, these enactments set out the rules as to who is entitled to be listed as a parent on a birth certificate in Nova Scotia.

As set out above, birth certificates are evidence of parentage, but do not bestow or establish legal parentage.[75] Because Nova Scotia lacks parentage legislation, however, this distinction has been blurred, and being listed on a birth certificate is often falsely equated with the status of parentage. This widespread misunderstanding is doubly problematic. First, it misapprehends the role and authority of the birth certificate. Second, it cloaks the Registrar of Vital Statistics with an ostensive authority to determine parentage – a power which she does not actually possess. This arrangement likely offends the rule of law, as the Registrar's refusal to list one's name on a birth certificate lacks a clear avenue of redress, and in any event, does not actually rectify the problem being faced (i.e., recognition of legal parentage).

Separate from the birth registration process, the VSA and Birth Regulations contain three provisions that address legal parentage. In each case, a judge is given the authority to make a declaration of legal parentage:

- Section 8 of the VSA directs any person whose birth has not been registered in accordance with the VSA to apply to a judge for a finding that they were born in Nova Scotia on or before a certain date, and as to their parentage.[76]
- Section 11A of the VSA entitles the court to make a declaratory order regarding a child's paternity via blood or DNA testing.[77]
- Section 5 of the Birth Regulations directs intended persons who use a surrogate to obtain a judicial declaration that they are parents of the child born.[78]

(b) Parenting and Support Act

The *Parenting and Support Act* (PSA) governs parenting time, decision-making responsibility, child and spousal support and exclusive occupation of the home for unmarried couples and

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[73] *VSA, supra* note 2; *T (TL) v B (G),* 2012 NSFC 8 at para 11.
[74] Birth Regulations, *supra* note 24.
[75] ULCC Working Group, *supra* note 34 at para 25, see also: Uniform Law Conference of Canada, *Uniform Vital Statistics Act (2017), With Commentary*, s 1 available at: https://www.ulcc.ca/images/stories/2017_pdf_en/2017ulcc0027.pdf (see commentary on definition of "parent") [ULCC Uniform *VSA*].
[76] *VSA, supra* note 2 at s 8(1).
[77] *Ibid* at s 11A, B.
[78] Birth Regulations, *supra* note 24 at s 5.

married couples who are separating but not yet seeking a divorce.[79] It is not primarily focused on locating legal parentage, and instead, focuses on assigning roles and responsibilities to caregiving adults.[80]

Legal parentage is, however, an important starting point for asserting rights and responsibilities *vis-a-vis* the child.[81] In the absence of any state action or judicial intervention, legal parents are given the presumptive status to exercise the rights and responsibilities contained in the PSA.

In addition, several sections of the PSA touch on legal parentage:

- Section 2(i) defines a "parent" as including "a person who is determined to be the parent of a child under this Act". This appears to refer to s 27, which permits a court to order a mother, child or possible father to undergo a blood test, genetic test, or other test to affirmatively declare a person to be a father, or to exclude a person as a "possible father".[82]

  This biological testing would only impact proceedings under the Act, and only the parties to the proceedings.[83] However, to the extent that s 27 permits a person to use blood or genetic testing to be declared a father, it provides evidence that could be used to affirm or rebut the common law presumption in other areas of the law.

- Sections 47-50 provide rules which "legitimate" some children who are otherwise "illegitimate" under the common law.[84]

(c) Children and Family Services Act

The *Children and Family Services Act* (CFSA) governs the protection of children "in need of protection" and adoptions in the province.[85] It has two definitions of parent: a general one that covers interventions, and one specific to adoption. These definitions are based on a biological understanding of maternity and paternity.

For example, under the non-adoption rules, "mother" and "father" are not defined terms. However, a mother and father are only considered "parents" under the Act if they have custody or reside with the child, or have an application before the court regarding care, custody or support

[79] *PSA, supra* note 8.
[80] ULCC Working Group, *supra* note 34 at para 27.
[81] See, for example, *C(G) v V-F (T)*, 2021 QCCS 5233 at para 114.
[82] *PSA, supra* note 8 at s 27 (1).
[83] NS Legitimacy Report, *supra* note 21 at 9.
[84] *PSA, supra* note 8 at ss 47-50.
[85] *CFSA*, *supra* note 12.

for the child.[86] Most of the relevant case law that considers these provisions asks whether a biological father can be considered a parent under this definition.[87]

The CFSA's adoption provisions contemplate the transfer of legal parentage. They equate legal parentage at birth with biology, but also rely on the common law presumptions of paternity. A "mother" is a child's biological mother.[88] A "father" is a person who shares a biological connection with a child, but is only automatically recognized as a "parent" (and thus be entitled to notice, consent, and participation in adoption proceedings) if he was in a married or common law relationship with the mother.[89] Much of the case law considering this provision is focused on whether someone who falls within the definition of a father (but not necessarily parent) is entitled to notice or consent in an adoption context.[90]

(d) The Judicature Act

The *Judicature Act* codifies a judge's inherent authority to exercise its *parens patriae* jurisdiction in matters involving children.[91] *Parens patriae* powers (literally translating to parent of the

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[86] *CFSA*, *supra* note 12 at s 3(r): "parent or guardian" are collectively defined as:
(i) the mother of the child, if the mother
(A) has custody of the child under a written agreement or court order, or
(B) resides with and has care of the child,
(ii) the father of the child, if the father
(A) has custody of the child under a written agreement or court order, or
(B) resides with and has care of the child,
...
(iv) an individual residing with and having the care of the child,
...
(vi) an individual who...has custody of the child, is required to provide support for the child or has a right of access to the child,
(vii) a mother or father who
(A) has an application before a court respecting custody or access or against whom there is an application before a court for support for the child at the time proceedings are commenced pursuant to this Act, or
(B) is providing support or exercising access to the child at the time proceedings are commenced pursuant to this Act,
but does not include a foster parent.

[87] *Nova Scotia (Community Services) v C (K)*, 2016 NSSC 280; *C(A) v E(M),* 2013 NSSC 192; *Nova Scotia (Minister of Community Services) v W (F)*, 2010 NSFC 32; *Nova Scotia (Minister of Community Services) v F (J*), 2004 NSSF 79; *Nova Scotia (Minister of Community Services) v Y (JO),* 2009 NSSC 69.

[88] *CFSA*, *supra* note 12 at s 67(1)(e): (e) "mother" means the biological mother of the child except where the child is adopted and in such case means...the mother by adoption.

[89] *CFSA*, *supra* note 12 at s 67(1)(d) and (f): "father" of a child means the biological father of the child except where the child is adopted and in such case means ... the father by adoption; (f) "parent" of a child means (i) the mother of the child, (ii) the father of the child where the father was, at the time of the child's birth, married to or in a common-law relationship with the mother of the child.

[90] See for example *Nova Scotia (Community Services) v Nova Scotia (Attorney General)*, 2017 NSCA 73; *Re: T(D)* (1992), 113 NSR (2d) 74.

[91] *Judicature Act*, RSNS 1989, c 240, s 32A(1)(t).

nation) have assumed a central importance in assigning legal parentage in the absence of legislation.

The *parens patriae* doctrine itself is a centuries-old doctrine which provides that "the Crown has an inherent jurisdiction to do what is for the benefit of the incompetent."[92] It is founded on necessity that flows from the need to act for the protection of those who cannot care for themselves. It is invoked in relation to children and adults who lack capacity. Courts have frequently stated that it is to be exercised in the "best interests" of the protected person.

While there have been attempts to classify or constrain the doctrine, the Supreme Court of Canada has stated that "[i]ts limits (or scope) have not, and cannot, be defined."[93]

2.2.2 The Federal Assisted Human Reproduction Act

Federal statutes do not determine parentage – this issue falls under provincial jurisdiction. The federal *Assisted Human Reproduction Act* (AHRA) does, however, impact legal parentage because it regulates when and how ART and/or surrogacy may be practiced.[94]

In relation to surrogacy, the AHRA prohibits commercial surrogacy (surrogacy for hire), surrogacy via sexual intercourse, and persons under the age of 21 acting as a surrogate.[95] Provinces retain the jurisdiction to determine whether surrogacy contracts are enforceable.[96]

In relation to other assisted conception practices, the AHRA prohibits the sale of embryos or gametes, posthumous use of reproductive material without prior written consent, and sets out consent requirements needed to carry out ART.[97]

2.2.3 Human Rights Obligations

Canada has international, national and provincial human rights obligations to be cognizant of in drafting parentage laws. At the international level, Canada has ratified the *Convention on Rights of the Child*.[98] It requires that a child be protected from discrimination,[99] and that the primary

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[92] *Re Eve*, [1986] 2 SCR 388 at para 40. For a historical summary of *parens patriae* jurisdiction, see paras 31-71; Margaret Isabel Hall, "The Vulnerability Jurisdiction: Equity, Parens Patriae, and the Inherent Jurisdiction of the Court", Canadian Journal of Comparative and Contemporary Law, 2016 CanLIIDocs 46; *LM v British Columbia (Director of Child, Family and Community Services),* 2016 BCCA 367.
[93] *Re Eve*, *ibid* at paras 43, 74.
[94] *Assisted Human Reproduction Act,* SC 2004, c 2 [*AHRA*]
[95] *Ibid* at s 6.
[96] *Ibid* at s 6(5).
[97] *Ibid* at s 7.
[98] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 (ratified by Canada on December 12, 1991) [UN CRC].
[99] *Ibid*, Art 2.

consideration in all actions involving children is the best interests of the child.[100] In addition, article 7 of the *Convention on Rights of the Child* requires a child be given an identity at birth, and that they know their parents. Article 7 states:

> The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.[101]

Under our Constitution, s 15(1) of the *Charter* guarantees equality before and under the law, and equal protection and benefit of the law.[102]

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

A claim of discrimination is established if claimants can demonstrate that the law creates a distinction based on an enumerated or analogous ground, and the distinction creates a disadvantage by perpetuating prejudice or stereotyping.[103] The guarantee of equality is substantive, in that it does not necessarily require identical treatment.[104] Discrimination also need not be intentional. A law may contravene the *Charter* if it is facially neutral, but has a disproportionate or adverse impact on a protected group.

Discrimination on the basis of sexual orientation contravenes the *Charter*.[105] To the extent that Nova Scotia's parentage regime imposes burdens or withholds benefits on particular groups, the law is vulnerable to attacks of discrimination in contravention of s 15(1) of the *Charter*.

Lastly, the Nova Scotia *Human Rights Act* prohibits discrimination in the provision of or access to services customarily available to the public on the grounds of protected characteristics, including age, sex, sexual orientation, gender identity, gender expression, family status, and marital status.[106]

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[100] *Ibid*, Art 3.
[101] *Ibid*, Art 7.
[102] *Charter, supra* note 25 at s 15.
[103] *Law v Canada* [1999] 1 SCR 497; *R v Kapp*, [2008] 2 SCR 483 at para 17; *Quebec (Attorney General) v A,* 2013 SCC 5; *Howe v Nova Scotia Barristers' Society*, 2019 NSCA 81 (CanLII) at paras 72, 73.
[104] *Withler v Canada*, [2011] 1 SCR 396 at para 39.
[105] *Egan v Canada*, [1995] 2 SCR 513; *Vriend v Alberta,* [1998] 1 SCR 493. See also discussion of the Constitutionality of distinctions based on marital status at Chapter 6.2, below.
[106] *Human Rights Act,* RSNS 1989, c 214, ss 4, 5.

2.2.4 Conclusion

Nova Scotia's parentage law remains a common law doctrine. Various statutes, however, touch on legal parentage. These statutes largely take a biological approach to parentage – they assume legal parentage is a question of biology, and permit a judge to issue declarations of parentage or impose parental responsibilities as a result of blood or genetic testing. The one exception to the biological understanding of parentage are the surrogacy provisions in the Birth Regulations.

Any new parentage law that is created in Nova Scotia must consider the *Convention on the Rights of the Child*. It must also comply with the *Charter*, and the Nova Scotia *Human Rights Act*, and be cognizant of overarching judicial powers to make a decision for the protection of a child.

2.3 Social Context

This section provides data that is relevant to legal parentage in Nova Scotia. An increasing number of Nova Scotians find themselves outside the boundaries of our parentage laws. This flows from the fact that: more Nova Scotians are having children without marrying; the legal and social acceptance of 2SLGBTQIA+ people, many of whom have families; and increases in assisted conception and surrogacy.

2.3.1 Changing Family Forms

Family forms have changed since the days from which ancient common law presumptions were developed. First, there is no longer a stigma associated with having children outside of marriage. Statistics trace this change. More Canadians are living together and having children without being married. Data from the 2021 Census indicates that 21% of Nova Scotia's cohabiting couples are not married, an increase from the national average of 6.3% in 1981.[107] Of those most recently surveyed cohabiting couples, 35% are living with children.[108]

Second, there is now widespread acceptance of the 2SLGBTQIA+ community, many members of whom are now raising children. The 2021 Census tracks a continuing upward trend of same sex, non-binary, and/or transgender families with children. In 2006, 8.1% of Canadian same-sex

[107] Statistics Canada, "Census Profile – Nova Scotia" (2021) online:<https://www12.statcan.gc.ca/census-recensement/2021/dp-pd/prof/details/page.cfm?Lang=E&SearchText=Nova%20Scotia&DGUIDlist=2021A000212&GENDERlist=1,2,3&STATISTIClist=1&HEADERlist=0 [2021 Census Profile – Nova Scotia]; Statistics Canada, *Study:* Families, households and marital status: Key results from the 2016 Census (2017), at <https://www150.statcan.gc.ca/n1/daily-quotidien/170802/dq170802a-eng.pdf> [Statistics Canada, Key Results]

[108] 2021 Census Profile – Nova Scotia, *ibid.*

couples had children in their home, by 2016, this number had risen to 12.6%.[109] In 2021, 17.1% of Nova Scotia's same sex, non-binary and/or transgender families were living with children.[110]

This data demonstrates that Nova Scotians today do not see marriage as a prerequisite to having children, and that people in the 2SLGBTQIA+ community are having children and raising families. It is important for Nova Scotia's laws reflect this diversification.

2.3.2 Use of Assisted Reproductive Technologies is on the Rise

In addition to the changing structure of Canadian families, there are new ways to bring children into the world. Assisted Reproductive Technology (ART) and surrogacy have revolutionized how children are made, and have opened the reproductive doors for diverse family forms.

ART encompasses several different procedures designed to assist in either the conception or gestation of a child without sexual intercourse. It includes artificial insemination – (insemination that occurs directly within a woman's body without intercourse),[111] and *in vitro* fertilization (IVF) (fertilization of an ova outside of the body). Both artificial insemination and IVF can use sperm from the child's parents or donated sperm. In addition, with IVF, donated ova and embryos may be used. During these processes, extra sperm or eggs may be extracted, or embryos created, which can be frozen for use at a later date.

Surrogacy is an arrangement whereby a person with a uterus (the surrogate) agrees to gestate and give birth to a child for another person(s) who will be the parent(s) of the child (we refer to these persons as "the intended parents" throughout). There are two types of surrogacy: traditional surrogacy, which occurs when the surrogate's ovum is used to create a child; and gestational surrogacy, which occurs when the surrogate's reproductive material is not used.[112] Pursuant to federal law, conception even in a traditional surrogacy must occur via ART and not by sexual intercourse.[113]

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[109] Statistics Canada, *Same Sex Couples in Canada in 2016* (Ottawa: Ministry of Industry, 2017), at <https://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016007/98-200-x2016007-eng.pdf>.

[110] Statistics Canada, "Gender diversity status of couple family, type of union and presence of children: Canada, provinces and territories, census metropolitan areas and census agglomerations – Nova Scotia"(13 July 2022) online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=9810013601&pickMembers%5B0%5D=1.10&pickMembers%5B1%5D=2.1>

[111] Saskatchewan Final Report, *supra* note 35 at 10; ULCC Working Group, *supra* note 34, See also: Atlantic Assisted Reproductive Therapies, *Glossary of Terms,* online: http://www.aart.ca/resources/glossary-of-terms/.

[112] Saskatchewan Final Report, *supra* note 35 at 56.

[113] *AHRA*, *supra* note 94 at s 3 "surrogate mother means a female person who — with the intention of surrendering the child at birth to a donor or another person — carries an embryo or fetus that was **conceived by means of an assisted reproduction procedure** and derived from the genes of a donor or donors." [emphasis added]

Most of the statistics on ART and/or surrogacy available in Canada come from reporting done by fertility clinics.[114] These statistics give the most detailed picture of ART and surrogacy practices in Canada. However, they only capture fertility services performed at clinics - they do not capture ART processes carried out at home. This means these statistics would tend not to capture persons who are using ART and surrogacy for reasons other than infertility, which may underreport ART practices in some communities. For example, because most lesbian couples would require a sperm donor for reasons other than infertility, they may be more likely to proceed privately because they do not require medicalized ART techniques.[115]

Even with this limitation in mind, this data unequivocally demonstrates that ART and surrogacy are on the rise in Canada. In 2006, ART represented approximately 1% of all births in Canada.[116] By 2013, this number increased to 1.5% (5,748 ART live births compared to 380,323 total live births),[117] 1.7% in 2016 (6,514 ART live births compared to 383,102 total live births), [118] and 1.9% in 2019 (6922 ART live births compared to 372,078 total live births).[119] These numbers can be

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[114] Canada has a voluntary reporting database that fertility clinics can use to submit their records. This registry, known as Canadian Assisted Reproductive Technologies Register (CARTR Plus), is hosted by the Better Outcomes Registry and Network (BORN), a prescribed registry under Ontario's *Personal Health Information Protection Act,* RSO 2004, c 3, Sch *A* . See: Canadian Fertility and Andrology Society, "About CFAS", online: <https://cfas.ca/about-cfas.html>

[115] For more discussion of the gaps in this data, see Pamela M White "'Why We Don't Know What We Don't Know' About Canada's Surrogacy Practices and Outcomes" in Vanessa Gruben et al, *Surrogacy in Canada* (Toronto: Irwin Law Inc, 2018) 51. There are four particular gaps to keep in mind: It (1) collects information on IVF and surrogacy. It does not collect information on artificial insemination; (2) relies on voluntary data submission. Most Canadian fertility clinics choose to provide their data, but compliance is not universal; (3) only reports ART and/or surrogacy practices from people who attend fertility clinics; and (4) protects much of its data from outsiders and reports its information in language intended for medical professionals.

[116] ULCC Working Group, *supra* note 34 at para 11.

[117] Canadian Assisted Reproductive Technologies Register Plus, "Final treatment cycle and pregnancy outcome data for 2013" "Preliminary Treatment cycle data for 2014" developed by Better Outcomes Registry and Network Ontario (Ottawa), and delivered at the Canadian Fertility and Andrology Society's 61st Annual Meeting, Halifax, October 2015, online: https://cfas.ca/_Library/cartr_annual_reports/BORN_CARTR_Plus_presentation.pdf [CARTR Halifax]; Statistics Canada, "Live Births and Fetal Deaths by place of birth" online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310042901> [Stats Can Live Births].

[118] Canadian Assisted Reproductive Technologies Register Plus, "Final treatment cycle and pregnancy outcome data for 2015 & preliminary treatment cycle and pregnancy outcome data for 2016" developed by Better Outcomes Registry and Network Ontario (Ottawa), and delivered at the Canadian Fertility and Andrology Society's 63rd Annual Meeting, Vancouver, September 2017, online: <https://cfas.ca/_Library/cartr_annual_reports/CFAS-CARTR-Plus-presentation-Sept-2017-for-CFAS-website.pdf> [CARTR Vancouver]; Stats Can Live Births, *ibid*.

[119] Canadian Assisted Reproductive Technologies Register Plus, "Final treatment cycle and pregnancy outcome data for 2019 & preliminary treatment cycle and pregnancy outcome data for 2020" developed by Better Outcomes Registry and Network Ontario (Ottawa), and delivered at the Canadian Fertility and Andrology Society's 67th Annual Meeting, Vancouver, September 2021 online: <https://cfas.ca/_Library/CARTR/CFAS_CARTR_Plus_Report.pdf>
Statistics Canada, *The Daily*, *Births 2019* < https://www150.statcan.gc.ca/n1/daily-quotidien/200929/dq200929e-eng.htm>

expected to continue to increase with the recent provincial government proposal to provide financial support to families undergoing fertility and/or surrogacy treatments.[120]

Gestational surrogacy is also rising. In 2013, 413 gestational carriers were reported.[121] The number increased to 417 (2014), 533 (2015), 639 (2016), 895 (2017), and 949 (2018).[122] These numbers dipped in 2020, which may be due to the Covid-19 pandemic.[123] It should be noted that most fertility clinics do not permit traditional surrogacies, and so data on the rate of traditional surrogacies is not available.

This data clearly demonstrates that rates of ART, surrogacy, and same-sex parenting are rising in Canada. Individuals who have children using these methods are not contemplated by the common law or first wave parentage legislation. These technologies challenge traditional markers of parentage and coincide with increased pressure on lawmakers to recognize the parent-child relationships that flow from these technologies and relationships.

2.4 Conclusion

This Chapter has sought to situate the law of parentage in modern Nova Scotia. The governing law itself is ancient and remains closely linked to the patriarchal society from which it came. While several statutes touch on parentage, they largely assume that legal parentage is a question of

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[120] Finance and. Treasury Board, "Rebate for Fertility Treatments, Surrogacy-Related Medical Expenses" *News Release,* Nova Scotia Government (30 Mar 2022) online: < https://novascotia.ca/news/release/?id=20220330002>.

[121] Canadian Assisted Reproductive Technologies Register Plus, "Final treatment cycle and pregnancy outcome data for 2013" developed by Better Outcomes Registry and Network Ontario (Ottawa), and delivered at the Canadian Fertility and Andrology Society's 60th Annual Meeting, Quebec City, September 2014 online: < https://cfas.ca/_Library/cartr_annual_reports/BORN_CFAS_CARTR_Plus_presentation.pdf>.

[122] CARTR Halifax, *supra* note 117; Canadian Assisted Reproductive Technologies Register Plus, "Final treatment cycle and pregnancy outcome data for 2013" developed by Better Outcomes Registry and Network Ontario (Ottawa), and delivered at the Canadian Fertility and Andrology Society's 60th Annual Meeting, Ottawa, September 2016 online: < https://cfas.ca/_Library/cartr_annual_reports/BORN-CFAS-CARTR-Plus-presentation-Oct-2016-for-website-1.pdf>; CARTR Vancouver, *supra* note 118; ; Canadian Assisted Reproductive Technologies Register Plus, "Final treatment cycle and pregnancy outcome data for 2016 and preliminary treatment cycle data for 2017" developed by Better Outcomes Registry and Network Ontario (Ottawa), and delivered at the Canadian Fertility and Andrology Society's 64th Annual Meeting, Montreal, September 2018 online: https://cfas.ca/_Library/cartr_annual_reports/CFAS-CARTR-Plus-presentation-Sept-2018-FINAL-for-CFAS-website.pdf; Canadian Assisted Reproductive Technologies Register Plus, "Final treatment cycle and pregnancy outcome data for 2017 and preliminary treatment cycle and pregnancy outcome data for 2018" developed by Better Outcomes Registry and Network Ontario (Ottawa), and delivered at the Canadian Fertility and Andrology Society's 65th Annual Meeting, Ottawa, September 2019 online: https://cfas.ca/_Library/CARTR/CFAS_CARTR_Plus_presentation_plenary_slides_FINAL_for_website_-_opened.pdf.

[123] *supra* note 119.

biology, which is evidenced by birth or marriage. This understanding is increasing out-of-step with modern families.

Persons in Nova Scotia have children inside and outside of marriage, families are increasingly consisting of persons of different sexual orientations and identities, and overall, Nova Scotians are increasingly using reproductive technologies that which sever the necessary connection between parentage, gestation, and biology. The consequences of a disconnect between the law and practice of legal parentage is that many people in Nova Scotia are not recognized to be the parents of their own children.

3 Principles of Reform

Over the past two decades, several law reform bodies in Canada and internationally have been re-examining their parentage legislation.

Law Reform and/or government bodies in Manitoba,[124] Saskatchewan,[125] British Columbia,[126] Quebec,[127] Scotland, England and Wales,[128] Australia,[129] New Zealand[130] as well as the Uniform Law Commission of Canada[131] and the U.S. Uniform Law Commission[132] have all undertaken (or are currently undertaking) reviews of parentage law. In addition, within Canada, Saskatchewan,[133] British Columbia,[134] Manitoba,[135] Ontario,[136] Quebec,[137] and Prince Edward Island[138] have all recently passed parentage laws. Quebec had recently attempted to move yet another set of reformed parentage laws through their legislature, although they ultimately did not pass.[139]

Most of these law reform efforts are driven by a small cluster of guiding principles. The principles considered by other law reform efforts and ones that may be relevant to reform in Nova Scotia are outlined below.

3.1 The Best Interests of the Child v. Child and Family-Centred Approach

The best interests of the child is consistently invoked as a guiding principle in reform of parentage laws.[140] It forms the backbone of family law in Canada. In addition, the UN *Convention on Rights*

[124] Manitoba Issues Paper, *supra* note 36.
[125] Saskatchewan Final Report, *supra* note 35.
[126] BC White Paper, *supra* note 37.
[127] Comité, *supra* note 39.
[128] Joint Law Commission Report, *supra* note 42.
[129] Victorian Final Report, *supra* note 40. See also the *Assisted Reproductive Treatment Act, 2008* (Vic), (2008/76) which incorporated many of the Victorian Final Report Recommendations.
[130] New Zealand 2005 Report, New Zealand 2022 Report, *supra* note 41.
[131] Uniform Law Conference of Canada, *Uniform Vital Statistics Legislation* (2017) online: https://www.bcli.org/wordpress/wp-content/uploads/2018/06/UNIFORM-VITAL-STATISTICS-ACT-2017.pdf [*Uniform VSA*]; *Uniform Act*, *supra* note 34.
[132] *UPA (2017)*, *supra* note 43.
[133] Sask *CLA*, *supra* note 29.
[134] BC *FLA*, *supra* note 29 at Part 3.
[135] Man *FMA, supra* note 29.
[136] Ont *CLRA, supra* note 29 at Part 1.
[137] Que Civil Code, *supra* note 29 at ss. 538.1.
[138] PEI *CLA*, *supra* note 29.
[139] Bill 2, *supra* note 30
[140] Manitoba Issues Paper, *supra* note 36 at 23, Saskatchewan Final Report, *supra* note 35; New Zealand 2005 Report, *supra* note 41 at xvii, Joint Law Commission Report, *supra* note 42 at 1.42, 1.45.

of the Child requires that "[i]n all actions concerning children … undertaken by … legislative bodies, the best interests of the child shall be a primary consideration."[141]

In a report on surrogacy, the Special Rapporteur on the sale and sexual exploitation of children called upon states to "[e]nsure that in all parentage and parental responsibility decisions involving a surrogacy arrangement, a court or competent authority makes a post-birth best interests of the child determination, which should be the paramount consideration"[142]

This principle is not, however, without controversy. The "best interests" analysis arises in a specific legal context and imports a number of questions about *parenting* (the capacity of a person to care for a child) which may be ill-suited to the ascription of legal parentage on birth. In other words, the best interest analysis is contextual, but at the moment of birth much of this context is lacking. This may result in the principle being used to invoke abstract or stereotyped opinions about family forms.

There is also a view that the best interests of the child principle is misguided when it does not account for the views and perspective of the child. This view holds that a "top down" approach is paternalistic, external, and unlikely to lead to the best outcome for the child. In the context of parentage, this issue is front and centre in debates about a child's right to know their origins.[143] There is a growing "right-to-know your genetic origins" movement among donor-conceived persons who have argued that existing parentage laws are built on parental perspectives of a child's best interests, while ignoring their views, rights, and interests in accessing gestational and genetic information about themselves. A child-centred approach would be better at including these views.

There is also disagreement as to the hierarchy a best interests or child-centred principle should have in relation to others. In Australia and Manitoba, law reform commissions cited the child's best interests as the single or paramount guiding principle for its reform.[144] Judges in British Columbia and Alberta have noted the paramountcy of the best interests principle in issuing parentage declarations.[145]

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[141] CRC, *supra* note 98 at Art 3:1.
[142] UN General Assembly, Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material A/HRC/37/60 (15 Jan 2018) at 77(e) online:https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/007/71/PDF/G1800771.pdf?OpenElement [UN Report on Sale of Children]
[143]New Zealand 2005 Report, *supra* note 41 at 6.
[144] Victorian Final Report, *supra* note 40 at 21. Manitoba Issues Paper, *supra* note 36 at 23. The Joint Law Commission Report also noted the best interests of the child / child welfare as the paramount consideration in existing law on making parental orders (*supra* note 42 at 5.102). It then sought to reconcile its principles of reform with what it saw as a pre-established paramountcy of child's best interest within parentage law (*supra* note 42 at 7.78)
[145] *Re: Family Law Act*, 2016 BCSC 22; *HDW v RDJ*, *supra* note 49 at para 61.

By contrast, in 2005 the New Zealand Law Reform Commission cautioned against treating the best interests principle as paramount. In its view:

> [A] child's welfare and best interests should be a primary but not paramount consideration as other factors may need to be taken into account where parenthood laws are concerned. For example, where the interests of justice require, a presumed father who has reason to believe he is not the father should be able to have the matter resolved, regardless of the fact that the child may lose his or her financial support. Other considerations include: the need to ensure the vulnerable situation of a surrogate mother is protected; the need to give effect to the intentions of the parties, in certain situations, to relinquish legal parenthood; and the need of the state to ensure that parents assume their child support obligations.[146]

The Ontario Superior Court of Justice recently noted that the best of interests of the child, while influential in parentage determinations, should not be used to directly contradict the spirit and purpose of parentage legislation:[147]

> To examine the "best interests of the child" in a parentage case could produce results that directly contradict the spirit and purpose of Part I of the *CLRA*. Part I of the amended *CLRA* was designed to protect the security of children regardless of family composition; a family can be comprised of one parent and one or more children. As the court in *Ferguson* noted, although a child would obviously benefit from having a further source of financial support, that approach could undermine the autonomy of those seeking to define their family unit to exclude known sperm donors or surrogates as legal parents, and it could discriminate against people who choose, prior to the child's conception, to be single parents. If parties do not have confidence in their pre- conception agreements, they may simply opt not to have a child at all.

Academic commentators caution against making any determination based on an atomistic conception of a child in relation to their family. Instead, they argue for a relational stance on a child's best interests, which recognizes that children do better when their parents are in a secure financial and mental state. Wanda Wiegers, for example, has suggested that a child's best interests should be determined in conjunction with their (intended) parents' because that child's experience is directly impacted by family stability and expectation.[148] Fiona Kelly argues that, in order to prevent discrimination on the basis of method of conception and/or the structure of the family into which the child is born, the best interests test must be interpreted in a manner consistent with section 15 equality rights under the *Charter*.[149]

3.2 Substantive Equality

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[146] New Zealand 2005 Report, *supra* note 41 at 5.
[147] *R (MR) v M (J), supra* note 56 at paras 149-150.
[148] See Wanda Wiegers, "Assisted Conception and Equality of Familial Status in Parentage Law" (2012) 28 Can J Fam L 147 at 149, discussed in Saskatchewan Final Report, *supra* note 35 at 37.
[149] Kelly: Equal Parents Equal Children, *supra* note 50 at 256.

This principle of reform argues that parentage laws should treat all families equally. Current parentage laws are steeped in colonial, heteronormative, and cisgender notions of family that have worked to the detriment of marginalized communities. Reforms should be geared towards eliminating this discrimination by the legislation more inclusive and flexible. Many law reform agencies, including reports from Manitoba, Saskatchewan, British Columbia, and various international agencies cite equality as a principle to guide parentage reform.[150]

Law reform efforts have often been driven by equality concerns focused on 2SLGBTQIA+ families.[151] Given their diverse family forms and enhanced reliance on ART and surrogacy to conceive, 2SLGBTQIA+ families have a strong case that outdated or underinclusive parentage laws discriminate against them. In addition, other groups - including unmarried parents, parents who lack viable genetic material, and the children born to these parents - are also differentially treated under the current law.

The goal of equality requires taking a critical lens to the status quo, which includes an acknowledgment of the historical inequities that have existed for 2SLGBTQIA+ and other families. It also requires a sensitivity to gender, both as an awareness of the way gender binarism can exclude certain families, and through a gender-based analysis which is sensitive to the way parentage can be used to perpetuate power imbalances and/or violence. Lastly, it requires an understanding of how poverty impacts the ascription of parentage (for example, by only ascribing parentage to persons who attend fertility clinics, we exclude low-income families from status).

3.3 Intention to Parent/Functional Parentage

Intent to parent has emerged as the primary guiding principle of parentage in cases of ART and/or surrogacy. Where a direct biological connection is absent, intention has stepped in as the factor to crystalize parentage status. This principle provides that, where intended parents come together to make a child, that family should be afforded the same legal autonomy as those based on direct genetic links.

The Manitoba Law Reform Commission explained their use of intent as the principle marker of parentage when ART was used to conceive a child. Because "[t]he sole aim of ART is to produce a

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[150] Saskatchewan Final Report, *supra* note 35 at para 100; New Zealand 2005 Report, *supra* note 41 at xvii. Manitoba Issues Paper, *supra* note 36 at 23; The BC White Paper articulated this as a somewhat different way, although equality lies behind the concern. The BC White Paper prioritized "Treating children fairly, regardless of the circumstances of their birth"; and "protecting vulnerable persons" (BC White Paper, *supra* note 37 at 31); *UPA (2017), supra* note 43 at 1-2 (Prefatory Note); New Zealand 2005 Report, *supra* note 41 at xvii, 7.

[151] Snow, *supra* note 52. See also, Ontario, Legislative Assembly, *Hansard* " 41st Leg, 2nd Sess (3 October 2016) at 528; CBC News, "Birth registration discriminatory, lesbian couple says" *CBC News* (17 Sept 2007) online: https://www.cbc.ca/news/canada/nova-scotia/birth-registration-discriminatory-lesbian-couple-says-1.647243; Nova Scotia Rainbow Action Project, *2008 Annual Activity Report: Community – A Work in Progress* at 5 online: <http://nsrap.ca/wordpress/wp-content/uploads/2010/11/2008AnnualReport_-_NSRAP.pdf>.

child…legal processes should take into consideration that the children would not have been conceived or born but for the efforts of the intended parents."[152]

The Ontario Superior Court of Justice explained Ontario's conceptual shift towards preconception intent as a driver of parentage law in *MRR v JM:*[153]

> 162 The amendments to the *CLRA* with respect to parentage move the focus away from biology toward the pre-conception intentions of the parties. The legislature, in enacting the amendments to the *CLRA*, has signalled its support for parties to determine a child's family unit regardless of the gender of the parents and, with some limitations, regardless of the number of parents. A family intentionally comprised of one parent is no less a child's family than one comprised of two or more parents.

Academic advocates for an intent-based models emphasize that a biological foundation of parentage does not respect family autonomy and is out-of-step with the party understandings. An intention-based model protects family autonomy and builds on existing practice.[154] Others note that it would be perplexing to prioritize biology over intention in cases of ART and/or surrogacy, because the entire point of assisted conception is to de-centre the role of biological connection.[155]

This focus on intent has the added benefit of reflecting reality, and designing law to reflect the lived experiences of those people who rely on them. Instead of designing laws based on theoretical concerns or assumptions, parentage ought to be based on the experiences of those involved in the process, and the families that exist today.[156]

Some critics have argued against the focusing on intent in forming parent-child relationships. Marsha Garrison and others have claimed that a regime focused on pre-conception intent imposes a contract-based model that is ill-suited to the family law context. They oppose a regime which allows adults to bargain away children's rights, and which prioritizes autonomous (adult) individuality rather than fixed relations predicated on "biological truth."[157]

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[152] Manitoba Issues Paper, *supra* note 36 at 23.
[153] *Supra* note 28 at para 162.
[154] Anne Reichmann Schiff "Frustrated Intentions and Binding Biology: Seeking AID in the Law" (1994) 44:3 Duke LJ 524 at 549. For more discussions on intent-based parentage, see Susan B Boyd, "Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility" (2007) 25:1 Windsor YB Access Just 63; Jenni Millbank, "The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family" (2008) 22:2 Intl J of L, Policy & the Family 149.
[155] Kelly: Equal Parents Equal Children, *supra* note 50 at 256, quoting Angela Campbell, "Conceiving Parents Through Law" (2007) 21(2) *International Journal of Law, Policy and the Family* 242 at 259.
[156] Angela Campbell, "Law's Suppositions about Surrogacy against the Backdrop of Social Science" (2011) 43 Ottawa L Rev 29.
[157]Joint Law Commission Report, *supra* note 42 at 7.79, citing to J Dolgin, *Defining the Family: Law, Technology, and Reproduction in an Uneasy Age* (1997) at 213; Ga Marsha Garrison, "Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage" (2000) 113:4 Harv L

3.4 Clarity and Certainty

Existing determinations of parentage can be complex. Several law reform agencies in Canada and internationally argued that all parties benefit when status is clearly and concretely determined at the earliest possible time in a child's life.[158] This provides family stability that benefits the child, and also helps achieve the other goals of equality, and of meeting the child's interests.

The Canadian Bar Association (Saskatchewan Branch) made this point in their submissions to the Saskatchewan Law Reform Commission. It reasoned that:

> Applications for parentage and/or adoption can be time consuming….[and] establish[ing] *in loco parentis* status is neither permanent nor equal to legal parentage and takes time to develop under the law…The sooner legal parentage can be established for all intended parents, the better off the parties will be. This will further facilitate structure and security for the child.[159]

Statements in Saskatchewan's Hansard emphasized the role that certainty played in guiding legislative reforms:

> [T]he Government of Saskatchewan does not want to stand in the way of personal family decisions. Ultimately we want to increase certainty and remove obstacles for families when they are making important decisions about reproduction and their children. [160]

This principle of reform argues that, given the importance of status for both parents and children, parentage laws should endeavour to clearly and concretely determine status are as soon as possible after a child is born. No one benefits from a situation where parentage is unclear or unsettled, or where paths to resolve this issue are opaque and complex.

3.5 Access to Justice

Several law reform agencies have asserted that reform efforts should be focused on making parentage determinations more accessible, simpler and/or more efficient.[161] This, in turn, was linked to reducing reliance on judicially-reliant parentage models wherever possible. [162]

Rev 835 at 861-64.

[158] BC White Paper, *supra* note 37 at 31; Saskatchewan Final Report, *supra* note 35 at 38, New Zealand 2005 Report, *supra* note 41 at 6.

[159] Saskatchewan Final Report, *supra* note 35 at para 99-100.

[160] Saskatchewan Legislative Assembly, Government Orders: Second Readings "Bill No. 205 — *The Children's Law Act, 2019 - Loi de 2019 sur le droit de l'enfance Official Report of Debates (Hansard)* (4 December 2019) at 6690. (Hon Mr Morgan).

[161] New Zealand 2005 Report, *supra* note 41 at xvii; Manitoba Issues Paper, *supra* note 36 at 23; BC White Paper, *supra* note 37 at 31.

[162] Manitoba Issues Paper, *supra* note 36 at 23: "Children and their parents benefit from clarity and certainty of status at the earliest reasonable time. Accordingly, out-of-court processes should be preferred

Requiring families to seek a court order in order to recognize a parent-child relationship poses significant financial and emotional strain on what is already a lengthy and expensive process of conceiving via ART and/or surrogacy. This added legal cost creates a risk that parents may be navigating court processes without adequate legal representation, which can create problems for the adults and negatively impact their children.[163] Reducing the need for judicial approval enhances equality, reduces costs, and advances access to justice.

This principle holds that as much as possible, we should be helping people to declare or give them the authority to declare their parentage without having to go to a judge. Parentage laws ought to avoid situations that deny people in poverty rights of parentage because of they could not afford to go to a fertility clinic. It also should not require people to medicalize their assisted conception in order for parentage to be recognized in situations where it is not medically necessary.

3.6 Harmonization

Harmonization with other Canadian jurisdictions is thought to prevent forum shopping and help safeguard against the emerging issue of "reproductive tourism" – in which individuals travel to other provinces or countries to conceive of children in various forms because those treatments or services are not available in their home province or country. The Saskatchewan Law Reform Commission relied on the principle of harmonization in guiding its reforms. [164]

3.7 Proposed Principles of Reform

We propose the following principles of reform to guide this project:

(a) A relational, child-centred approach

A parentage law should take a child-centred approach to best interests that values their stability and recognizes their families. Rather than a paternalistic and atomistic understanding of the best interests of a child, this stance should be informed by a relational understanding of families, and an understanding that children are better off when their parents are not burdened with mental and financial stress, and have secure legal standing.

(b) Substantive Equality

Parentage law should have the goal of making the legal concept of the family more inclusive. This will require rethinking traditional touchstones of parentage such as marriage, conjugality and

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for establishing parentage whenever possible"; BC White Paper, *supra* note 37 at 31: "preferring out-of-court processes where possible."

[163] Saskatchewan Final Report, *supra* note 35 at 38. See, for example, *H(DW) v R(DJ), supra* note 49 and how defects in the applicant's self-represented application caused issues that had to be resolved on appeal at 2013 ABCA 240.

[164] Saskatchewan Final Report, *supra* note 35 at 37.

bloodline, which have been used to reinforce heteronormative, cisgender, and colonial notions of family to the detriment of marginalized and racialized communities.

(c) Harmonization

Harmonization with other jurisdictions assists parents and children avoid discrepancies in their parenting status depending on where the child is born. This, in turn, avoids the problem of birthplace forum shopping or other reproductive tourism.

(d) Clarity and Certainty

The sooner legal parentage can be established for all intended parents, the better off the parties will be. A clear and certain system will further facilitate structure and security for the child.

(e) Intent

Biology, gestation, and marriage or common law status alone are inadequate tools to locate parentage where conception occurs by way of ART and/or surrogacy. Intention ought to be the primary guiding principle in locating parentage where conception occurs by way of ART and/or surrogacy.

In cases of conception by sexual intercourse, however, the principle of intention should not govern so as to allow people to claim a lack of intention as a way of avoiding their responsibilities towards the child.

(f) Access to Justice

Parentage law should work to ensure that recognition is affordable and efficient. This requires an awareness of the fact that, imposing differential standards based on the method of conception (at home or in a clinic, for example) tends to disadvantage lower income families.

In addition, insofar as possible, parentage law should avoid requiring expert legal services or judicial approval. Importing the legal system on top of the already burdensome fertility process places additional barriers on families, which has the potential to cause significant disparity among the legal rights of parents based on financial circumstance and/or economic class.

Proposal for Discussion:

The following principles of reform should guide this project:

- A relational, child-centred approach
- Functional / intentional parentage
- Substantive equality including a consideration of intersectionality, gender-based analysis including structural violence and historical racism

- Harmonization
- Clarity and certainty
- Access to justice

4 Sperm, Egg and Embryo Donation

4.1 Introduction

This chapter considers who is a child's legal parent when the child was conceived via donated eggs, sperm, or embryos.[165] It does not deal with surrogacy, in which one person (the surrogate) gestates and delivers a child for intended parents. Surrogacy is addressed in Chapter 5.

Sperm, egg and embryo donation challenge the biological understanding of parentage. While the current law is grounded in real or imagined genetic links, when a child is conceived via donated reproductive material, we know ahead of time that (a) one or both intended parents will have no direct biological link to the child, and (b) someone who does have a direct biological link to the child does not intend to be a parent.

As explored in more detail in this chapter, there is a growing consensus that parentage in cases of sperm, egg and embryo donation should be based on *intention*.[166] This is viewed as "a reasonable reflection of the reality of the lives of children born as a result of assisted reproduction, given that deliberate planning and forethought was required in order for them to be conceived."[167]

4.2 Nova Scotia's Current Law

Nova Scotia does not have parentage laws specific to sperm, egg and embryo donation. The common law rules remain intact. To reiterate the discussion above, these laws state:

- The woman who gives birth to a child is the child's mother; and
- Her husband, if any, is the father.

The presumption of paternity can be affirmed or overridden by evidence such as a genetic test. The presumption of maternity cannot be rebutted by any evidence, biological or otherwise.

These laws create the following outcomes in the context of egg, sperm and embryo donation:

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[165] Note: this chapter does not discuss parentage in cases of blended gametes (where the reproductive material of more than one person is blended in an egg – known as egg splicing, mitochondrial transfer, mitochondrial replacement techniques, or mitochondrial therapy). While this technology exists, at present it is illegal in Canada (AHRA, *supra* note 94 at s 5(1)(f)). In the future, it raises interesting questions of parentage, particularly in the context of a multiple-parent household. For more information, see: Glenn Cohen et al., "The Regulation of Mitochondrial Replacement Techniques Around the World" (2020) 21:3 Annual Review of Genomics and Human Genetics 3.1; Catherine Weiner, "Mitochondrial Transfer: The making of three-parent babies" (22 August 2018), online (blog): *Science in the News* <http://sitn.hms.harvard.edu/flash/2018/mitochondrial-transfer-making-three-parent-babies/> .

[166] For an academic advocacy for an intention-based model, see: Millbank, *supra* note 154.

[167] Manitoba Issues Paper, *supra* note 36 at 23.

<table>
<tr><th colspan="4">Who is a Parent?</th></tr>
<tr><th></th><th>Egg Donation</th><th>Sperm Donation</th><th>Egg and Sperm / Embryo Donation</th></tr>
<tr><td>Person who gives birth</td><td>Yes</td><td>Yes</td><td>Yes</td></tr>
<tr><td rowspan="2">Other Parent</td><td>Married Man: Yes</td><td>Married Man: Presumed Yes</td><td>Married Man: Presumed Yes</td></tr>
<tr><td>Unmarried / Woman: not presumed. Paternity provable via biological testing</td><td>Unmarried / Woman: no</td><td>Unmarried / Woman: no</td></tr>
<tr><td rowspan="2">Donor</td><td rowspan="2">No</td><td rowspan="2">Can prove parentage via biological testing</td><td>Egg donor: No</td></tr>
<tr><td>Sperm /embryo Donor: Can prove parentage via biological testing</td></tr>
</table>

- The person who gives birth is always considered a parent. This is because the presumption of maternity flows from the act of giving birth. Their status is secure, regardless of whether they have a direct biological link to the child born.

- Matters are more complicated for the "other parent". Because the presumption of paternity is based on married opposite sex relationships, men who are married to the birth parent are presumed parents. Other people in this position (unmarried partners or female non-birth parents) are not. Regardless of whether this "other parent" benefits from a presumption of parentage, the status of all "other parents" is vulnerable to biological testing. If biological testing is performed, the sperm / embryo donor has the superior claim to parentage over the other parent.

Concerns raised by this regime are outlined below.

4.3 Problems with Nova Scotia's Approach

4.3.1 The Foundation of Biology

Under our current law, status of the "other parent" ultimately rests on biology. In the context of sperm and embryo donation, this means that donors can successfully claim parentage.[168] It also means that the status of all "other parents" - be they married, unmarried, men, women, or otherwise identified – are vulnerable to biological testing.

In practice, people who use sperm and embryo donation avoid this by relying on one of the presumptions of parentage (married men only), adopting their child, using anonymous sperm donors[169] and/or settling for recognition on a birth registration as opposed to legal parentage. With the exception of adoption, however, all of these tools are vulnerable to biological testing.

By giving donors a stronger claim to parentage than the birth parent's partner, our parentage laws are not in line with either the parties' or public's expectations.

4.3.2 Discriminatory Presumptions

While the status of all "other parents" is vulnerable to biological testing, married men benefit from a presumption of parentage when their wife has a child. A married heterosexual couple may use a sperm donor to conceive, but in the absence of evidence to the contrary, the man is a legal parent. "Other parents" who are not married men do not receive this presumption.

In theory, the narrowness of this presumption could impact all people regardless of their gender identity and/or sexual orientation (based on marital status). In practice, however, its negative impact is disproportionately borne by the 2SLGTBQIA+ community. Heterosexual couples, married or not, can hide their use of donated sperm or embryos in a way that a lesbian couple

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[168] A donor can assert their parentage via biological testing to (1) get their name on a birth certificate (*VSA*, *supra* note 2 at ss 11A-11C), (2) assert parenting rights or responsibilities under the *PSA* (see *B (RA) v J (WE),* [1996] 145 NSR (2d) 230 (NSSC), (3) interfere with adoption proceeds (*VSA*, *supra* note 2 at ss 11A-11C; *CFSA*, *supra* note 13 at s 67(1)(f)(vi)), and/or (4) assert certain rights of inheritance (under intestacy legislation, for example, where a child dies the inheritance goes to their parent, ISA, *supra* note 6 at s 7)

[169] Anonymous donors refer to situations where intended parents access anonymous genetic material at fertility clinics or sperm banks. Known donors refer to situations where people obtain genetic material from a non-anonymous source (family, friends, or other sources such as online ads). By using an anonymous donor, parents can effectively remove the possibility of that donor coming forward and claiming parentage. Research suggests, however, that known donors are more common in the 2SLGBTQIA+ community, and that donor-conceived children value the information and relationships derived from using known donors – see, *Pratten v British Columbia (Attorney General),* 2012 BCCA 480. See also: Fiona Kelly, "Is it time to tell? Abolishing Donor Anonymity in Canada" (2017) 30(2) Canadian Journal of Family Law 173. There is also an argument that commercialized DNA tracing tools (for example 23 and Me, Ancestry.com) are eliminating the distinction between known and anonymous donors.

cannot. We have heard, for example, that members of the 2sLGBTQIA+ have been singled out for questioning about their use of donated sperm or embryos, and in some cases are told they must adopt their own child if they wish to be legal parents.[170]

There is a strong argument that requiring 2SLGBTQIA+ parents to adopt their child where the same obligation is not imposed on heterosexual couples is unconstitutional.[171] *Fraess v Alberta* provides an example of this, in which a non-birth mother in a lesbian relationship challenged Alberta's predecessor child status legislation for failing to provide a path for her to be automatically recognized as a parent.[172] The Court found the law unjustifiably infringed s 15(1) of the *Charter*.

There is a related argument that the regime discriminates against unmarried couples, regardless of their gender. Because Canadian courts have been hesitant to find distinctions based on marital status violate the *Charter*, however, the strength of this argument is muddied.[173]

4.3.3 Gender/Sex Binary

The current law of parentage is based on binary assumptions about gender and sex – that women give birth and are called mothers, and that they are married to men who provide sperm and are fathers. These assumptions do not reflect the reality of many Nova Scotians, particularly those who are non-binary and/or members of the 2SLGBTQIA+ community.

4.3.4 Maximum Number of Parents

Nova Scotia's law assumes a child will always have two parents. While this may make sense where conception occurs without assisted conception, it is less clear in cases of assisted conception, where conception can involve only one (in the case of a woman using a sperm donor) or more than two (for example, a couple using a sperm donor) parties. Multiple-parent families are discussed in detail at Chapter 7, below. It is important, however, to note that multiple-parent families are particularly relevant for families that use egg, sperm and embryo donation.

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[170] For discussion of how this impacts lesbian women who use a sperm donor, see Halifax Pride, "Are All Families Equal? Not for 2SLGBTQIA+ Families in NS" Noon Hour Panel Discussion (13 Aug 2021) (online): https://www.youtube.com/watch?v=LMM0AtQZ86E.
[171] Manitoba Issues Paper, *supra* note 36 at 25.
[172] 2005 ABQB 889.
[173] For a fuller discussion on the constitutionality of distinctions based on marital status, see Chapter 6.2. See also: *Quebec (Attorney General) v A*, 2013 SCC 5.

4.4 Jurisdictional Scan

Most Canadian jurisdictions and the *Uniform Act* address parentage in the case of donated sperm, eggs and/or embryos.[174]

Across these jurisdictions, a fairly consistent approach has emerged. Parentage is underpinned by intention rather than biology, which is codified via three general rules:

- The person who gives birth is a parent;[175]
- The birth parent's spouse or partner is also a parent, unless they did not consent to be a parent prior to conception; and
- A donor is not, solely by virtue of their donation, a parent.

With some variations, international jurisdictions generally follow this approach. Details on specific laws, and the policy rationales that support or detract from this approach, are outlined below.

4.4.1 The Person Who Gives Birth

All jurisdictions we reviewed with rules on egg, sperm and/or embryo donation treat the person who gives birth to a child as that child's parent.[176] If a person who gives birth to a child does not intend to be the child's parent, their parentage is addressed via surrogacy (discussed in Chapter 5, below) or adoption. Law reform efforts have not recommended straying from this approach.[177]

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[174] BC *FLA*, *supra* note 29 at s 27; Alta *FLA*, *supra* note 29 at s 8.1; Sask *CLA, supra* note 29 at ss 58, 60; Ont *CLRA, supra* note 29 at s 6; *Quebec Civil Code*, *supra* note 29 at Art 538.1; PEI *CLA, supra* note 29 at s 21(2); Nfld *CLA*, *supra* note 32 at s 12; Yukon *CLA, supra* note 32 at s 13; NWT *CLA, supra* note 32 at ss 2(1.1), 8.1; *Uniform Act*, *supra* note 34 at s ss 3, 6. The comprehensiveness of these regimes vary by jurisdiction. Note that while the *Uniform Act,* British Columbia, Alberta, Ontario, Prince Edward Island, Quebec, and the Northwest Territories have schemes to recognized parentage in all cases where conception occurs other than sexual intercourse, Yukon and Newfoundland and Labrador only create alternate parentage presumptions in cases of "artificial insemination" – which would exclude ovum and embryo donation.

[175] It is worth emphasizing that this rule may not apply in cases of surrogacy (where the person who gives birth does not intend to be a parent). Surrogacy has its own rules for parentage, which are discussed in Chapter 5.

[176] BC *FLA*, *supra* note 29 at s 27(2); Alta *FLA*, *supra* note 29 at s 8.1(2)(a), 8.1(3)(a), 8.1(4)(a); Sask *CLA, supra* note 29 at s 58(1); Man *FMA, supra* note 29 at s 22(1); Ont *CLRA, supra* note 29 at s 6; *Que Civ Code*, *supra* note 29 at Art 538.1; PEI *CLA, supra* note 29 at s 21(2); Nfld *CLA*, *supra* note 32 at s 3; Yk *CLA, supra* note 32 at s 5(1); NWT *CLA, supra* note 32 at s 2(1.1); *Status of Children Act, 1974* (Vic), 1974/8602 at ss 10A-10E, 11-16; *Status of Children Act 1969* (NZ), 1969/18 at s 17; *UPA (2017)*, *supra* note 43 at s 201.

[177] Saskatchewan Final Report, *supra* note 35 at para 109; Manitoba Issues Paper, *supra* note 36 at 23-24; BC White Paper, *supra* note 37 at 30-1.

As a policy, this view is defended as being in line with common law presumptions, public expectations, and widespread practice. It is also consistent with the principle of intention. It is worth emphasizing that, because we are not dealing with surrogacy in this Chapter, we know that this person has intentionally impregnated themselves for the purpose of being that child's parent.

This rule is also defended as supporting a child's best interests and Article 7(1) of the *Convention on Rights of the Child*, which gives children the right to know and be cared for by parents from birth.[178]

On the other side of the equation, this view obscures genetic links. Automatically assigning parentage to a birth parent regardless of a direct biological link obscures a donor-conceived person's ability to learn their genetic origins.[179] The automatic recognition of the birth parent may prioritize that parent's rights over the child's interest in knowing their genetic origins. On the other hand, however, this rule supports donor offspring by ensuring they have a parent with legal standing from birth, which provides stability and equality for all children born as a result of assisted conception.[180] There are also other possible ways to deal with a child's right to know their genetic origins without denying parentage to the birth parent, such as including genetic markers on vital statistics documents, or making a registry of donors.[181]

We propose for discussion that the person who gives birth should be considered a parent of a child born. This accords with the principle of intention, as we know this person intends to parent the child. While protecting a child's right to know their genetic origins is an important consideration, we are of the view that there are other ways to accomplish this (such as genetic markers, and/or multiple parent provisions, discussed at Chapter 7) which do not deny parentage to the birth parent.

Proposal for Discussion:

In cases of conception via sperm, egg or embryo donation, the person who gives birth to the child is a parent of the child.

4.4.2 The Status of a Non-birth Parent

Canadian jurisdictions take a fairly uniform approach to the status of the non-birth parent of donor-conceived persons. The person who is married to (or often, in a conjugal or "marriage-like"

[178] UN CRC, *supra* note 98 at Art 7(1).
[179] For more on this, see *Pratten, supra* note 169; Kelly: Is it time to tell? *supra* note 169.
[180] *Uniform Act*, *supra* note 34 at s 5 (commentary) at 10-11.
[181] For example, see New Zealand's donor registry: Human Assisted Reproductive Technology Act, 2004/94 (NZ) ss 52-64 [HART Act] online: <https://www.legislation.govt.nz/act/public/2004/0092/latest/whole.html#DLM319374>. See also: NZ 2022 Report, *supra* note 41 at 7.14-7.16.

relationship with) the birth parent at the time of conception is deemed to be a parent.[182] Most jurisdictions also stipulate that this rule automatically applies unless it can be demonstrated that the spouse or conjugal partner either did not consent to be a parent, or withdrew their consent prior to conception.[183] Ontario's *CLRA* embodies the standard Canadian approach to this issue. It states:

> **8 (1)** If the birth parent of a child conceived through assisted reproduction had a spouse at the time of the child's conception, **the spouse[184] is, and shall be recognized in law to be, a parent of the child.**
>
> …
>
> (3) This section does not apply if, before the child's conception,
>
> (a) the spouse did not consent to be a parent of the child; or
>
> (b) the spouse consented to be a parent of the child but withdrew the consent. [emphasis added]

There are three key points to take from this approach:

> (1) it adopts an intent-based understanding of parentage, regardless of a direct biological connection;
>
> (2) the relevant point in time of intention is the point of conception – an "other parent" cannot withdraw their consent once their partner is pregnant; and
>
> (3) it applies to "spouses" which is defined as including "a person living in a conjugal relationship with the birth parent".

Issues 1 and 2 are discussed below. The definition of who ought to qualify as a "spouse" (and whether it includes unmarried, common law, and/or conjugal partners) is discussed at Chapter 6.4.1 below.

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[182] BC *FLA*, *supra* note 29 at s 27(3); Alta *FLA, supra* note 29 at s 8.2(1)(a); Sask CLA *supra* note 29 at s 60(1); Man *FMA, supra* note 29 at s 22(2); Ont *CLRA, supra* note 29 at s 8(3); Que Civil Code, *supra* note 29 at s 538.3, 539; PEI *CLA supra* note 29 at s 21(3), 1; Nfld *CLA*, *supra* note 32 at s 12(3), (4); *Uniform Act*, *supra* note 67 at s 3(2)(b), 5(1), Yk *CLA supra* note 32 at s 13(2)-(4), NWT *CLA, supra* note 32 at s 8.1.

[183] See, for example, Ont *CLRA, supra* note 29 at s 8(3); BC *FLA*, *supra* note 29 at s 27(3); PEI *CLA supra* note 29 at s 21(3); Alta *FLA*, *supra* note 29 at s 8.1(6).

[184] A "spouse" for the purposes of gamete and embryo donation includes a person living in a conjugal relationship with the birth parent: Ont *CLRA, supra* note 29 at s 1(1) "spouse".

4.4.2.1 Intention-Based Model

Most of international jurisdictions we reviewed also adopt this intent-based model – i.e., so long as the birth parent's spouse or partner consented to the procedure, they are deemed to be (or irrebuttably presumed to be) the child's parent.[185]

The American *Uniform Parentage Act (2017)* is an outlier in that it offers no presumption or deeming of parentage to the other parent. It requires a positive demonstration of preconception consent (either in writing, or demonstrable with clear and convincing evidence) for any individual other than the birth mother to be a parent to a child born via ART. Some American states require ART to be carried out by a licenced physician in order for the birth parent's spouse to be a parent.[186]

The American *UPA (2017)* drafters also recommended a third method to be treated as a parent where express consent does not exist. Under its proposal, a non-birth parent to a donor-conceived child will also be considered a parent if, for two years following birth, they resided with the birth mother and child and held themselves out as a parent of the child.[187]

The dominant approach, whereby a birth parent's spouse or common law partner is a legal parent unless they did not consent to conception, has been defended on many grounds. First, it aligns the law with the principle of intent, in that a non-birth parent is treated as a parent unless they can show that intent did not exist.

The intention-based model can also be defended on the grounds of equality. The current law protects and prioritizes the status of (1) heterosexual married men (by giving them a presumption of parentage that is not given to others) and (2) sperm donors (who are able to successfully claim parentage and displace an "other parent" based on biological testing). This disproportionately affects 2SLGBTQIA+ families, many of whom must rely on donation to conceive. By shifting the law to an intent-based model, all parents, regardless of their sexual orientation or gender, are treated equally.

This approach also removes a problematic differential status as between parents. Currently, non-birth parents are placed in a subordinate position to birth parents, which places them in a precarious legal position should the couple separate. It also perpetuates negative stereotypes about whether or not they are a "real" parent. By extending parentage to the person who did not

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[185] *Status of Children Act 1969, supra* note 176 at s 18; *Status of Children Act, 1974* (Vic), *supra* note 176 at ss 10-16 ("irrebuttably presumes" the other parent is a parent); *Human Fertilisation and Embryology Act* (UK), 1990 37 Eliz II, CH 37, at ss 35, 42 [*HFEA*].
[186] See Alaska: Stat 25.20.045 (2004), Alabama: Code of Ala 26-17-21 (2004), Colorado: CRS 19-4-106 (2004), Montana: MCA 40-6-106 (2004), Minnesota: Minn Stat 257.56 (2003), New Jersey: NJ Stat Ann 9:17-44 (2004), Nevada: NRS 126.061 (2004), New Mexico: NM Stat Ann 40-11-6 (2004), Wisconsin: Wis Stat 891.40 (2004).
[187] *UPA (2017)*, *supra* note 43 at s 704.

birth the child on the basis of intent, non-birth parents are given "ironclad proof of parentage" that protects and equalizes their status *vis-a-vis* the child.[188] This model also supports donor-conceived children by ensuring their parents have equal legal standing from birth, which provides stability and equality for children.[189]

This approach also arguably aligns the law with reality. Sperm, egg and embryo donation are well-established practices in Canada. On the ground, people are having children using donors, on the understanding that the intended parents, and not the donors, are parents of the children born. Assigning parentage based on that widespread practice aligns our law with what is happening in the real world, and the expectations of would-be parents and donors alike.

Lastly, this approach can be defended as harmonizing Nova Scotia's parentage laws with laws in other jurisdictions in Canada and around the world. Most laws (outside of the US) recognize non-birth parents in the case of sperm, egg and embryo donation based on their intent, and their relationship to the birth parent, unless proven otherwise. Changing our laws would bring our parentage regime in line with that of these other jurisdictions.

On the other hand, in 2005 the New Zealand Law Reform Commission raised some problems with automatically deeming a spouse or partner of a birth parent to be a parent. Donor offspring have been critical of deeming provisions because of transparency concerns. These deeming provisions obscure a donor-conceived person's ability to learn their genetic origins, and enable parents to hide the truth from their children. Nonetheless, that commission recommended maintaining this approach because it also supports donor offspring by ensuring their parents have the legal standing from birth with all the rights and responsibilities of legal parenthood. It also provides the anonymity that many donors seek before committing to donation, and was strongly supported by parents who had donor-conceived children.[190] That Commission separately addressed the right of a donor-conceived person to know their genetic origins via a registry system.[191]

Lastly, this model can be criticized for failing to protect a biological notion of parentage, which is helpful in case the "donor" (a) never actually intended to be a donor, or (b) had a change of heart after the child was born. This model thus operates to ensure that a genetic contributor is given paths to legal recognition of their relationship with a child.

We propose for discussion that, in cases of sperm, egg and embryo donation, the parentage of an "other parent" be dictated by intention to parent. This person will have legal parent status unless it can be demonstrated that the "other parent" did not consent to be a parent prior to conception or, if they had consented, they withdrew their consent prior to conception. This provides an automatic, clear and certain status to other parents that respects family autonomy which, in turn,

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[188] Snow, *supra* note 52 at 337.
[189] *Uniform Act*, *supra* note 34 at s 10-11.
[190] New Zealand 2005 Report, *supra* note 41 at 6.12 - 6.16.
[191] New Zealand 2005 Report, *supra* note 41 at Chapter 10.

supports the child's interests. It also provides automatic recognition which both equalizes the status of families regardless of their method of conception, and enhances access to justice. While we are cognizant of the transparency concerns raised by donor-conceived persons, we are of the view there are alternate ways protect this status (via a donor registry, for example) without compromising family autonomy and the "other parent's" status as such.

Proposal for Discussion:

In cases of sperm, egg and embryo donation, the parentage of an "other parent" should be dictated by intention to parent.

4.4.2.2 Timing: When Intention to Parent Must be Formed

Most jurisdictions single out the moment of conception as the relevant point in which parentage crystalizes for the "other parent". The moment of conception is critical for two inquiries: they must have formed the intention to parent and not withdrawn it prior to conception and they must have qualified as a spouse or common law partner at the moment of conception. For example, to be a parent under Ontario's *CLRA*:

> **8 (1)** If the birth parent of a child conceived through assisted reproduction had a **spouse at the time of the child's conception**, the spouse[192] is, and shall be recognized in law to be, a parent of the child**.**
>
> …
>
> (3) This section does not apply if, **before the child's conception**,
>
> (a) the spouse did not consent to be a parent of the child; or
>
> (b) the spouse consented to be a parent of the child but withdrew the consent. [emphasis added]

As to the first issue (timing of intention to parent), as a matter of policy, it makes sense to assign parentage to the other parent based on the presence or absence of their consent at conception. It speaks to the deliberate nature of conception by sperm, egg and embryo donation, and recognizes the role the other parent likely planned in planning to have that child (attending fertility clinics, researching donors, etc). This model also protects the rights of the child and the birth parent in cases where separation occurs during gestation. It would be unfair, for example, to permit an "other parent" to change their mind and "opt-out" of parentage after conception in a way that is

[192]A "spouse" for the purposes of gamete and embryo donation includes a person living in a conjugal relationship with the birth parent: Ont *CLRA, supra* note 29 at s 1(1) "spouse".

not permissible when a child is conceived by sexual intercourse. If the non-birth parent gave consent at the moment of conception, this person is "locked in" to parentage regardless of whether their intent changes later on. The parties may separate after conception, but the spouse or partner should continue to be the parent of the child born. Similarly, a donor cannot change their mind after conception and decide to a parent. Like the other parties, status crystalizes with the intentions that exist at conception.

But while there are sound policy reasons to crystalize parentage via sperm, egg and embryo donation at the moment of conception, it may be unfair to demand this person qualify as a spouse or partner at conception in order for them to receive legal parentage. As explored in Chapter 6, where a child is conceived by sexual intercourse, a presumption of parentage is extended to the birth parent's spouse at either conception ***or*** birth. This is a vestige of ancient legitimacy laws which were designed to legitimate a child who was conceived before marriage, but born after the couple had married.

In the interests of equality, there is no reason not to extend the same style of recognition where conception occurs by sperm, egg and embryo donation. A qualifying "other parent" at either conception or birth should be able to be treated as a parent, unless it can be demonstrated that this person did not consent to be a parent at the moment of conception. This protects all "other parents" and treats them identically to non-birth parents where conception has occurred via sexual intercourse. For persons who were not present at conception, or for those who never had an intention to parent, they are not parents by virtue of their lack of intention to parent at conception.

As a matter of practice, this distinction will only impact partners who did not qualify as a spouse or partner at conception, but do qualify on birth.[193] These people will be recognized on an equal basis to a child conceived via sexual intercourse. Other groups, such as persons who met and marry a birth parent during gestation, do not have parentage status, because they did not have intention to parent at the moment of conception.

Of course, this status from the moment of conception should not be interpreted to give an "other parent" control over a gestating fetus. We propose that parentage law in Nova Scotia should clarify that the intention to parent may arise at the moment of conception, but that status as a parent does not crystallize until the moment of birth. This is in line with case law on a gestating person's complete control over health, medical and other decisions involving themselves and the fetus, in accordance with their bodily autonomy.[194]

We note that, in making this recommendation, the issue of qualification (who counts as a spouse or partner) also needs to be addressed. We deal with this issue under the umbrella of conception

[193] See Chapter 6.4.1 for discussion on who qualifies as a partner.
[194] See *Tremblay v Daigle*, [1989] 2 SCR 530.

via sexual relations at Chapter 6.4.1, below. It's recommendations on who qualifies as a spouse or partner would apply here as well.

Proposals for Discussion:

Where a child is conceived via egg, sperm or embryo donation, Nova Scotia's parentage law should deem the spouse or partner (as defined at Chapter 6.4.1) of a birth parent at the time of conception or birth as a parent of the child born.

A parentage law should state that the birth parent's spouse or partner is not a parent if they did not consent to be a parent at the time of conception, or that if they had provided consent, they withdrew it prior to conception.

The law should clarify that the status that accrues to a non-birth parent crystallizes at the moment of birth and does not give the non-birth parent a say over the birth parent's bodily autonomy.

4.4.3 The Status of the Donor

Most Canadian jurisdictions and the *Uniform Act* prevent a donor from being treated as a parent.[195] Section 5 of Ontario's *CLRA* provides an example of a typical approach:

> 5 A person who provides reproductive material or an embryo for use in the conception of a child through assisted reproduction is not, and shall not be recognized in law to be, a parent of the child unless he or she is a parent of the child under this Part.[196]

This clause is meant to stop a sperm or embryo donor from relying on biological testing to establish parentage of a child. Provisions such as this are common internationally as well.[197] This widespread approach is seen to protect the intentions of the parents (in having certainty and family stability) and the donor (who otherwise risks being approached for child support).

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[195] Ont *CLRA, supra* note 29 at s 5(1); BC *FLA*, *supra* note 29 at s 24(1); Alta *FLA*, *supra* note 29 at s 7(4); Nfld *CLA*, *supra* note 32 at s 12(6); PEI *CLA*, *supra* note 29 at 19(4); Que Civil Code, *supra* note 29 at 538.2; Man *FLA, supra* note 29 at s 20; *Uniform Act*, *supra* note 34 at s 6(6); Yk *CLA*, *supra* note 32 at s 13(6); NWT *CLA, supra* note 32 at s 5.1(3).

[196] Ont *CLRA, supra* note 29 at s 5.

[197] Under the American *UPA (2017), supra* note 43 at s 702 and Australia's Victorian territory's *Status of Children Act (1974), supra* note 176 at ss 10D(2)(d) and 11(1)(c) a donor is not a parent of a child conceived by assisted reproduction. New Zealand's *Care of Children Act 1969, supra* note 176 at s 19-25 holds that an ovum or sperm donor is not a parent unless they are also the partner of the birth mother.

While laws like this are common in parentage schemes that address assisted conception, the precise wording has caused problems in the context of disputed parentage. The case of *ML v JC*[198] dealt with a dispute between a man and a lesbian couple after the man provided sperm to both women on the understanding that they would both become pregnant and he would be the parent of one child, and they would parent the other child. When only one woman became pregnant, a dispute arose as to whether the man provided sperm as a donor, or as an intended parent in a surrogacy. Because the statutory requirements for surrogacy were not met, the man was treated as a donor. Under s 5 of the *CLRA* however, he could not be recognized as a parent. This was a problem for the court because he clearly provided genetic material on the understanding that he would be a parent. The court, bound by s 5, had to rely on *parens patriae* jurisdiction to declare the man was a parent *in addition to* the couple. In other words, *ML v JC* demonstrates that laws which prevent donors from claiming parentage can run into trouble when people do not fit cleanly within the box of a "donor".

Interestingly, Saskatchewan's new parentage legislation contains no legislative statement that donors are not parents. This stands in contrast to the recommendations from its Law Reform Commission which noted that:[199]

> [124] Consultees were unanimously of the opinion that donors should not be considered parents and that legislation should provide that donors are not, and cannot be declared to be, parents solely on the basis of the donation. This approach will provide certainty and reflect the intentions of the vast majority of donors and intended parents.

Despite problems in *ML v JC*, Canadian law reform efforts recommend specific laws that prevent a donor from claiming parentage. The British Columbia White Paper on *Family Relations Act* Reform recommended that donors should not be considered parents by virtue of the donation, because as a general rule, "third party donors do not intend to be the child's parents."[200] It was also recommended, however, that a path be established by which a child could have more than two parents, for example, donors along the other intended parents.[201]

Similarly, the Manitoba Law Reform Commission recommended that legislation:

> [S]hould provide that a person who donates human reproductive material or an embryo for the purposes of assisted reproduction other than for the person's own reproductive use

[198] *ML v JC*, *supra* note 57.
[199] Saskatchewan Final Report, *supra* note 35 at para 124.
[200] BC White Paper, *supra* note 37 at 32.
[201] *ibid*.

> is not, by reason only of the donation, a parent of a child born as a result, and may not be declared to be a parent of the child by reason only of the donation.[202]

In summary, there are three arguments in favour of statutorily excluding donors from parentage:

- **Equality:** A clear legislative statement of non-parentage better protects the equal status of donor-conceived families from legal challenge. Donor-conceived families should enjoy equal status to families who conceive via traditional methods, and these laws provide that added level of certainty. This issue becomes particularly important if legislative reforms permit a child to have more than two legal parents (discussed at Chapter 7).

- **Expectations:** The statement of donor non-parentage tracks the expectations and intent of the child's parents and of the donors. Donors and parents are both protected from a change of heart after the child has been born. Exceptional Circumstances: The problem revealed in the *ML* decision may be remedied without eliminating the general statement of donor non-parentage. Truly exceptional circumstances can be dealt with by ensuring that Courts retain a broad discretionary power to order declaratory relief.

- **Harmonization:** A statement of donor non-parentage would harmonize Nova Scotia law with other Canadian and international jurisdictions. This reduces the prospect of reproductive tourism and forum shopping.

On the other hand, as *ML v JC* demonstrates, there are some situations where it is truly not clear if a person provided reproductive material as a donor or as an intended parent. A law that excludes this person from being recognized as a parent is unduly restrictive. On this view, the law should remain silent and any disputes ought to be settled by a judge.

Despite the concerns in *ML v JC*, we propose that parentage laws should contain a clear legislative statement that donors are not parents purely by virtue of their donation. In our view, such a statement would clarify the law and provide certainty to donors and parents on their respective roles and responsibilities. It would also protect families by providing a clear statement that parentage law in the context of assisted reproduction is based on intention, not biology. While there may be cases where a person's status as a donor is called into question, in our view this situation is the exception and not the norm. In cases of true confusion, or where the donor's intention is not clear from context, the parties will be able to seek judicial clarity, either via a declaratory order or via the court's' *parens patriae* jurisdiction. General declaratory and *parens patriae* powers are discussed at Chapter 8.

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[202] Manitoba Issues Paper, *supra* note 36 at 24.

Proposals for Discussion:

Nova Scotia's parentage statute should state that sperm, egg or embryo donors cannot claim parental status purely by virtue of their donation.

Courts should retain discretion to review the parentage of persons who would otherwise be classified as donors in exceptional cases.

4.5 Sperm Donation via Sexual Intercourse

This section considers whether a person can ever be a sperm donor by sexual intercourse – a concept that occurs when parties agree ahead of time that sperm donation will occur via sexual intercourse as opposed to assisted conception.

As explored in more detail below, sperm donation by sexual intercourse creates a challenge for parentage laws. Most jurisdictions divide their parentage laws based on the method of conception: parentage of children born via sexual intercourse is based on biology, while parentage in cases of assisted conception is based on intention. Sperm donation by sexual intercourse blurs this dividing line. We discuss how law should treat situations where the parties have the requisite intention for assisted conception, but the method of conception precludes a consideration of that intent.

4.5.1 Jurisdictional Scan

Nova Scotia parentage laws do not contemplate sperm donation by sexual intercourse – under our laws, a man who has intercourse with a woman is always a father (via presumption or biological connection).

Most Canadian and international jurisdictions do not recognize sperm donation by sexual intercourse. Among other things, this is seen to be necessary in preserving the child's right to child support in cases where conception occurs by sexual intercourse.[203] Sperm donation by sexual intercourse presents a concern to some people who worry that persons will claim they were a donor to avoid responsibilities (such as child support) to a child.[204]

Outside of Canada, various American courts have rejected non-paternity arguments in cases of "natural insemination" generally on one of two grounds: (1) sexually conceiving parents are

[203] Snow, *supra* note 52 at 338.
[204] *Ibid.*

unable to bargain away the rights of their children, or (2) sexual contracts are void as against public policy.[205]

Among Canada's most recently reformed parentage regimes, there is a mixed approach. Manitoba and Prince Edward Island do not recognize sperm donation via sexual intercourse.[206] Ontario, Saskatchewan, and Quebec differ from most jurisdictions, in that they permit sperm donation to happen via sexual intercourse where a written preconception agreement exists. Section 7(4) of the Ontario *CLRA,* for example, states the following:

> 7(4) This section [parentage presumptions as a result of sexual intercourse] is deemed not to apply to a person whose sperm is used to conceive a child through sexual intercourse if, before the child is conceived, the person and the intended birth parent agree in writing that the person does not intend to be a parent of the child.

The Quebec *Civil Code* takes a different approach. Where sperm donation occurs via sexual intercourse as part of a "parental project" the donor may establish filiation (parentage) within the first year of the child's life.[207] Quebec Bill 2 would have changed this rule to provide that a sperm donor via sexual intercourse would only be able to make a claim to filiation if "if the third person who provided his reproductive material through sexual intercourse … was not informed beforehand of the nature of his contribution to the parental project."[208] This reform was not, however, implemented.

There is case law out of Ontario and Quebec which discuss sperm donation by sexual intercourse. All of this case law deals with disputes where the alleged agreement was not reduced to writing.

In Quebec, "parental projects" under the Quebec *Civil Code* do not need to be reduced to writing.[209] In *Droit de la famille – 111729*,[210] the mother of a child had died, and her parents were not able to contradict the man with whom she conceived a child via sexual intercourse's assertion that he was the child's father rather than a sperm donor. There was no evidence that he had expressly limited his claim to that of a genetic contributor. The fact that he had been paid a reward

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[205] For discussion, see Susan Frelich Appleton, "Between the Binaries Exploring the Legal Boundaries of Nonanonymous Sperm Donation" (2015) 49:1 Fam LQ 93 at 108-111, discussing *Ferguson v McKernan*, 940 A.2d 1236, 1246 (Pa. 2007); I*n re Paternity of MF,* 938 NE 2d 1256 (Ind Ct App 2010), and *Marvin v Marvin*, *557* P.2d 106, 112 (Cal 1976).
[206] Man *FMA*, *supra* note 29; PEI *CLA, supra* note 29.
[207] Que Civil Code, *supra* note 29 at Art 538.2
[208] Bill 2 *supra* note 30 at s 93, replacing the text of Art 538.2.
[209] A "parental project" exists "from the moment a person alone decides, or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project." Que Civil Code, *supra* note 29 at Art 538.3.
[210] 2011 QCCA 1180.

for his contribution and did not want to support the child financially did not prevent the recognition of his paternity.[211]

In *R (MR) v M (J)*,[212] the Ontario Superior Court of Justice determined that a sperm donor by sexual intercourse was not a father. However, because the parties' agreement was not in writing, the court could not rely on s 7(4) of the *CLRA*. The case dealt with cross applications made by a birth parent (for child support) and an alleged sperm donor (for a declaration of non-parentage). The birth parent had not been able to conceive via artificial insemination. Prior to conception, she entered an oral agreement with a friend for him to donate sperm via sexual intercourse. *After* the child's birth, the parties signed a contract purporting to confirm the pre-conception agreement that the man would not be child's legal father. The birth parent then brought an application for child support. The Court relied on a general declaratory power in the Act to declare that the donor was not a parent. The Court found that the factors of the case, including the parties' intention and the goals of the *CLRA* weighed in favor of the declaration of non-parentage.

In *EK v NB*, a man claimed that he was a sperm donor by sexual intercourse in response to a claim for child support. The Ontario Court of Justice found there was no merit to his assertion.[213]

> 43 [T]he father had consensual unprotected sexual intercourse with the mother. He was therefore prepared to take the risk that as a result of sexual intercourse the mother could become pregnant regardless of any previous fertility issues. This was not a situation where the mother asked him to be a sperm donor and they agreed or even discussed his obligations if she should become pregnant. This was a typical situation of two consenting adults having unprotected sex and a child being born. I accept the father's statement that he did not want the child but child support is the right of the child and it would be contrary to the spirit, purpose and policy of the legislation for the father to be absolved of his obligation to support his biological child.

Lastly, in *MD v TK*,[214] a biological father sought an order for increased parenting time, while the mother sought a declaration of non-parentage, claiming the applicant was merely a sperm donor. The parties did not have any written agreement, as conception occurred prior to the passage of s 7(4) of Ontario's *CLRA*. The Court undertook a detailed review of written evidence, including a review of text messages and recollections of prior conversations. The court found it had insufficient evidence to reach a decision on the issue. The judge declined to order the declaration of non-parentage, but without prejudice to the mother's ability to make the same argument at a trial.

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[211] *Ibid* at para 62.
[212] *Supra* note 56.
[213] 2018 ONCJ 634.
[214] 2021 ONSC 8514.

Scholarly commentary on sperm donation by sexual intercourse is divided. Marsha Garrison argues that there should be no difference in the legal system based on how a child is conceived because,[215] from a child-centred perspective, the result and interests are the same. Her argument is in line with some US case law finding that parents cannot contract out of their children's rights.[216]

On the other hand, Wanda Wiegers believes there are be good reasons to retain a distinction between conception via sexual intercourse and conception via artificial insemination:[217]

> [T]he "mechanics of conception" may be highly relevant to "relational realities." Holding men responsible in instances of casual sex, may, at least in theory, promote an equal sense of responsibility for the potential consequences of sexual intercourse. By contrast, assisted conception is typically highly planned and deliberate, especially when executed in a clinical setting, and usually indicative of a very high level of responsibility on the part of both donors and intended parents.

Fiona Kelly agrees with the Ontario and Saskatchewan approach to allowing for sperm donation by sexual intercourse. Kelly advocates for treating sexual intercourse as a method of artificial insemination only where there is clear pre-conception intent. She argues that parental provisions contemplating sperm donation via sexual intercourse are "essential" given its prevalence as a method of conception by single women and some lesbian families. Kelly's stance is focused on pre-conception intent, rather than the method of conception:

> Given that conception via intercourse is a reasonably common feature of SMC [single mother by choice] cases, and occasionally present in lesbian couple cases, defining "assisted conception" to include conception via intercourse seems essential. As with conception via donor insemination or IVF, the main issue for the court should be to determine the parties' pre-conception intention. It would therefore be beneficial for legislation to encourage pre-conception written agreements, as the B.C. statute does in relation to "multiple parent" families, discussed below.[218]

Appleton makes a similar argument in favour of the Ontario approach based on the view that if the primary concern is bargaining away a child's rights, there is nothing to distinguish this concern from the pre-conception agreements that exist when assisted conception occurs without sexual intercourse. If discomfort is based in enforcing a contract for sex, she recommends

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[215] Garrison, *supra* note 157 at 888, 895.
[216] *Ferguson v McKieman*, 940 A. 2d 1236 (Pa. 2007) at 1241, discussed in Appleton, *supra* note 205 at 108.
[217] Wiegers, *supra* note 148 at 149.
[218] Kelly: Equal Parents Equal Children, *supra* note 50 at 275.

"consider[ing] a new, more functional examination of intended conceptions, whatever the means of sperm delivery, in search of a more coherent understanding."[219]

4.5.2 Summary of Policy Arguments

In summary, the benefits of recognizing sperm donation that occurs via sexual intercourse are as follows:

- It arguably increases access to justice by aligning the recognition of parentage with the ways that conception occurs in the real world.
- It respects the free and informed choice made by autonomous adults who wish to enter their own private arrangements for the conception of a child, without meddling in the specific methods of conception.
- It prioritizes intent in the conception of children via alternate means, regardless of the method by which that conception occurs.
- It represents the forefront of parentage law.

The drawbacks of allowing for recognizing sperm donation that occurs via sexual intercourse are as follows:

- It arguably prioritizes the contractual interests of intended parents and sperm donors over and above the best interests of the child. From a child-centred view, their parentage is the same regardless of any intent of their parents.
- It imposes contract-like requirement on the parents, in enforcing someone's pre-conception intent even if their feelings and attitudes change after conception or the birth of a child.
- It raises the prospect of sexual exploitation by potential sperm donors and romantic partners who wish to avoid parenting responsibilities.
- Blurs a long tradition of refusing to enforce non-parental agreements from intimate partners.
- Raises moral and public policy concerns about enforcing a sexual contract.

We propose for discussion a parentage law in Nova Scotia should recognize sperm donation by sexual intercourse where a written preconception agreement exists. In our view, this is an important method of conception that is already a reality for some families, including lesbian couples and single women, where they do not want - or cannot afford - the cost of fertility treatments. Recognition would provide clarity and certainty for these families and donors, and stability for the children born of these arrangements.

[219] Appleton, *supra* note 205 at 114.

In order to minimize the potential for abuse or use by people who wish to avoid parental responsibilities, we are of the view that a written preconception agreement should be required before sperm donation via sexual intercourse is recognized. When sexual intercourse is the method of conception, a written pre-conception agreement is essential to ensure who is a donor, and who is a parent.

In order to mitigate the negative impact a writing requirement would have on access to justice for low-income persons, we are of the view that there should be a standard form agreement in the regulations which the donor should sign before donating. These forms should clearly state the impact of signing, in order to minimize chances that people will sign them without understanding their content.

Proposals for Discussion:

Nova Scotia parentage law should recognize that sperm donation may occur via sexual intercourse.

Sperm donation via sexual intercourse should only be recognized where the intended parents and the donor enter a preconception written agreement setting out their intentions.

Regulations should include a standard form agreement to donate sperm via sexual intercourse.

4.5.3 Other Possible Requirements

In order to minimize the possibility that sperm donation by sexual intercourse being used in an exploitive or impulsive way, we may consider additional requirements aside from the presence of a preconception written agreement. For example:

- Parentage laws could prohibit current intimate partners (married partners, common law partners, or other romantic partners) from entering an agreement for sperm donation by sexual intercourse. This would prevent an "other parent" from avoiding child support obligations by having one of these agreements signed as part of an ongoing sexual or romantic relationship. This would require, however, a clear definition of an intimate partner, and a "current" partner, which may be difficult to delineate legislatively.

- Parentage laws could impose a mandatory "cooling off" period (such as 48 hours) between signing an agreement and attempted conception, or the need for independent legal advice before an agreement for sperm donation via sexual intercourse to be recognized. This would permit parties to reflect on their agreement and plan in advance before attempting to conceive.

Both of these restrictions minimize the chance that these agreements are used in an exploitative way. However, by imposing too many qualifications on the concept, we may be creating disputes by crafting situations where parties will fall short of the rule. We therefore ask the questions:

- Should parentage laws prohibit current intimate partners from entering an agreement to donate sperm via sexual intercourse?

- Should parentage laws impose a mandatory cooling-off period or require independent legal advice before recognizing an agreement to donate sperm via sexual intercourse?

Questions for Discussion:

Should parentage laws prohibit current intimate partners from entering an agreement to donate sperm via sexual intercourse?

Should parentage laws impose a mandatory cooling-off period or require independent legal advice before recognizing an agreement to donate sperm via sexual intercourse?

5 Surrogacy

5.1 Introduction

Surrogacy is an arrangement whereby one person (a "surrogate") agrees to become pregnant, gestate, and deliver a baby with the intention of physically and legally surrendering the child after birth to intended parents who will raise the child.[220] There are two types of surrogacy:

- Traditional or partial surrogacy refers to cases where the surrogate has a direct biological link to the child born, because their egg is used to conceive the child.

- In a gestational or full surrogacy, there is no direct biological link between the surrogate and the child.

All gestational surrogacies occur via *in vitro* fertilization in a clinic setting, while traditional surrogacies are more likely to be conducted outside of the clinic setting. Most fertility clinics in Canada – including Nova Scotia's only clinic - do not work with traditional surrogacies.[221]

Surrogacy is relied on by people of all genders, sexual orientations, and family statuses who, for biological, medical or other reasons, are unable to gestate a child.

As outlined in Chapter 2, gestational surrogacy is on the rise in Canada. In 2013, 413 gestational carriers were reported. This number rose to 949 by 2018.[222] Anecdotally, we have heard that traditional surrogacies are less common than gestational surrogacies, although it is more difficult to track because they do not occur in a clinic setting.

5.2 Legislative Framework

The federal *Assisted Human Reproduction Act*[223] (the "AHRA") regulates surrogacy practices in Canada. It prohibits commercial surrogacy (i.e. – paying someone to act as a surrogate) but permits altruistic surrogacy arrangements.[224] Surrogacy must occur via assisted reproductive procedures (i.e. not by sexual intercourse), and the surrogate must carry a fetus that is derived from the genes of a donor or donors.[225]

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[220] Joint Law Commission Report, *supra* note 42 at 1.1, see also *AHRA, supra* note 95 at s 3 "surrogate mother".
[221] Consultation with AART Jan 2022, notes on file with the author.
[222] *Supra* note 122.
[223] *AHRA, supra* note 95.
[224] *Ibid* at s 6.
[225] *Ibid* at s 3 "surrogate mother".

The AHRA specifically allows provinces to make their own rules respecting the validity of surrogacy agreements.[226] Six jurisdictions in Canada have a dedicated legal process for determining parentage in a surrogacy: Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, Prince Edward Island and Nova Scotia.[227] Quebec expressly declares that surrogacy agreements were "null."[228] Northwest Territories has a single provision that eliminates the presumption of parentage which could flow to the spouse or conjugal partner of a surrogate.[229] Newfoundland and Labrador's *Vital Statistics Act* specifically allows for the registration of intended parents to a surrogacy arrangement if a general declaratory order under the *Children's Law Act*[230] is made in favour of intended parents.[231]

The remaining Canadian jurisdictions (New Brunswick, Yukon, and Nunavut) do not contemplate surrogacy. Surrogates and intended parents in these jurisdictions must rely on a combination of general declaratory provisions and the Court's *parens patriae* jurisdiction. These methods of recognition are not comprehensive and can involve considerable expense.[232] They are discussed at Chapter 9, below.

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[226] *AHRA, supra* note 95 at s 6(5).
[227] Ont *CLRA, supra* note 29 at ss 10, 11; BC FLA, *supra* note 29 at s 29; Alta *FLA, supra* note 29 at s 8.2; Sask *CLA, supra* note 29 at s 62; Man *FLA, supra* note 29 at ss 24, 24.1, 24.2; PEI *CLA, supra* note 29 at s 23; Birth Regulations, *supra* note 24 at ss 4 and 5.
[228] Que Civ Code, *supra* note 29 at Art 541; See also: *Adoption-091,* 2009 QCQ 628, [2009] RJQ 445. It's overhaul family law Bill 2, in its original form, would have regulated surrogacy agreements for the first time in Quebec: Bill 2, *supra* note 30 at s 96 (inserting s 541.1 to Que Civil Code) See also: Stefanie Carsley, "Reconceiving Quebec's Laws on Surrogate Motherhood" (2018) 96 The Canadian Bar Review 121 [Carsley: Reconceiving].
[229] NWT *CLA*, *supra* note 32 at s 8(1.3).
[230] Nfld *CLA, supra* note 32.
[231] *Ibid,* at ss. 6, 7; *Vital Statistics Act,* 2009 SNL 2009, c V-6.01, s 5(6).
[232] These general declaratory provisions permit "any interested party" to apply for a declaration that they are a mother or father of a child, which applications are generally aided by proof of a blood or genetic relationship with a child. While this approach assists intended parents to a gestational surrogacy where both intended parents used their reproductive material in conceiving a child, it is limited in its ability to assist non-genetic intended parents or the non-genetic parent in a same-sex relationship. See, for example: *JAW v JEW*, 2010 NBQB 414 where the New Brunswick Court of Queen's bench was asked to assign parentage to intended parents after a gestational surrogacy. The intended parents were a heterosexual married couple, both of whom contributed genetic material to create an embryo. The gestational surrogate was a sister of one of the intended parents. She and her husband supported the transfer of parentage. The Court exercised its authority to declare the intended parents to be the child's parents. In so doing, it noted that the Legislature intended to allow for declarations of parentage based on biological connections, which the intended parents would be able to satisfy (at para 18). While this was helpful to the applicants before the Court, this reasoning could be problematic in cases of same-sex surrogacy, or other situations where one (or both) intended parents lacks a genetic link to the child. See also *M(MA) v M(TA)*, 2015 NBBR 145 for the court relying on a combination of general declaratory powers and *parens patriae* jurisdiction (at para 33).

5.3 Policy Considerations

There are a number of competing policy considerations that infuse all discussions about surrogacy, including the assignment of parentage. Canadian Law Professor and fertility expert Karen Busby summarizes many of these considerations:

> Lawmakers have a myriad of concerns [regarding surrogacy], including the potential for the exploitation of vulnerable women; fears that women and newborns are being trafficked or that international adoption protocols are being circumvented; moral objections to a practice that may commodify human bodies; religious objections to the use of ARTs; and beliefs that only heterosexual married couples are competent parents. … More recently, law reformers in some countries where surrogacy is practised have tried to balance concerns supporting restrictions with the utility of quick decision making related to parentage, asserting that the latter most fully respects both the "best interest of the child" principle and the personal autonomy of both surrogate mothers and intended parents.[233]

Many surrogacy laws are driven by protectionist concerns focused on the exploitation and commodification of women and children. These laws are underpinned by a belief that surrogates and children need to be protected from (1) unscrupulous intended parents, (2) human traffickers who will sell a surrogate's body and the children born with little regard for their health, wellbeing, or interests, and (3) the own unknown emotional connection they will develop with the child during gestation.[234]

Concerns about exploitation and commodification are most poignant in the context of commercial surrogacy, which is illegal in Canada. There is speculation, however, that commercial surrogacies still occur in Canada, and that altruistic surrogacies do not fully mitigate these concerns. Internationally, concerns about exploitation and commodification are heightened, especially where intended parents from developed countries rely on surrogates in developing countries. In these situations, there have been reports of surrogacy arrangements that are clearly exploitive and/or involve human trafficking.[235] In this regard, it is noteworthy that Canadian intended parents form part of this international surrogacy marketplace.[236] Wherever it occurs, opponents believe that surrogacy creates a market in which parentage is transferred for money, and that women are selling "their" babies (particularly in the case of traditional surrogacy). These concerns

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[233] Karen Busby, "Of Surrogate Mother Born: Parentage Determinations in Canada and Elsewhere" (2013) 25 Can J Women & L 284 at 285.
[234] For a more detailed overview of these stances, see Joint Law Commission Report, *supra* note 42 at 2.45-2.64.
[235] UN Report on Sale of Children, *supra* note 142 at para 29.
[236] *Ibid* at para 14.

drive calls for stringent judicial oversight of all surrogacies, and for vesting the surrogate with parentage on birth.[237]

On the other hand, there is also a growing movement for the law to better reflect the intentions, experiences, and expectations of parties to a surrogacy arrangement. These advocates focus on consent and bodily autonomy, and argue that surrogacy laws should facilitate the safe and respectful recognition of parentage in accordance with the parties' intentions. Some advocates focus on the paternalistic slant of existing surrogacy laws which treat women as being unable to provide consent or make decisions for themselves.[238] Other advocates note, for example, that while existing surrogacy laws tend to imagine surrogates as vulnerable to exploitation, motivated by financial gain, and psychologically damaged by relinquishing the child to intended parents, social science research paints a much more heterogenous picture of their motivations and experiences (at least in Canada).[239] In this regard, there is an argument that clear and efficient domestic surrogacy laws will lead to fewer international surrogacies, where concerns about exploitation and commodification are heightened.[240] Essentially, the arguments under this heading is that most surrogacy arrangements proceed according to plan, and that the law should protect against exceptions to the rule, but not be modelled on it.

As of writing this report, there have been four reported cases in Canada where the parties to a surrogacy arrangement disagreed on parentage.[241] There are, however, more cases out of the United States,[242] and some media/anecdotal reports of disputes within surrogacy arrangements in Canada.[243] Moreover, and in contrast to the dominant characterization of surrogacy disputes,

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[237] UN Report on Sale of Children, *supra* note 142.
[238] Joint Law Commission Report, *supra* note 42 at 2.66-2.67, citing L M Purdy, "A Response to Dodds and Jones" (1989) 3 *Bioethics* 40, 41 and L B Andrews, "Surrogate Motherhood: The Challenge for Feminists" (1988) 16 *Law, Medicine & Health Care* 72, 75.
[239] Angela Campbell, "Law's Suppositions about Surrogacy Against the Backdrop of Social Science" (2011) 43 Ottawa L Rev 29 at 32. While recognizing the limits of researching a self-selected and small group of women, surrogates identify several psychological and emotional benefits that exist alongside the prospect of financial benefit. Evidence also counters some narratives about the power imbalance that exists between surrogate and intended parent(s) (at 35-44). See also: Karen Busby & Delaney Vun, "Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers" (2010) 26:1 Can J Fam L 13.
[240] New Zealand 2022 Report, *supra* note 41 at 3.96-3.103; 9.2, 9.3
[241] *ML v JC*, *supra* note 57; *W(HL) v T(JC)* 2005 BCSC 1679; *H(DW) v R(DJ)*, *supra* note 49, aff'd on appeal 2013 ABCA 240; *KB v MSB*, 2021 BCSC 1283.
[242] For an overview of some American caselaw, read Roxanne Mykitiuk, "Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies" (2001) 39:4 Osgoode Hall LJ 771. See also *Cook v Harding*, 190 F Supp 3d 921 (CD Cal 2016), discussed in Christine Overall "Whose Child is This? 'Surrogacy', Authority and Responsibility" in Vanessa Gruben, Alana Cattapan and Angela Cameron, eds, *Surrogacy Law in Canada* (Toronto: Irwin Law, 2018) 29.
[243] See for example, Cynthia Vukets, "Surrogate Mother's Nightmare", *Toronto Star* (9 September 2011), online: https://www.thestar.com/ news/canada/2011/09/09/surrogate_mothers_nightmare.html, Tom Blackwell, "Couple Urged Surrogate Mother to Abort Fetus Because of Defect", *National Post* (6 October 2010), online: <news.nationalpost.com/holy-post/couple-urged-surrogate-mother-to-abort- fetus-because-of-defect>.

we have also been anecdotally told that when surrogacy agreements fall apart, it is the intended parents who are more likely to have a change of heart, not surrogates.

Cross-jurisdictional issues overlay all of these competing policy considerations. Formal and informal interjurisdictional surrogacy networks have developed around the globe. Anecdotally, for example, we have been told that Nova Scotia has emerged as destination for intended parents from France. Any surrogacy regime we recommend must be cognizant of this international dynamic, and balance the needs for safety and access, knowing that an overly stringent regime will drive intended parents to other, perhaps less scrupulous, jurisdictions.

Against this backdrop, there have been a number of law reform efforts within Canada and internationally that have been driven by a desire to change how to recognize parentage via surrogacy. Recent legislative reforms in Ontario, British Columbia, Saskatchewan, Manitoba, Quebec, certain American states, and law reform commission reports in the United Kingdom, New Zealand and (to a lesser extent) the Victorian territory of Australia share a desire to facilitate recognition of the parties' intentions, while safeguarding the interests of vulnerable parties.

5.4 Nova Scotia's Approach

Nova Scotia has legislation that addresses parentage in a surrogacy. Section 5 of the Birth Regulations permits a judge of the Supreme Court of Nova Scotia (Family Division) to make a declaratory order on the parentage of a child born via surrogacy. It states:

> 5(2) On application by the intended parents in a surrogacy arrangement, the court may make a declaratory order with respect to the parentage of the child if all of the following apply:
>
> (a) the surrogacy arrangement was initiated by the intended parents;
>
> (b) the surrogacy arrangement was planned before conception;
>
> (c) the woman who is to carry and give birth to the child does not intend to be the child's parent;
>
> (d) the intended parents intend to be the child's parents;
>
> (e) one of the intended parents has a genetic link to the child.[244]

Academic Stefanie Carsley has conducted extensive research and interviews on the topic of Canadian surrogacy disputes in her forthcoming PhD thesis (Stefanie Carsley, *Surrogate Motherhood in Canada: Exploring Lawyers' Practices and Perspectives* (DCL Thesis, McGill University, Faculty of Law, 2018) [unpublished]). Carsley briefly discusses this research in Carsley: Reconceiving, *supra* note 228 at 140.

[244] Birth Regulations, *supra* note 24 at s 5(2).

Outside of legislative requirements, Nova Scotia's only fertility clinic voluntarily complies with the Professional Code of Conduct on Third Party Reproduction provided by the Canadian Fertility and Androgyny Society (the "CFAS"). This Code recommends:

- All individuals involved in surrogacy and their partners have legal counsel prior to treatment;
- All parties have a comprehensive [written] surrogacy agreement in place prior to treatment;
- Clinics receive clearance letters from both lawyers involved confirming that a surrogacy agreement has been completed before treatment commences;
- Gestational carriers sign informed consent forms;
- Gestational carriers undergo comprehensive medical, obstetrical and social screening to determine eligibility and are counselled on risks of surrogacy and pregnancy generally;
- Gestational carriers be treated as an independent patient;
- All parties obtain separate and group implications counselling before treatment commences. This includes an inquiry into possible financial or emotional coercion of the surrogate.[245]

These rules would be imposed on all surrogacies carried out at Nova Scotia's fertility clinic, and all other CFAS member fertility clinics in Canada.

5.5 Jurisdictional Scan

Given the legal and policy concerns at play, no dominant approach to recognize parentage in the case of surrogacy has emerged, either in Canada or internationally. There are, however, a collection of approaches that have gained traction in Canada and around the world. Below, we have grouped these approaches into three models. We also set out Quebec's recent legislative proposal on regulating surrogacy. This proposal was not ultimately passed, and surrogacy agreements remain null in that province.

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[245] Canadian Fertility and Andrology Society, "Guidelines for Third Party Reproduction" (April 2016) online: https://cfas.ca/_Library/clinical_practice_guidelines/Third-Party-Procreation-AMENDED-.pdf [CFAS Guidelines]. For details on the content of implications counselling, see: Canadian Fertility and Andrology Society, Counselling Special interest Group, "Assisted Human Reproduction Counselling Guidelines" (2009) online: https://cfas.ca/_Library/clinical_practice_guidelines/CSIG_Counselling_Practice_Guidelines_August_2009_.pdf at 23.
Atlantic Assisted Reproductive Technologies, "Gestational Carrier and Intended Parent Information" online:< https://static1.squarespace.com/static/5fb58782cebfa2506e167002/t/62151dec1a0f1d714877f89b/1645551084439/AART+DOC+CLIN004+Gestational+Carrier+%26+Intended+Parent+Information-HC_20220202.pdf> [AART Practices]. Note that the Atlantic Assisted Reproductive Therapies Clinic uses different terminology than this report. Rather than using the term "surrogate", they use the term "gestational carrier" which denotes the fact that this clinic does not work with traditional surrogacies.

5.5.1 The Judicial Model

Under this model, parentage laws at birth remain unchanged: the woman who gives birth to the child is the mother and her husband, if any, is the presumed father. The intended parents are not parents. Sometime after the child is born, parentage is transferred by a judge from the surrogate to the intended parents. Statutory requirements must be satisfied before a judge may make such an order.

Nova Scotia currently uses this model.[246] In our province, if a child is born via surrogacy, the surrogate is the child's mother, and she is treated accordingly at the hospital. For example, the IWK Health Centre has a protocol on surrogate births, which requires the birthing physician to record the surrogate as the parent on birth, treats the surrogate alone as the child's legal guardian, seeks the surrogate's consent for medical treatment of the newborn, and gives the surrogate the choice to leave the hospital with the newborn. In the event a newborn dies or is stillborn, the surrogate is listed as the parent, and the other parent space is left blank unless one of the intended parents is a biological parent.[247]

At some point after birth, the intended parents make a court application, and, provided the statutory criteria are met (see s 5(2) above) a judge may issue a declaratory order stating that the intended parents are the child's parents, and that the surrogate is not.

Anecdotally, a fertility lawyer in Nova Scotia estimated that they undertook this process approximately 12 times a year, and that the transfer is completed 3-6 weeks after the child is born. In this lawyer's experience, the applications are not typically refused. Case law from other jurisdictions, however, demonstrates how the judicial transfer model could erect unexpected hurdles in practice. *CPB v LMB*[248] arose under Saskatchewan's predecessor legislation. The surrogate was a gestational carrier of an embryo for a same sex married couple. The embryo was created using sperm from one of the intended parents and an unidentified egg donor. The intended parents and surrogate consented to the application. Nonetheless, the presiding judge refused to transfer parentage until it received evidence that (1) the surrogacy agreement was altruistic, (2) the respondents received independent legal advice before consenting to the application, (3) a discrepancy on the child's birth registration was explained, (4) the status of the unidentified egg donor was explained, (5) the applicants explained why the application was brought outside the district in which the parties reside, and (6) notice was given to the Registrar of Vital Statistics. While the Court acknowledged that none of these stipulations were specifically

[246] Birth Regulations, *supra* note 24 at s 5.
[247] IWK Health Centre, "Surrogate Mothers and Intended Parents" Number 151 (Administrative Manual Policy/Protocols) (5 Dec 2018) online: < http://policy.nshealth.ca/Site_Published/IWK/document_render.aspx?documentRender.IdType=6&documentRender.GenericField=&documentRender.Id=71495>
[248] 2019 SKQB 306.

required by the legislation, it justified a cautious approach because "the court must take special care where children's interests are at stake."[249]

Alberta and the *Uniform Act* currently use a judicial model, as well.[250] Manitoba has a hybrid model which requires a judicial declaration to transfer parentage, but otherwise bears similarity to the sharing model (discussed below).[251]

Several international jurisdictions, including the United Kingdom and Australia, currently use the judicial model. Under the United Kingdom's current *HFEA 2008*, a parental order must be made by a judge between the time that a child is 6 weeks – 6 months of age. Intended parents must satisfy domicile, genetic connection, age, consent, and relationship requirements, and demonstrate that the child is living with the intended parents at the time of the application. The application will only be made if it is in the child's best interests.[252]

In Australia, the Victorian Law Reform Commissions recommended that a surrogate be treated as a child's parent on birth, and that this parentage not be transferred until the child is at least 28 days old,[253] all of which is reflected in that territory's child status legislation.[254] In the Australian Capital Territory, parentage legislation does not allow parentage to be transferred from a child born in a surrogacy arrangement (substitute parent agreement) until the child is 6 weeks old.[255]

5.5.2 Sharing Model

A second model, which we dub the "sharing model" has been gaining traction in Canada and around the world. British Columbia, Ontario, Saskatchewan, Manitoba, and Prince Edward Island all use some form of the sharing model. Most recently, the New Zealand Law Reform Commission has recently recommended a version of this model.[256]

Under a sharing model, when a child is born via surrogate, at the moment of birth the surrogate and intended parents share parenting rights and responsibilities.[257] At some point after the child is born - which ranges from immediately (British Columbia and Prince Edward Island), two days (Manitoba), three days (Saskatchewan) and seven days post-birth (in Ontario and recommended

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[249] *Ibid,* at para 38.
[250] Alta *FLA, supra* note 29 at s 8.2(5) and (6); *Uniform Act, supra* note 34 at 8(2).
[251] Man *FMA, supra* note 29 at s 24.1(1).
[252] Joint Law Commission Report, *supra* note 42 at Chapter 5.
[253] Victorian Final Report, *supra* note 40 at 16.
[254] *Status of Children Act* 1974, *supra* note 176 at s 20(2).
[255] Australian Capital Territory, *Parentage Act 2004* (ACT), (1/2004) at s 25(3).
[256] New Zealand 2022 Report, *supra* note 41 at 20-21 (Recommendations 17-24).
[257] Man *FMA, supra* note 29 at 24(6); Ont *CLRA, supra* note 29 at 10(5) ; PEI *CLA, supra* note 29 at s 23(2)(b); Sask *CLA, supra* note 29 at s 62(5).

in New Zealand) the surrogate provides written consent relinquishing her parentage.[258] From that point on (with the exception of Manitoba) only the intended parents are the parents of the child.

It is worth emphasizing that judges are not a mandatory part of the sharing model. Where statutory criteria are satisfied, parentage is recognized administratively via the exchange of written documents between the surrogate and the intended parents, satisfaction of which is declared on registering the child's birth. [259] Judges only become involved if a dispute arises, or if statutory criteria are not satisfied. Manitoba is an exception to this rule, as it requires a judicial declaration after the sharing window has passed.[260]

The exact statutory criteria to satisfy varies slightly by jurisdiction. In Ontario, for example, the surrogate and the intended parents must enter into a written pre-conception surrogacy agreement; all parties must receive independent legal advice before entering the agreement; there must be no more than four intended parents; and the child must be conceived through assisted reproduction.[261] Saskatchewan's approach is similar, but does not address the number of intended parents to a surrogacy.[262] Prince Edward Island requires the parties sign a statutory declaration confirming that the written agreement has been entered into, and independent legal advice obtained.[263] In New Zealand's proposal, prior to conception the surrogacy must have been approved by an ethics oversight body, which approval requires a written surrogacy agreement, counselling and a surrogacy report (which is essentially a child welfare check) by their Ministry for Children.[264]

Surrogacies that fail to satisfy these criteria cannot proceed via the sharing model. In those cases, the process would require a judicial declaration, which in practice, would look similar to the judicial model above.

5.5.3 Intended Parent Model

A third regime, which we call the intended parent model - recognizes only the intended parents as parents on birth. There are two versions of this model.

- In the United States, gestational surrogacy contracts can be used to eliminate the surrogate's parental status before birth. It is not available for traditional surrogacies.

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[258] BC *FLA, supra* note 29 at s 29(3)(b); PEI *CLA, supra* note 29 at s 23(2)(b); Manitoba *FMA, supra* note 29 at s 24.1(2); Sask *CLA, supra* note 29 at s 62(4); Ont *CLRA, supra* note 29 at s 10(4).
[259] General, RRO 1990, Reg 1094 s 2(11.2). Form available here: https://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/FormDetail?OpenForm&ACT=RDR&TAB=PROFILE%20&SRCH=1&ENV=WWE&TIT=11333&NO=007-11333E
[260] Man *FMA, supra* note 29 at s 23.1
[261] Ont *CLRA, supra* note 29 at s 10(2), 10(3).
[262] Sask *CLA, supra* note 29 at s 62.
[263] PEI *CLA, supra* note 29 at s 23(2)(c).
[264] New Zealand 2022 Report, *supra* note 41 at 17-18 (Recommendations 5, 6 and 8).

- The New Zealand Law Reform Commission and the Joint Law Commission Report have considered a path by which intended parents can be recognized as the only parents on birth (but not prenatally). Under this approach, surrogates are not parents on birth, but are given a postnatal window to object to the child's parentage.

To start with the U.S. example, under the American *Uniform Parentage Act (2017)* a gestational surrogate can relinquish their parental rights prior to a child's birth.[265] This means that, when the child is born, it is only the intended parents' child, and the surrogate is not a parent. In order to transfer parentage prenatally, detailed rules must be followed. Among other things, before the contract is signed all parties must have medical examinations, mental health evaluations and independent legal representation.[266] The contract must be witnessed and/or notarized, and cover a number of matters on parentage, financial responsibility, bodily autonomy, health insurance,[267] and relinquishment of parentals status from the surrogate and their spouse, if any.[268] It is only available in gestational surrogacies. Several U.S. states have implemented variations of the *UPA (2017)* approach.[269] For example, in California, parties to a gestational surrogacy contract can bring a court application before a child is born and a court may order that intended parents are the child's only parents on birth.[270]

The other version of this model is in not currently in force but has been provisionally recommended in the Joint Law Commission Report (a collaboration between the Law Commission of England and Wales and the Scottish Law Reform Commission). Their "new pathway" would permit the intended parents to be the only parents on birth, but would be subject to a surrogate exercising a right to object during a defined period following birth (one week shorter than the period in which a child's birth must be registered in the country – either England, Wales or Scotland - where the pathway exists).[271] If the surrogate exercises her right to object during this period, the surrogacy exits the new pathway and parentage must be determined by a judge.

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[265] *UPA (2017)*, *supra* note 43 at ss 804, 809. If it is a traditional surrogacy, parentage can contractually still vest in the intended parents pre-birth, but the surrogate is given 72 hours post-birth to terminate the agreement, at which point parentage is determined in accordance with non-surrogacy rules (s 814, 815).
[266] *Ibid* at s 802.
[267] *Ibid* at s 803, 804.
[268] *Ibid.*
[269] For a list of states which have enacted or adopted versions of the *UPA 2017,* see: Uniform Law Commission, *Parentage Ac*t, online: https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f>. The Uniform Law Commission reports that a version (or substantially similar version) of the *UPA (2017)* has been enacted in California, Vermont, Washington, Rhode Island, Colorado, Connecticut and Maine. Versions have been introduced in Pennsylvania, Hawaii, and Massachusetts (as of publication).
[270] Cal. Fam. Code § 7962
[271] Joint Law Commission Report, *supra* note 42 at 8.2-8.7.

Accessing the new pathway would require the parties satisfy several preconception criteria, including a detailed written surrogacy agreement,[272] implications counselling, independent legal advice, and a criminal record check.[273] This is in addition to the general restrictions on surrogacy, which includes domicile requirements, an attestation as to the child's home, and the entering of personal data into a national register.[274]

The New Zealand Law Reform Commission has also considered the intended parent model on two occasions. In 2005, it recommended an intended parent model in which a pre-birth court order transferred parentage on an interim basis to intended parents alone, but was subject to a 21-day post-birth period in which the surrogate may apply to overturn the order. This interim status would be finalized by a judge after the 21-day window had passed, so long as the surrogate did not file an objection and the court received evidence of a genetic connection between the child and at least one intended parent.[275] Access to this stream would require a written pre-conception agreement, implications counselling (including the surrogate's spouse or partner),[276] and independent legal advice for all parties.[277] At least one intended parent must have a genetic link to the child born. While this model was open to both gestational and traditional surrogacies, New Zealand's ethics regulator required pre-conception approval for all in vitro fertilization (IVF) procedures – so all gestational surrogacies would also have received preconception ethics approval.

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[272] The surrogacy agreement must record the following: (1) the details of those involved in the surrogacy arrangement: the intended parents and the surrogate, and the clinic or regulated surrogacy organisation; (2) whose genetic material is being used, including that of any donor (that is not the intended parents or the surrogate); (3) confirmation that genetic and gestational parenthood will be recorded in the national register of surrogacy; (4) confirmation that a welfare of the child assessment has been completed and no significant concerns about welfare have been raised; (5) confirmation that the parties have fulfilled the eligibility and screening requirements; and (6) confirmation that the procedural safeguards have been met, including the provision of information about the implications of entering into the agreement with respect to the effect on the legal parenthood of the child (known as implications counselling); (7) a statement that, on the child's birth, the intended parents will be the child's legal parents and that they intend that the child born of the arrangement shall live with them,6 and that both the surrogate and her spouse or civil partner will not be legal parents, but that the surrogate will have, for a limited period, the right to object to the acquisition of legal parenthood by the intended parents. (Joint Law Commission Report, *supra* note 42 at 8.8). The regulated surrogacy organization or clinic would be required to keep a copy of these agreements (Joint Law Commission Report, *supra* note 42 at 8.12).

[273] Joint Law Commission Report, *supra* note 42 at Chapter 13.

[274] *Ibid* at 12.15, 12.34, 12.115-12.117.

[275] New Zealand 2005 Report, *supra* note 41 at xxvi.

[276] *Ibid* at 7.73.

[277] *Ibid* at xxvi, 7.73: The surrogate mother must be over 18 years and has already had one child herself; the child would be the genetic child of at least one of the intending parents (gestational surrogacy); the only money that will pass between the parties is for "reasonable and necessary expenses" incurred in the pregnancy; the intending parents and surrogate mother have had separate and joint counselling; and the surrogate mother and her partner have entered into the arrangement voluntarily and have given their unconditional consent to the making of the order, having had independent legal advice and having a full understanding of what is involved.

This reform was not implemented, and in 2022 it revisited the recommendation.[278] As a result of consultations, it recommended a shared parenting model similar to the Ontario model (discussed above).[279] It is noteworthy that, during the course of these consultations New Zealand's oversight body on Assisted Reproductive Technology, its Ministry of Children, its Office of the Children's Commissioner, and its family court judges all favoured an intended parent model.[280]

5.5.4 Quebec's (Unimplemented) Proposal

Surrogacy agreements in Quebec are "null" – they have no legal force. Recently, there was attempt to change this via Bill 2 – a large piece of family law legislation that sought to regulate parentage via surrogacy. While the surrogacy and filiation provisions of Bill 2 were dropped at the last minute, it took an interesting approach to surrogacy that contained elements of all three models above. Its foundation was a written pre-conception surrogacy agreement, which required pre-conception psychosocial counselling.[281] Once intended parents and potential surrogate signed the agreement, the intended parents assumed all financial responsibility and obligations towards the child,[282] and the intended parents could not terminate the agreement.

When the child was born, the child was entrusted to the intended parents unless the surrogate objected.[283] Between 7 and 30 days after the child was born, the surrogate would provide post-birth consent waiving her filiation over the child,[284] which would be accompanied by a notarial act *en minute*, or given in front of two witnesses with no interest in the parental project, at which point the intended parents would be deemed to be the child's parents.[285]

The child's birth would then be declared to the registrar of vital statistics. Up to the point of providing that consent, the surrogate could unilaterally terminate the agreement – meaning they would not have to give the child to the intended parents.[286] If they did not provide consent, parentage would be determined under the non-assisted reproduction parentage rules (the woman who gives birth is the mother) but not in relation to the surrogate's spouse.[287] If the legislative requirements were not satisfied, a judge could still make a declaration of parentage but the streamlined regime could not be used.[288] In cases where the surrogate was not domiciled in Quebec, additional government approvals must be obtained.

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[278] *Ibid* at 6.99.
[279] *Ibid* at 194 (Recommendations 18-23), 6.109-6.112.
[280] *Ibid* at 6.50-54.
[281] Bill 2, *supra* note 30 at cl 96 adding Arts 541.10-12.
[282] *Ibid* at cl 96 adding Arts 541.8, 541.9.
[283] *Ibid* at cl 96 adding Art 541.13.
[284] *Ibid* at cl 96 adding Arts 541.8, 541.14.
[285] *Ibid* at cl 96 adding Arts 541.4, 541.8, 541.15.
[286] *Ibid* at cl 96 adding Arts 541.8, 541.9.
[287] *Ibid* at cl 96 adding Art 541.16.
[288] *Ibid* at cl 96 adding Art 541.21.

5.6 Comparison of Models

Each of these models take a different approach to timing – when safeguards must be satisfied, and when intended parents are recognized. As a general rule, the fewer requirements that exist for intended parents at the preconception stage, the greater obstacles must be satisfied after birth (and vice versa):

- Under the judicial model, there are relatively few obligations at the preconception stage other than the existence of a surrogacy agreement. Once the child is born, however, the intended parents are not recognized. There must be a postnatal court application in order to be recognized.
- Under the sharing model, there are more requirements at the preconception stage (at a minimum - a written agreement preceded by independent legal advice). The intended parents are recognized alongside the surrogate on birth, and their status is exclusive in the days following, after the surrogate provides consent. There is no judge necessarily involved.
- Under the intended parent model, only the intended parents are recognized on birth. At the pre-conception stage, however, there are the most onerous obligations, including written agreements, possible judicial approval (New Zealand's 2005 proposal), independent legal advice, and implications counselling.

This can be explained by the view that, the more work done at the "front end", the less oversight is needed at the "back end", because we have more confidence that the parties are not exploited, the child's rights are protected, and parties' intentions will remain intact.

With that said, the following section considers the benefits and drawbacks of the judicial, sharing, and intended parent models. It is worth emphasizing at the outset that these models are not packages carved in stone. As Quebec's proposal demonstrates, it is possible to pick and choose different ideas to craft a bespoke legislative response.

5.6.1 Judicial Model

The drafters of the *Uniform Act* argued that treating the surrogate as the only parent at birth provides "stability for the child", "complies with the requirement in Article 7(1) of the UN *Convention on the Rights of the Child* that a child has a right to a name, nationality and to know his or her parents from birth", and is "consistent with the treatment of mothers both historically in the common law and in the civil law, and under existing Vital Statistics legislation."[289] They also argued that this model ensures a child has a present legal parent at birth in case the child requires emergency medical treatment.[290]

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[289] *Uniform Act*, *supra* note 34 at 8.
[290] *Ibid* at 17.

The Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material made recommendations that would support the judicial model. They recommended that a surrogate mother should retain parentage on birth and that "in all parentage and parental responsibility decisions involving a surrogacy arrangement, a court or competent authority makes a post-birth best interests of the child determination, which should be the paramount consideration."[291]

Other advocates argue that the judicial model is needed to protect the surrogate's mental and physical health. There are several strands of this argument. Some argue that during pregnancy, a special relationship develops between the fetus and the mother which cannot be anticipated pre-conception. The law should protect this relationship over the interests of intended parents, or else risk causing severe psychological harm to the surrogate.[292]

Others, such as Karen Busby, argue that vesting the surrogate alone with parentage protects her pre- and post-natal health by giving her control and leverage in a potentially unequal bargaining relationship. Allocating parentage to a surrogate alone encourages a good relationship between the intended parents and the surrogate throughout the pregnancy as the surrogate retains control over the process.[293]

Lastly, on philosophical grounds it has been argued that given the surrogate's physical contribution to the development and delivery of a child, the surrogate is properly viewed as the child's only parent on birth.[294]

There are, however, many arguments against the judicial model. First, the current model places children at risk insofar as intended parents bear no legal responsibility for the child. Intended parents who change their minds can simply decline to make a judicial application, and leave the surrogate in the role of legal parent. This "deliberate measure designed to discourage people from entering into surrogacy agreements"[295] places an unfair risk on surrogates. There is a strong argument that intended parents should bear the responsibility of raising the child or placing it for adoption.[296] The Quebec government relied on this concern in defending its proposal to overhaul surrogacy laws in that Province.[297]

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[291] UN Report on Sale of Children, *supra* note 142 at 77(e).
[292] Joint Law Commission Report, *supra* note 42 at 7.48, citing *Re G (Residence: Same-Sex Partner)* [2006] UKHL 43, [2006] 4 All ER 241 at para 34; Victorian Final Report, *supra* note 40 at 189.
[293] Busby, *supra* note 233 at 303, 313.
[294] Overall, *supra* note 242.
[295] Joint Law Commission Report, *supra* note 42 at 7.51, quoting G Douglas, "The Intention to be a Parent and the Making of Mothers" (1994) 57 *Modern Law Review* 636, 637.
[296] Carsley: Reconceiving, *supra* note 228 at 138.
[297] Caroline Plant, "Quebec Introduces Family Law Reform, Would Regulate Surrogate Motherhood" *Global News* (21 Oct 2021) online: < https://globalnews.ca/news/8287568/quebec-family-law-reform-surrogate-motherhood/>.

It may also be argued that the judicial model is discriminatory. 2SLGBTQIA+ persons, and persons with reproductive challenges rely more heavily on surrogacy. To the extent that they are not recognized as a parent of their child on birth, there is an argument that the law discriminates against them.

The judicial model has also been attacked as solidifying the exact opposite of the parties' intentions. In this regard, surrogates interviewed as part of a news story expressed discomfort with surrogacy laws treating them as legal parents, for example: "I was choosing to become a surrogate to help someone else have a family and help them have a child, and I was done with my own family and having my own children. Being listed on the birth certificate felt wrong morally and ethically just because she's not our child."[298] Advocates who oppose the judicial model argue that the law should protect against exceptional circumstances, but not be modelled on it.

Mandatory judicial applications also create access to justice problems. The post-birth judicial transfer of parentage comes after what is, for most parties, a lengthy and extremely expensive process (Canadian estimates range from $60,000-$85,000+ for gestational surrogacy).[299] Placing a legal application at the end of this process may exhaust already depleted financial resources. We have heard from one Nova Scotian fertility lawyer this judicial application costs approximately $1,200.[300] While this figure is not a large amount in terms of legal fees, in the context of a years' long process, this makes surrogacy more difficult for lower income people to access, and exacerbates already existing financial inequalities in access to fertility services. The additional cost also raises the potential that intended parents will make parentage applications without the assistance of legal counsel.[301]

Another argument against the judicial model focuses on scarce judicial resources. It may be argued that it is not wise or appropriate to spend judicial time reviewing cases where the surrogate and the intended parents are in agreement and their intentions have remained unchanged. Some people we spoke with believed it is not appropriate for judges to "screen" intended parents in a way that is not imposed on other parents at birth. In addition, it may be argued that "rubber-stamp" judicial applications do not actually provide the oversight that its proponents advance.

Lastly, the judicial model prolongs the amount of time that a child's parental status is in flux both in terms of bringing an application, and in facing the prospect that the judge will deny the application.[302] This raises uncertainty and stress for all parties. Drawing out the transfer of

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[298] Blunt, *supra* note 51.
[299] These estimates come from surrogacy matching services, for example: Canadian Surrogacy Community, *Costs of Surrogacy* online: < https://surrogacycommunity.ca/costs-of-surrogacy/>.
[300] Estimate provided by a fertility lawyer on our Advisory Group (Jan 2022).
[301] See, for example: *N(BA) v H(J),* 2008 BCSC 808 at para 2; *AWM v TNS*, 2014 ONSC 5420 at para 3.
[302] See, for example: *Adoption-091,* 2009 QCCQ 628, [2009] RJQ 445.

parentage is mentally and physically taxing on the child's parents, and creates uncertainty for that child's life.

In summary, the arguments in favour of a judicial model are as follows:

- Ensures the child has a legal parent present and identifiable on birth. If the child needs a parent immediately after birth (for example, if the child requires medical care) a parent is there to provide consent.
- Allows a court to inquire into the child's best interests.
- Minimizes risk of fraud (people using surrogacy procedure to avoid adoption process).
- Complies with Article 7 of United Nations *Convention on the Rights of the Child*.
- Equalizes power imbalances between intended parents and surrogates.
- Protects against potential that the surrogate's health will be overlooked and deprioritized.
- Protects fetal-maternal bonding.
- Protects against exploitation of women, commodification of women and children, and the covert use of illegal surrogacy contracts for profit.
- Provides recognition to the physical and emotional contribution of gestating a child.

Arguments against the judicial model are as follows:

- Places all risk on surrogate. If the intended parents change their mind, the surrogate is left as the child's legal parent and must proceed accordingly (i.e. she must decide whether to raise the child, place the child for adoption, or possibly attend court to attempt to transfer parentage notwithstanding the intended parents' objection).
- Potentially discriminates against marginalized and/or disadvantaged groups that must rely on surrogacy.
- Exacerbates an already expensive and uncertain process.
- Worsens financial inequities in access to fertility services.
- Is not in alignment with party intention.
- Inserts a judge into a private arrangement.
- Takes up scarce judicial resources.
- Prolongs the amount of time that the child's status is uncertain.

5.6.2 The Sharing Model

The sharing model attempts to locate a compromise between the competing interests at play in a surrogacy. It purports to offer access to justice, equality, practicality, and harmonization.

Ontario's parentage model was promoted as something that would "…[p]rovide greater clarity and certainty for parents who use assisted reproduction…provide a streamlined process for the legal

recognition of parents who use a surrogate" and "reduce the need for parents who use assisted reproduction to have to go to court to have their parental status recognized in law."[303]

Before recommending a similar model, the Saskatchewan Law Reform Commission summarized the feedback it received on parentage via surrogacy. Most of its consultees favoured a system that recognized the surrogate's status as a parent until birth, but that relinquished or transferred parentage administratively once the child was born. The Ontario model was viewed as the best way to protect the surrogate's prenatal autonomy, while reducing unnecessary costs.[304]

New Zealand's law reform commission defended the sharing model on the basis that it provided the quickest path to have status determined, best ensured the surrogate's consent, and avoided unnecessary judicial oversight.[305]

On the issue of access to justice, the sharing model typically does not require judicial intervention unless a dispute arises or the statutory requirements are not satisfied. This meets a growing sentiment that judicial oversight should not be required in cases where all parties are in agreement and legal formalities have been met.[306] Judicial oversight makes determination of a child's status more expensive, prolonged and uncertain. An administrative system such as the sharing model reduces these negative features, which promotes a quicker and less expensive resolution of parentage.

This model also more closely adheres to the principle of intention. It lets parties make their own agreements without the prospect of judicial interference hovering over them. While there remains some uncertainty (what if the surrogate does not provide post-birth consent to relinquish parentage?), by and large the uncertainty comes from the parties themselves, rather than external actors.

By treating both the surrogate and intended parents as parents on birth, the regime complies with article 7 of the UN *Convention on the Rights of the Child* requirement that a child have a parent on birth. By giving the surrogate the final say in the transfer of parentage, this regime also helps to protect the surrogates physical and mental health.

On the grounds of equality, as this regime may be more often used by members of the 2SLGBTQIA+ community and persons with reproductive disabilities, access to an administrative scheme helps to promote their equal right to parentage. These intended parents should not be obligated to convince a judge they are the parents of their own child.

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[303] Snow, *supra* note 52.
[304] Saskatchewan Final Report, *supra* note 35 at paras 219-222.
[305] New Zealand 2022 Report, *supra* note 41 at 6.98-.99
[306] Manitoba Issues Paper, *supra* note 36 at 36; Saskatchewan Final Report, *supra* note 35 at para 220.

Lastly, this model can also be defended on the basis of harmonization – several Canadian provinces (Ontario, Saskatchewan, Prince Edward Island, British Columbia) have moved towards a sharing model.[307] Manitoba has also moved in this direction, although it retains judicial oversight.[308]

On the other hand, some Canadian fertility lawyers have criticized the sharing model. These criticisms are primarily focused on the removal of judicial oversight. Michelle Flowerday, for example, has argued that "It is in the best interests of children to have some judicial oversight when a child's legal parentage is at issue". [309] Fertility lawyer Sara Cohen echoes this view, but only in the context of traditional surrogacies: "We had a situation where judicial oversight stopped a lot of fraud in the traditional surrogacy context, and we had growing legitimacy in gestational surrogacy…One day we will look back on this [removal of judicial oversight] with regret. How could we let court oversight of the agreement and preconception concerns go?"[310] Cohen prefers the model that is in place in Illinois, in which intended parents are only recognized on birth where the surrogacy is gestational.[311]

Cohen's concerns about private traditional surrogacies played out in a court proceeding currently proceeding through British Columbia's courts. British Columbia uses a sharing model, where the surrogate can provide written consent relinquishing parentage immediately after birth. It also treats traditional and gestational surrogacies the same. The case of *KB v MSB*[312] represents a worst-case scenario of what can happen when all external points of contact (whether from lawyers, judges, or medical professionals) are removed in a traditional surrogacy. At the time of writing this report, it was not conclusively resolved on the issue of parentage.

The reported case is an interim application brought by an alleged surrogate to resume contact with a now 4-year-old child, as against the child's recognized parents. The fact pattern is complicated. The child's recognized parents are a heterosexual married couple who were unable to conceive naturally or via assisted reproductive technologies. According to them, they retained a friend to act as a surrogate, and the parties signed a written agreement (without independent

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[307] Ont *CLRA, supra* note 29 at s 10; Sask *CLA, supra* note 29 at s 62; PEI CLA, *supra* note 29 at s 23; BC *FLA, supra* note 29 at s 29.
[308] Man *FLA, supra* note 29 at s 24.1.
[309] Law Times, "Focus: Surrogacy law goes backward, say lawyers" (27 February 2017) *Law Times* online: https://www.lawtimesnews.com/news/legal-analysis/focus-surrogacy-law-goes-backward-say-lawyers/262434.
[310] *Ibid.*
[311] There, intended parents are recognized as the only parents on birth without a necessary court application where the following criteria are satisfied: the surrogacy is gestational; the surrogate has had at least one child already and is at least 21 years old; the surrogate undergoes preconception medical and mental health evaluations; the child born is genetically related to at least one of the intended parents; a doctor completes a form stating that there is a medial need for a gestational surrogacy; all parties receive independent legal advice. Illinois has no system to recognize parentage in a traditional surrogacy outside of adoption (750 ILCS 47/1 – 47/75).
[312] *KB v MSB*, 2021 BCSC 1283 (CanLII)

legal advice) setting out their intentions.[313] After an attempt at gestational surrogacy failed, the surrogate was then, according to them, inseminated at home (outside of a clinic setting) via artificial insemination as part of a traditional surrogacy. According to the alleged surrogate, she never signed a written agreement regarding the surrogacy.[314] She also alleges that she was having an ongoing sexual relationship with the husband and the child was conceived via sexual intercourse.[315] Once the child was born, the alleged surrogate acknowledges signing a piece of paper in the hospital, but that she didn't read it and was only generally aware that it allowed the child to go home with the intended parents.[316] Several weeks later, she signed a statutory declaration as to the intended parents' parentage, but argued that she only signed it because she understood it was needed for the child to get healthcare coverage.[317]

So long as the written preconception agreement is authentic, the fact-pattern leading to this dispute falls within the rules for British Columbia's sharing model. It can be argued that, by removing all external points of contact (judges, lawyers, and medical professionals) the sharing model removes too much oversight, particularly in the context of traditional surrogacies.

Another drawback of the sharing model is that the addition of more shared parents creates more space for disagreement. It may be difficult for medical professionals, for example, to determine who has the right to consent to certain treatment where there are multiple parties who can call themselves parent.

The sharing model also does not meet the concerns about risk allocation. Under it, if the intended parents disappear, the surrogate cannot give them her consent to relinquish parentage. In that case, the surrogate is left in the role of legal parent.

5.6.3 Intended Parent Model

The intended parent model can be defended on the grounds of risk allocation, intention, reflecting reality, and child protection.

According to the Joint Law Commission Report, the Intended Parent model is preferable for three reasons. First, it allocates legal responsibility for the child with the intended parents. By making the surrogate's post-birth consent presumptive, there is no possibility for the intended parents to simply change their mind and leave the surrogate to care for the child. The Joint Law Commission Report explained this rationale:

> We emphasise that unless the surrogate objects, the intended parents will *as a matter of law* be the legal parents of the surrogate-born child. There is no

[313] *Ibid,* at para 13.
[314] *Ibid.*
[315] *Ibid* at paras 16-17.
[316] *Ibid* at para 19.
[317] *Ibid* at paras 20-23.

> possibility within the new pathway that the intended parents could change their mind. This approach provides an important safeguard to the surrogate and the child. It ensures that she can never be required to take legal responsibility for the child, and that the intended parents can never "reject" the child. If the intended parents do not want, or are not able, to care for the child …then the responsibility lies with them as legal parents to make arrangements.[318]

Second, it aligns the law with the way surrogacy arrangements proceed in the vast majority of cases. Rather than designing the law for the exception, it is preferable to fashion the law to meet the reality within which most surrogacies play out (while allowing for deviations to the general rule).[319]

Third, this approach avoids additional administrative steps for the vast majority of surrogacies, and it allows the intended parents to proceed confidently as the child's parents absent a notice of objection. As such, this approach is more efficient, cost-effective, and less stressful for the parties.

Lastly, advocates for this model note that it most closely tracks the parties' intentions. All the parties to a surrogacy arrangement intend for the intended parents to parent the child and law reform should reflect this reality. Surrogacy laws should better reflect this intention by assigning that status from birth. If there are concerns about the surrogate's changed intention, they can be assuaged by giving the surrogate a post-birth window to object.

There are, however, several arguments against the intended parent model. These focus on harmonization, exploitation, certainty, human rights, and unintended consequences. On the issue of harmonization, at present, no system in Canada automatically recognizes the intended parents as the child's only parents from the moment of birth.[320] If Nova Scotia followed this approach, it may encourage forum shopping and reproductive tourism.

There are also concerns about exploitation of a surrogate. By failing to give the surrogate parental status at birth, we remove a legal mechanism that was thought to equalize bargaining power between the parties, protect the surrogate's rights, and mitigate the surrogate's vulnerability to exploitation, bullying, or other maltreatment.[321]

On the point of certainty, the New Zealand Law Reform Commission noted that the surrogate's window to object is generally longer than the positive consent model at the heart of the sharing model (for example, a 7-day window under Ontario's sharing model vs a several week window to

[318] Joint Law Commission Report, *supra* note 42 at 8.24.
[319] *Ibid* at 8.25.
[320] Saskatchewan Final Report, *supra* note 35 at para 156.
[321] Busby, *supra* note 233 at 303-304.

object proposed by the Joint Law Commission Report).[322] This long window for the surrogate to object undermines the certainty offered by the intended parent model.

There may also be constitutional or human rights considerations that come into play. For the surrogate, there are concerns about her bodily autonomy and constitutional rights. A surrogate's constitutional right to be a parent has not been addressed in a court. There are indications, however, that her status may attract constitutional protection. In *H(DW) v R(DJ),*[323] the court was faced with an alleged surrogacy arrangement between a woman (the alleged surrogate) and a same-sex couple (the intended parents). When the intended parents separated post-birth, the genetic parent and the surrogate sought to deny access to the non-genetic parent. The non-genetic parent argued that the fact that his parentage wasn't automatically recognized over the surrogate's constituted discrimination in violation of s 15(1) of the *Charter*. The Court disagreed:

> 56 ...[T]he *FLA* does not discriminate against gay intended parents by failing to automatically "force" a birth mother to relinquish a child to intended gay parents by operation of law. ...
>
> 59 Moreover, I accept the argument put forth by the Intervener that any legislated forced relinquishment of parental status by the birth mother would fly in the face of various laws enacted to ensure the best interests of the child, to say nothing of the negative effect upon women's autonomy.

Separately, in *G(J),*[324] the Supreme Court of Canada held that s 7 of the *Charter* was engaged in relation to state determinations of one's status as parent. On this basis, there may be *Charter* concerns if a surrogate gives birth to a child and the state declares she is not a parent.

By denying the surrogate a parental status, we may also be transgressing international human rights obligations. Because the surrogate is the only person who physically must be present at the birth of a child, providing them with parental status at birth is the most foolproof way to guarantee a child has a name, nationality and right to know and be cared for by their parents from birth, as demanded by the UN *Convention on Rights of the Child.*[325] As well, the surrogate will be able to make medical decisions on birth if the intended parents are unable to be present.

Lastly, recognizing only the intended parents on birth may have unintended consequences insofar as they relate to the newborn healthcare and provincial health coverage. In Nova Scotia, for example, it is not uncommon for a Nova Scotian surrogate to give birth to a child for intended parents who are not Nova Scotian residents. If they are the child's only parent on birth, the child

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[322] New Zealand 2022 Report, *supra* note 41 at 6.46, 6.111; Joint Law Commission Report *supra* note 42 at 8.2-8.7, 8.34; Ont *CLRA, supra* note 29 at s 10(4).
[323] *H(DW) v R(DJ), supra* note 49.
[324] [1999] 3 SCR 46.
[325] UN CRC, *supra* note 98 at Art 7.

may not qualify for MSI coverage in the event that it needs emergency health case or a stay in a Neonatal Intensive Care Unit, for example.

5.7 Proposal for Discussion: A Tiered Approach

The discussion above reveals a considerable state of uncertainty regarding the best way to recognize parentage of surrogate-born children. On the one hand, there is a strong incentive to facilitate recognition and bring the law in line with the reality that most surrogacies go according to plan. On the other hand, there are valid concerns about fraud, uncertainty, and the exploitation of children and surrogates. The concerns are particularly amplified in private, traditional surrogacy arrangements where neither the surrogate nor the intended parents have necessarily interacted with a lawyer, doctor, counsellor, or other external party. On top of this, we also must consider the existing surrogacy systems and expectations in Nova Scotia, and recommend reforms that are capable of being implemented with relative ease.

We do not believe that it is possible to navigate these concerns with a one-size-fits-all approach. We are of the view that an administrative process is best where possible, and judicial involvement ought to be reserved for a subset of surrogacies where additional clarity is needed. The administrative process should be an option for parties who have fulfilled certain pre-conception steps that protect against the concerns outlined above. Additional scrutiny should only be needed where we need clarity on the surrogacy and the parties' informed consent.

Therefore, we propose for discussion a tiered approach to parentage in cases of surrogacy. Under our tiered model, each of the intended parent, shared, and judicial models are available depending on the pre-conception steps taken by the parties:

- If the intended parents and surrogate satisfy three foundational pre-conception criteria: (1) entering into a preconception written agreement, (2) obtaining implications counselling, and (3) obtaining independent legal advice, the parties may proceed via the intended parent model. This is the case whether the surrogacy is traditional or gestational in nature.

- If the parties missed one of these three criteria, but the surrogacy is gestational in nature, then the sharing model is available. By necessity, gestational surrogacies take place in fertility clinics and are facilitated by medical professionals. Nova Scotia's clinic mandates many procedures which are similar enough to the three foundational pre-conception criteria, such that minor non-compliance should not, by necessity, require judicial involvement. However, without full compliance with these preconception criteria, we require active post-birth consent by the surrogate in order for parentage to vest in the intended parents alone.

- Where one or more of the foundational pre-conception criteria is missing, and the surrogacy is traditional, then the parties must proceed via the judicial route. In such cases, judicial oversight is needed to ensure the surrogacy is authentic, the parties are protected

from exploitation and the child's interests are protected. The judicial model is also available as a catch-all any time a dispute arises, or in the event the sharing or intended parent model's requirements are not satisfied (in terms of surrogate consent or objection).

In our view, a tiered approach is best able to meet the competing policy considerations and nature of agreements. The intended parent model is available to all surrogacies where the parties have satisfied the three foundational preconception safeguards. These safeguards provide sufficient protections such that we can be comfortable that, absent an objection by the surrogate within a defined window, parentage ought to flow from the parties' preconception stated intentions.

We also note that these criteria are already a practical requirement for the vast majority of surrogacies that take place in Canadian fertility clinics. As such, they do not impose additional costs over and above what is, as a practical matter, already a reality. Where one of those criteria is missing, however, these parties are not necessarily routed to a judge. Instead, we can rely on the on the safeguards imposed by fertility clinics to permit intended parents to be recognized, alongside the surrogate, at birth. In order to ensure the surrogate fully understands what is happening, she is required to provide positive consent post-birth, rather than being able to rely on her "passive consent" (failure to raise an objection). Where, however, the surrogacy is traditional in nature, we have no way to ensure her consent or to protect her and the child from exploitation or trafficking. In these cases, judicial oversight is required.

We are aware that there are trade-offs under this approach. To some, our proposal may move too far towards recognizing intended parents, at the expensive of the rights, health and wellbeing of the surrogate and the child born. A model which does not recognize the surrogate's parentage on birth may be seen as disregarding surrogate rights and out-of-step with the foundation of parentage law. It may also raise *Charter* concerns. In response, we emphasize that this route is meant to recognize the reality that most surrogacy agreements proceed according to plan. Where those plans change, there is a path by which the surrogate alone may exit the intended parent tier and take things to a judge. It also protects a surrogate by allocating the risks and responsibilities of parentage on the intended parents – the surrogate cannot be saddled with these responsibilities without raising an objection and proceeding to a judge. We are also of the view that the window of time with which the surrogate may object to her lack of parentage would satisfy any *Charter* concerns about the surrogate's status. We also note that, as part of consultations, we intend to consult with surrogates themselves to solicit their views before reaching final recommendations.

For others, this regime may not go far enough in that some parties (ie., to private traditional surrogacies) must proceed via the judicial route. This imposes a cost and uncertainty on families who are may already be lower-income and relying on more economical methods of surrogacy, and introduces barriers to access to justice that other parties do not face. In response to this, we note that the intended parent model is available to all surrogacies, whether traditional or gestational in nature, so long as the three foundational pre-conception criteria are satisfied.

In order to encourage parties to proceed via this route, we propose for discussion that standard form surrogacy agreements be made available in the regulations, which include references to the

need for both implications counselling and independent legal advice. We also propose for discussion that public legal education and support be provided to self-represented parties to mitigate the access to justice problems that could come from mandating judicial oversight for some traditional surrogacies.

The tiered-model can also be criticized from a harmonization perspective. No other Canadian jurisdiction has an intended parent model, and our particular approach is novel. In response, we note the lack of a uniform approach in Canada and the quickly evolving nature of parentage via surrogacy. Had Bill 2's surrogacy provisions passed, it would have represented a novel approach, and we note that British Columbia's Law Institute is currently in the process of re-evaluating its parentage laws as well. In short, harmonization is not likely to exist so long as we are following trends rather than staying abreast of the most current thinking.

We also are not convinced that concerns about reproductive tourism should change our proposal at this time. Despite significant changes to our regime, international intended parents who wish to take advantage of lenient surrogacy regimes are still more likely to travel to the United States, where their rights are contractually guaranteed preconception.

This proposed tiered model may also be criticized on the basis that imposes a distinction between traditional and gestational surrogacies, which is novel in Canada. In response to this, we note that under our proposal both traditional and gestational surrogacies may access the intended parent model by having a written agreement, and obtaining independent legal advice and implications counselling. Where one of these safeguards is not present, gestational surrogacies by have built in safeguards (by virtue of their clinic setting) which effectively meet the concerns which those preconception criteria are meant to assess. As the *KB v MSB* case demonstrates, however, traditional surrogacies undertaken outside of the clinic setting that have no contact with any external party have few safeguards.[326] In practice, they can raise considerable confusion, uncertainty and the potential exploitation of surrogates which requires external oversight.

Lastly, some may also argue that our approach is too complex, and has too many options to bring clarity to the law. In response, we note that the tiered model effectively creates a system similar to what is seen in other jurisdictions: an administrative path for most surrogacies, and a judicial path where external oversight is merited. Our proposed model merely gives parties an extra opportunity to avoid the judicial path where external safeguards indicate it is not needed.

Proposals For Discussion:

Nova Scotia should implement a tiered approach to recognize parentage of children born via surrogacy:

[326] See *KB v MSB, supra* note 312 at paras 8-23, in which the only external point of contact came weeks after the child's birth where the alleged surrogate signed a statutory declaration in front of a notary.

- Where the parties have a preconception written agreement and have obtained preconception implications counselling and independent legal advice, the intended parents should be recognized as the child's only parents on birth, subject to the surrogate objecting to this during a specified post-birth window.

- Where one of a preconception written agreement, implications counselling and independent legal advice are not satisfied, but the surrogacy is gestational, the intended parents and surrogate ought to share parenting rights and responsibilities until the surrogate provides post-birth confirmation of their intention not to be a parent of the child born.

- Where one of a preconception written agreement, implications counselling and independent legal advice are not satisfied and the surrogacy is traditional, the intended parents and surrogate must have parentage transferred from the surrogate to the intended parents by a judicial declaration post-birth.

In any case where a dispute arises, the intended parents and surrogate must have parentage determined by a judge after the child is born.

Standard form surrogacy agreements should be provided in regulations to a parentage law.

Public legal education should be provided to self-represented parties who are having parentage determined by a judge.

5.8 Tier One: Intended Parent

This section digs more deeply into our proposed first tier: intended parents being recognized as the only parents on birth. It begins by taking a closer look at the three foundational requirements that form the heart of this tier: the written preconception surrogacy agreement, implications counselling, and independent legal advice. It concludes by examining the surrogate's post-birth window to object to parentage.

5.8.1 A Written Agreement

Preconception agreements are built into the definition of surrogate and surrogacy.[327] We have proposed that, in order for the intended parents to be the sole parents recognized at birth, this

[327] For example: *AHRA, supra* note 95 at s 3 surrogate mother is "a female person who — with the intention of surrendering the child at birth to a donor or another person — carries an embryo or foetus that was conceived by means of an assisted reproduction procedure and derived from the genes of a donor or donors"; BC *FLA supra* note 29 at s 29(2): a surrogate is a birth mother who is party to a written agreement in which, prior to conception, she agrees with intended parent(s) to be the birth mother of a child conceived via assisted reproduction in which, on the child's birth, she will not be a parent of the

agreement must be in writing. At present, Nova Scotia law does not require surrogacy arrangements to be in writing. Canada's other judicial models (Alberta and the *Uniform Act* model) also do not impose a writing requirement on their surrogacy agreements.

While Nova Scotia has no legal requirement that surrogacy agreements be written, in practice they are common. Nova Scotia's only fertility clinic requires a written agreement signed by all parties.[328] Similar requirements would exist for all fertility clinics are members of the Canadian Fertility and Andrology Society. [329]

Jurisdictions with administrative methods of recognition have uniformly imposed writing requirements. This includes Canadian sharing model jurisdictions, Quebec's proposal in Bill 2,[330] and international jurisdictions. The Joint Law Commission Report, and the New Zealand Law Reform Commission's 2022 proposals both require written pre-conception agreements in order to access their recommended administrative models.[331]

There are many rationales for requiring pre-conception surrogacy agreements to be in writing. First, it minimizes conflict. A writing requirement does not guarantee a conflict-free surrogacy, but helps the parties fully process the implications of their decision, the range of possible outcomes, and the risks involved. In other words, the act of writing down an agreement allows the parties to more fully address the "what ifs" that may not come up on a verbal agreement.[332]

Second, insofar as a written agreement can avoid a contentious and expensive legal dispute, it also makes the law more certain, transparent, and affordable. Third, given that most fertility clinics in Canada already require written agreements, imposing this requirement brings the law in line with widespread practice, and does not impose new hurdles for most intended parents. Lastly, it is a

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child, will relinquish the child to the intended parent(s), and the intended parent(s) will be the child's parent(s); Ont *CLRA, supra* note 29 at s 1(1)): a surrogate is "a person who agrees to carry a child conceived through assisted reproduction if, at the time of conception, the person intends to relinquish entitlement to parentage of the child, once born, to one or more persons." (Ont *CLRA, supra* note 29 at s 1(1)).

[328] AART Practices, *supra* note 245 at 2.

[329] CFAS Guidelines, *supra* note 245 at 12.

[330] Bill 2, *supra* note 30 at Cl 96, modifying Art 541.11.

[331] New Zealand 2022 Report, *supra* note 41 at 5.43-47 (See Recommendation 8). This requirement is built into their ethics oversight process, only surrogacies that moved through this process were eligible for administrative recognition; Joint Law Commission Report, *supra* note 42 at 8.7-8.12.

[332] *ML v JC*, *supra* note 57 at para 54: "These "what ifs" would likely have been addressed had the parties received legal advice from a lawyer knowledgeable about surrogacy agreements, hence the requirement for independent legal advice under the new amendments. Examples of essential terms include (but are not limited to): (a) What would the parties do if Samantha did not become pregnant and Jane did (as transpired here)? (b) What would they do if only Samantha became pregnant and Jane did not? (c) What would they do if one of the women carried twins? Triplets? (d) What if there was a miscarriage? (e) What if a baby died at birth? (f) What if, in light of genetic testing or for other reasons, one party wished to terminate the pregnancy and the other did not."

protective mechanism against fraud and the potential that parties will use surrogacy laws as a mechanism to circumvent adoption.

On the other hand, requiring written agreements creates a new hurdle for traditional surrogacies. Because traditional surrogacies do not take place in a clinic setting, they may not be written down. It is arguably unfair to demand these parties write down what they have already agreed to do. In the absence of a dispute, the parties to the surrogacy should not be denied recognition of their parentage because of the form of their agreement. This poses an access to justice problem. Traditional surrogacy tends to be a less costly option. Writing requirements impose costs on lower income intended parents, while facilitating recognition for families with money.

Despite these concerns, we propose for discussion that a surrogacy agreement should be in writing in order to access the Intended Parent Tier. Under this model, only the intended parents are recognized on birth. At a bare minimum, there should be a concrete record demonstrating that the parties understood what they were agreeing to. In addition, this written agreement will minimize the chance of disputes and protects against fraud – both of which are in the child's interests. While this requirement imposes an additional burden on traditional surrogacies, in order to minimize costs and encourage parties to enter written preconception agreements, we have proposed for discussion that standard form surrogacy agreements be included in regulations. We also note that agreements that are not reduced to writing are not illegal, but require a separate path for recognition.

Proposal for Discussion:

In order to access the Intended Parent Tier, the partis must have a written preconception agreement.

5.8.2 Independent Legal Advice

Nova Scotia does not currently require that surrogacy agreements be preceded by independent legal advice. Neither does the judicial model in Alberta, nor the *Uniform Act*.

By contrast, most administrative model jurisdictions (Ontario, Manitoba, Prince Edward Island, and Saskatchewan) require all parties obtain independent legal advice before entering into a surrogacy agreement.[333] Quebec's proposed surrogacy law would not have imposed an independent legal advice requirement, but required all surrogacy agreements be recorded by a

[333] Ont *CLRA*, *supra* note 29 at s 10(2), 11(1); PEI *CLA*, *supra* note 29 at s 23(1)(c)(ii); Sask *CLA*, *supra* note 29 at 62(2)(b); Man *FMA*, *supra* note 29 at s 24(5).

notarial act *en minute*.[334] In contrast, British Columbia's administrative model does not require the surrogacy agreement to be preceded by independent legal advice.[335]

Many international jurisdictions require the parties to obtain independent legal advice. The American *Uniform Parentage Act (2017)* requires surrogacy contracts be preceded by independent legal representation for all parties.[336] Both of the New Zealand Law Reform Commission's 2005 and 2022 recommended models require independent legal advice for all parties,[337] as does the model proposed by the Joint Law Commission Report.[338] In Australia, the *Assisted Reproductive Technologies Act* requires parties to obtain independent legal advice.[339] The government of New South Wales has a surrogacy regime that exists on similar terms.[340]

The arguments in favour of requiring independent legal advice focus on informed consent, clarity and avoiding potential exploitation. Lawyers providing independent legal advice can assess whether their client understands the agreement, their rights, and the implications of signing. They can also assess whether the client is subject to duress, undue influence, and determine if their participation in the agreement is voluntary.[341] All of this strengthens the reliability of the preconception surrogacy agreement. It helps ensure that the parties fully understand the legal implications of their decision to participate in a surrogacy arrangement, and that they have considered the contingencies that may arise in a surrogacy. It also provides an opportunity for a professional to assess capacity of the parties, any potential power imbalances, and screen for any human trafficking concerns.

On the other hand, independent legal advice imposes additional financial barriers on intended parents. It also slows the surrogacy process, and adds more red tape to an already burdensome process. It also may be argued that it is overprotective. Surrogacy is typically arrived at after a long, thoughtful, and intentional process to bring a child into the world. Surrogates and intended parents are arguably already well aware of the legal impacts of their decisions, and should be able to collectively waive such a requirement.

There is also a concern that there aren't enough fertility lawyers in Nova Scotia to meaningfully provide independent legal advice. Lastly, there is a concern that independent legal advice is merely window dressing. In this regard, independent legal advice likely cannot prevent unfair or

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[334] Bill 2, *supra* note 30 at 541.10
[335] BC *FLA*, *supra* note 29 at s 29.
[336] *UPA (2017)*, *supra* note 43 at s 802.
[337] New Zealand 2005 Report, *supra* note 41 at 7.73; New Zealand 2022 Report, *supra* note 41 at 4.11, 6.113.
[338] Joint Commission Law Report, *supra* note 42 at 9.6, 13.49-13.65.
[339] *Assisted Reproductive Treatment Act (2008), supra* note 129 at ss 43, 40.
[340] *Surrogacy Act 2010* (NSW) at s 36 (2010/102).
[341] We note that, in cases of fraud or other illegal situations, the Code of Professional Conduct would require a lawyer to not assist in any fraud or illegal conduct (Nova Scotia Barristers' Society, *Code of Professional Conduct* (2011) Rule 3.2-7).

unequal surrogacy agreements. All it does is ensure the parties receive advice prior to signing – what parties do with that advice is up to them.

We propose for discussion that, in order for intended parents to be the only parents recognized on birth, the surrogate and intended parents should be required to obtain independent legal advice before entering into a written preconception agreement.

Free and informed consent is the pillar of surrogacy arrangements, and independent legal advice is a critical tool to ensure this consent exists. It is also useful to mitigate the chance of exploitation, fraud, and power imbalances. While we acknowledge this creates a financial barrier to parentage, given that surrogates in this Tier have no presumptive parental status on birth, the need to ensure their free and informed consent (and awareness of their window to object to parentage after birth) outweigh this concern. We also note that parties who do not obtain independent legal advice may still transfer parentage in a surrogacy, but not via this expedited path.

Proposal for Discussion:

In order to access the Intended Parent Tier, surrogates and intended parents must obtain independent legal advice prior to signing a pre-conception surrogacy agreement.

5.8.3 Implications Counselling

Implications counselling requirements are unusual in Canadian parentage law. Aside from Quebec's proposal, which would have required all surrogacy agreements to be preceded by counselling for the surrogate and the intended parents,[342] no other Canadian parentage law makes implication counselling a requirement. Implications counselling is, however, a practical reality for most surrogacies in Canada. Canadian CFAS fertility clinics, including Nova Scotia's only clinic, will not perform a surrogacy-related procedure until all parties have undergone group and individual implications counselling.[343]

Internationally, implications counselling is a common feature of surrogacy laws. The American *Uniform Parentage Act (2017)* requires surrogacy contracts be preceded by mental health evaluations for all parties.[344] Both of the New Zealand Law Reform Commission's 2005 and 2022 reports recommended that parties undergo joint and individual counselling.[345] The model proposed by the Joint Law Commission Report also requires implications counselling for all

[342] Bill 2, *supra* note 30 at 541.10.
[343] AART Practices, *supra* note 245 at 2; CFAS Guidelines, *supra* note 245.
[344] *UPA (2017)*, *supra* note 43 at s 802.
[345] New Zealand 2005 Report, *supra* note 41 at 7.73; New Zealand 2022 Report, *supra* note 41 at 10, Recommendation 9.

parties.[346] In Australia, the *Assisted Reproductive Technologies Act* requires parties to a surrogacy to undergo pre-conception counselling prior to conception, as does legislation in the Australian Capital Region and New South Wales.[347]

Implications counselling helps ensure that the parties process the emotional and psychological implications of their decision to participate in a surrogacy arrangement. It requires the parties to have conversations they may not otherwise have on their own, and helps ensure that everyone involved in the surrogacy is on the same page. In so doing, it strengthens relationships and minimizes the chances of conflict, which is in everyone's (including the child's) interests. It also bolsters confidence that the surrogacy agreement was entered with free and informed consent.

On the other hand, it could be argued that implications counselling is insulting or even discriminatory to intended parents. People become parents every day in our province without having to undergo counselling. Just because some people are unable to gestate a fetus does not mean they need to be somehow "screened" in order to be parents. It is also a financial and practical burden for intended parents, as they may lack the money to obtain counselling. In addition, given the shortage of mental health professionals in our province, requiring counselling may impose further delay and logistical problems for the parties.

We propose for discussion that, in order to access the Intended Parent Tier, intended parents and surrogates be required to obtain implications counselling prior to entering their surrogacy agreement. Ideally, the parties should obtain both individual and joint implications counselling. While we acknowledge the objections to this requirement, given that the surrogate has no parental status on birth, it is essential that the surrogate understands (at a legal, psychological and emotional level) the implications of undergoing surrogacy. It is also necessary for the intended parents to psychologically process their undertaking. This protective measure minimizes the chance of disputes, and bolsters our ability to rely on the surrogacy agreement as indicative of the parties intentions. Again, failure to satisfy this criteria just means that parentage will be assigned through either the shared or judicial tiers.

Proposal for Discussion:

In order to access the Intended Parent Tier, surrogates and intended parents must obtain implications counselling prior to signing a pre-conception surrogacy agreement.

[346] Joint Commission Law Report, *supra* note 42 at 9.6.
[347] *Assisted Reproductive Treatment Act (2008), supra* note 129 at ss 3, 40; *Parentage Act 2004, supra* note 340 at ss 24-26; *Surrogacy Act 2010* (NSW), (2010/102) s 35.

5.8.4 An Independent Oversight Body?

Both the Joint Law Commission Report and the New Zealand Law Reform Commission's proposed models include external oversight bodies. The bodies (regulated surrogacies organizations overseen by a central regulator in the Joint Law Commission Report, and an independent ethics board to receive individual applications in New Zealand) provide pre-conception screening and approval of surrogacies. Without obtaining approval from these bodies, surrogacies cannot access their proposed administrative parentage schemes. [348]

The benefits of an independent oversight body relate to protection and control. These bodies can ensure that the parties have complied with enhanced preconception requirements that are in place to permit access to their and are proceeding in alignment with legal standards, and address concerns about address concerns about exploitation and fraud. For traditional surrogacies in particular, it ensures that the parties make contact with an external body before conception, thus providing additional comfort that concerns about unethical surrogacy are absent, while providing access to the administrative regime.

The drawbacks of having an independent oversight body relate to necessity, delay, efficiency, and practicality. Fertility clinics already have a number of legal, physical and psychological screening mechanisms that must be satisfied before they attempt a surrogacy related procedure. While private traditional surrogacies fall outside this pre-existing screening, this is a practical reality that remains in the New Zealand Law Reform Commission and Joint Law Commission proposals. For example, the Joint Law Reform Commission recommended that traditional surrogacies be regulated via surrogacy organizations (organizations that "match" surrogates and intended parents who, in turn, report to a central regulator). They acknowledge, however that many if not most traditional surrogacies do not proceed through these organizations.[349] In short, there is no way to compel private traditional surrogacies to proceed through an external oversight process.

Second, external bodies likely introduce delay into surrogacy. In this regard, New Zealand's oversight body has been criticized as introducing significant delay (as a result of inadequate resourcing) that has been partially blamed for pushed people go overseas for surrogacy. [350]

In terms of effectiveness, the oversight body may be an inefficient and costly system that spends much of its time reviewing the lowest risk surrogacy agreements. This is because private traditional surrogacies (which are often seen as presenting the most ethically complex scenarios as well as the highest potential for fraud) cannot be compelled to proceed to a regulator. Instead, the oversight body will spend much of its time reviewing surrogacies that are already "captured" by some other form of external oversight (for example, gestational surrogacies proceeding

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[348]Joint Law Commission Report, *supra* note 42 at 9.6. See all of Chapter 9 for detail on their proposed regulatory scheme.
[349] *Ibid* at 9.30-9.37.
[350] New Zealand 2022 Report, *supra* note 41 at 4.22, 4.27-4.29, 4.38, 4.39, 4.58-4.61, 4.73-4.74.

through fertility clinics, or traditional surrogacy arrangements that are using lawyers who will direct them through the oversight process.

Lastly, on the basis of practicality, it may simply be impractical to require the creation of an oversight body where one does not already exist before reforming surrogacy laws in Nova Scotia.

We do not propose for discussion that an external oversight body be built into Nova Scotia's parentage law. Medical, and legal screening is already a practical reality for gestational surrogacies. Adding an external body on top of this would introduce further bureaucracy to these surrogacies. While private traditional surrogacies can fall outside these screening mechanisms, we have mandated external contact with lawyers (via independent legal advice) and counsellors (via implications counselling) in order to access the Intended Parent Tier. Where contact with these parties are absent, traditional surrogacies must transfer parentage post-birth judicially.

In addition, and as a practical matter, we are seeking legal reforms that are capable of being implemented with relative ease. The creation of a specialized oversight body may sound appealing if such a body already existed, but in the absence of such a body, we are concerned that this recommendation would stall much-needed reforms to surrogacy law.

Proposal for Discussion:

Nova Scotia should not require parties to a surrogacy to obtain approval for the surrogacy from an independent regulatory body in order to access the Intended Parent Tier.

5.8.5 Window to Object

This section considers the post-birth period with which a surrogate has a right to object to the acquisition of legal parenthood by the intended parents - which we call the "window to object". This "window to object" is featured in both the Joint Law Commission Report and New Zealand Law Reform Commission's 2005 proposals. Where a surrogate raises their right to object within this window, parentage exits the Intended Parent Tier, and must be settled by a judge.

We are of the opinion that the window to object is an essential – from an ethical and legal perspective - feature of the Intended Parent Tier. Under this tier, the surrogate is not presumptively given the legal status of parent. This window provides a safeguard to the surrogate and child in rare cases where the surrogate wishes to dispute the denial of parentage. Given that surrogacies under this regime have been preceded by counselling, written agreements and independent legal advice, we are of the view that in practice this objection will rarely be used. However, without it, we have concerns about the constitutionality of a regime that denies the person who gave birth to a child any claim to parentage.

In New Zealand's 2005 report, it recommended a proposed window to object was 21-days.[351] More recently, the Joint Law Commission Report tied the duration of their window to object to birth registration requirements - one week shorter than the period in which a child's birth must be registered in each of England, Scotland, and Wales – which in practice, fell within a 2-4 week period.[352]

The benefits of a shorter window to object focus on certainty. It is in the child's interest for their status to be certain as soon after birth as possible. For the surrogate and the intended parents, certainty allows the parties to get on with their lives without the prospect of parentage (or denial of that parentage) weighing over them. Given that parties in the Intended Parent Tier have written agreements, independent legal advice, and obtained implications counselling, it is unlikely the surrogate will change their mind post-birth.

The benefits of a longer window to object focus on protecting the surrogate's interests. The gestation and delivery of a child may impact a surrogate in unanticipated ways, and a surrogate ought to be given adequate time to process their feelings and reflect their rights once the child has been born. Too short a window risks ignoring the physiological and emotional impact of pregnancy on a surrogate and denying them a meaningful ability to object during this window. It also could raise capacity issues where a surrogate experiences physical or mental incapacity after birth (which is discussed in more detail below).

Subject to the discussion on incapacity below, we propose for discussion a 14-day window within which a surrogate may exercise a window to object. We are of the view that this period strikes the right balance between certainty and protection of a surrogate's interests.

Proposal for Discussion:

A surrogate should be given a 14-day post-birth window to object to parentage under the proposed Intended Parent Tier.

5.8.6 Incapacity of Surrogate

If we are relying on the passive passage of time as confirmation of the surrogate's intent not to be a parent, we must consider how to proceed in the event that the surrogate is incapacitated during this time frame. This section considers how to proceed in the event the surrogate lacks capacity during the window to object.

[351] New Zealand 2005 Report, *supra* note 41 at 7.74.
[352] Joint Law Commission Report, *supra* note 42 at 8.2-8.7.

The Joint Law Commission Report provisionally recommended one of two paths for dealing with this issue (1) if the lack of capacity is partial, the surrogate must provide positive consent rather than relying on the passage of time to demonstrate her desire not to object; or (2) if the lack of capacity spans the entire window, the parties cannot proceed via the new pathway and a judicial order must be obtained.[353]

While we see the appeal of this approach, we wonder how it will be policed in practice. Given that parentage is settled by the passage of time in this tier, there is no body that can demand that positive consent or judicial authorization be obtained. Absent this regime, however, the most likely method to resolve this problem is by allowing a surrogate to bring a court action outside of the window to object, alleging their incapacity during this period. This, however, places costs on the surrogate, and undermines the certainty of a 14-day window.

We pose the question for discussion: how should we proceed in the event a surrogate is incapacitated during her window to object?

Question for Discussion:

How should we proceed in the event a surrogate is incapacitated during the window to object?

5.9 Tier Two: Shared Rights and Responsibilities

This section drills down on the "Sharing Tier" for parentage via surrogacy – which is being proposed for gestational surrogacies that, for one reason or another, have failed to satisfy one of the writing, independent legal advice, and/or implications counselling requirements. In these cases, it may not be suitable to assign parentage under the Intended Parent Tier, but nonetheless, should not necessarily require judicial involvement. In these cases, we propose a middle ground in which the surrogate and intended parents share the rights and responsibilities of parentage until such time as the surrogate provides positive consent affirming their pre-conception intentions.

In practice, it will be rare that a gestational surrogacy fails to satisfy the three foundational criteria needed to access the Intended Parent Tier. Nova Scotia's only fertility clinic requires - and other CFAS member clinics recommend - written agreements, counselling and independent legal advice for intended parents and surrogates prior to carrying out a surrogacy-related procedure.[354] There may, however, be technical non-compliance with one of these rules – in cases where, for example,

[353] Joint Law Commission Report, *supra* note 42 at 8.34.
[354] AART Practices, *supra* note 245 at 2; CFAS Guidelines, *supra* note 245 at 11, 12, 18.

the surrogacy procedure was carried out a non-CFAS compliant fertility clinic in Canada. In those cases, the Sharing Tier is an option to recognize parentage.

5.9.1 The Need for Post-Birth Consent

All Canadian sharing model jurisdictions (Ontario, Saskatchewan, British Columbia, Prince Edward Island, and Manitoba) and require a surrogate to provide post birth consent confirming their intention to not be a parent in order to access their regimes. The New Zealand Law Reform Commission's 2022 proposal has also included post-birth consent as part of its model. This consent must be in writing.[355]

In practice, for most surrogacies the key distinction between the Intended Parent Tier and the Sharing Tier relates to the surrogate's post-birth consent, and whether this may be "active" (requiring the surrogate to take some positive step) or "passive" (not requiring any additional steps from the surrogate). As explored above, under the Intended Parent Tier, the surrogate's consent to non-parentage is confirmed by the passage of time without their needing to raise an objection. Under the Sharing Tier, however, the surrogate must give affirmative consent confirming their non-parentage. This consent must be given in writing, and be signed and dated by the surrogate.

The arguments in favour of requiring affirmative post-birth consent focus on the surrogate's rights and ensuring free and informed consent. Our Sharing Tier is only required for surrogacies that have failed to obtain either a written agreement, independent legal advice, or implications counselling. Given the role that those safeguards play in ensuring the surrogate's free and informed consent, and in ensuring they are aware of the post-birth window to object, it may not appropriate to proceed on the assumption that a surrogate is aware of these rights when we aren't sure that they have been informed about them.

The arguments against requiring affirmative post-birth consent focus on efficiency and intention. This method is more cumbersome because the surrogate is required to take additional administrative steps after the birth of the child. It also adds stress on the intended parents who must obtain this written consent before being treated as the parents. It also adds to a period of uncertainty in which the surrogate and intended parents all have the status of parent, which can be confusing in a hospital setting if the child needs medical treatment.

We propose for discussion that, under the Sharing Tier, the surrogate be required to give post-birth consent in writing confirming their non-parentage intentions. Because one of the requirements of a written agreement, implications counselling, and/or independent legal advice

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[355] BC *FLA*, *supra* note 29 at s 29(3)(b)(i); Ont *CLRA, supra* note 29 at s 10(3); Sask *CLA, supra* note 29 at s 62(3); PEI *CLA, supra* note 29 at s 23(2)(b)(i); Man *FMA, supra* note 29 at 24.1(2); New Zealand 2022 Report, *supra* note 41 at 20, 21 (Recommendations 18, 20).

are not satisfied, we are not comfortable proceeding on the assumption the surrogate is aware of their rights. Their affirmative post-birth written consent helps remedy this concern.

Proposal for Discussion:

Under the Sharing Tier, the surrogate must give post-birth consent in writing confirming their intention not to be a parent of the child born.

5.9.2 The Duration of Sharing Window: A Cooling off Period

Each jurisdiction that has implemented the sharing model takes a slightly different approach to the question of timing. Some jurisdictions (Ontario, Saskatchewan and Manitoba) impose a mandatory protected cooling off period, before which the surrogate may not provide her consent to not be a parent. This period ranges from 2-days (in Manitoba) to 7-days (in Ontario and under the New Zealand Law Reform Commission's 2022 proposal).[356] Prince Edward Island and British Columbia take a different approach, and permit a surrogate to give written consent affirming her pre-conception intention that she is not a parent immediately after the child is born.[357]

In making proposals for a cooling off window, the benefits of a shorter window relate to certainty. The sooner a child's status is determined, the better. The intended parents and child have stability of recognition, and surrogate is able to proceed with their life unencumbered by the prospect of unwanted obligations weighing over them. If a surrogate wishes to relinquish parentage in the seconds following birth, the law should not prevent that from happening, and it is patronizing to do otherwise.

On the other hand, a longer window better protects the surrogate's rights. The act of giving birth can have significant physical and emotional implications. The hours and days following birth should be a protected space in which the surrogate may recover before being asked to make significant decisions such as the decision to relinquish parentage. As the facts of *KB v MSB* demonstrate, the validity of a consent signed in the moments after birth may also be called into question.[358] It is less certain that an agreement signed in the moments following birth can be relied upon. A longer window permits reflection and better understanding for the surrogate, which translates to more reliability for all parties.

We propose for discussion that, for surrogacies under the Sharing Tier, a 7-day cooling off period be imposed before which the surrogate may not confirm her intentions not to be a parent. While

[356] Ont *CLRA, supra* note 29 at s 10(4); Sask *CLA, supra* note 29 at s 62(4); Man *FMA, supra* note 29 at 24.1(2); New Zealand 2022 Report, *supra* note 41 at 21 (Recommendation 20).
[357] BC *FLA*, *supra* note 29 at s 29(3)(b); PEI *CLA, supra* note 29 at s 23(2)(b).
[358] *KB v MSB*, *supra* note 312 at para 19.

this period is on the higher end as compared to other Canadian jurisdictions, under our proposal the Sharing Tier is only required for surrogacies for which parties have not entered into a written agreement, or failed to obtain independent legal advice or implications counselling. Given the role that those safeguards play in ensuring the surrogate's free and informed consent, the surrogate should be given a full week of protected time before the intended parents can ask for their consent to confirm non-parentage.

In proposing a 7-day window, have also considered the overall coherence of our proposed surrogacy regime. We have proposed a tiered system under which a 14-day window to object exists for surrogates in the Intended Parent Tier, but a 7-day cooling-off window under the Sharing Tier. While this might be seen as a discrepancy, in our view these time frames are best suited to their Tier: a 14-day cooling-off period seems too long to forbid a surrogate from confirming their non-parentage, while a 7-day window seems too short to require a surrogate raise an objection to their non-parentage. In practice, this one-week difference will likely have very little impact, as we do not anticipate many surrogates who are in either Tier will change their mind after the child is born.

Proposal For Discussion:

Under the Sharing Tier, the surrogate's post-birth consent confirming non-parentage must not be given before the child is 7-days old.

5.9.3 Surrogate's Failure to Provide Consent

Most Canadian sharing window jurisdictions provide a clear path on what to do when the surrogate does not provide post-birth consent confirming their non-parentage, and paths by which this consent may be waived.

British Columbia, Prince Edward Island and the *Uniform Act* permit intended parents to apply to court to waive the surrogate's consent if the surrogate is deceased, incapacitated or cannot be located after reasonable efforts to locate them.[359] Alberta only permits a court to waive the surrogate's post-birth consent where the surrogate is deceased or cannot be located.[360] In addition to these factors, Ontario permits a court to waive the surrogate's consent where she refuses to provide it.[361] In Saskatchewan, where consent is not provided for any reason, any party may apply to the court for a declaratory order as to parentage.[362]

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[359] BC *FLA*, *supra* note 29 at s 29(4); PEI *CLA, supra* note 29 at s 23(3); *Uniform Act, supra* note 34 at s 8(12).
[360] Alta *FLA, supra* note 29 at s 8.2(9).
[361] Ont *CLRA, supra* note 29 at 10(6).
[362] Sask *CLA, supra* note 29 at s 62(9).

Internationally, under the New Zealand Law Reform Commission's 2022 proposal, when the surrogate cannot provide consent for any reason (death, incapacity, unable to locate or refuses to provide consent) the surrogacy exists the administrative path and must be determined by a judge.[363]

In considering how to deal with surrogacies outside their "new pathway" the Joint Law Commission Report considered the benefits and drawbacks of permitting a court to waive a surrogate's post-birth consent in a way similar to other Canadian jurisdictions.[364] On the one hand, this weakens the surrogate's position vis-a-vis the intended parents, and opens the door to potential exploitation. It is also, however, arguably inappropriate for the surrogate, who lacked intention (and may lack a genetic connection), to unilaterally refuse to provide consent. A child's legal status should not hinge on the consent of the surrogate and their partner, to the exclusion of the intended parents. Creating a lifelong distinction between a child's legal parents versus their social / psychological parents was also viewed as detrimental to a child's welfare, and possibly in violation of the *European Convention on Human Rights'* guarantee to privacy and a family life.[365] In the end, the Joint Law Commission Report recommended that the court's ability to waive the surrogate's consent should only exist where the child is living with the intended parents, or a court has ordered the child's primary residence be with the intended parents.[366]

The benefits of having a broad basis upon which intended parents may ask a judge to waive the surrogate's post-birth consent relate to flexibility and practicality. In practice, when a surrogate does not provide consent to relinquish parentage of a child (on any basis including her refusal), the parties will be proceeding to a judge in any event. The Ontario approach merely provides an avenue for intended parents to ask a judge for permission to waive that consent, rather than assess parentage more globally. In practice, a judge faced with either application (waiving the surrogate's consent vs an general application as to parentage) would be tasked with evaluating the surrogacy arrangement, the parties intentions, and the best interests of the child.

The benefits of having a narrower base upon which to ask a judge to waive consent relate to protecting a surrogate's rights. On this view, the surrogate's consent is essential and their rights will only be waived in extreme circumstances. Without this consent, parentage ought to be determined via general declaratory or *parens patriae* powers – which, at least in theory, would give space for a broader inquiry into the child's interests as opposed to answering the discrete question as to whether' the surrogate's post-birth consent can be dispensed with.

We propose for discussion that Nova Scotia implement Ontario's model for waiving post-birth consent: where the surrogate cannot give consent because she has died, is incapacitated, cannot be located, or refuses to provide consent, the intended parents may apply to the Court to waive

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[363] New Zealand 2022 Report, *supra* note 41 at 23 (Recommendation 32).
[364] Joint Law Commission Report, *supra* note 42 at 11.39-11.58.
[365] *Ibid* at 11.38, 11.44-11.46.
[366] *Ibid* at 11.58.

that consent. This is the broadest approach in Canada, and includes the ability to waive consent where the surrogate has refused to provide it. While this may be criticized for being too broad, we emphasize that, regardless of the reason, intended parents in this situation will always have to appear before a judge (either to seek a waiver of the surrogate's consent or to seek a general declaration confirming their parentage). A broad rule on waiving consent does not change the element of judicial oversight. Once before a judge, the reasons for the refusal will be considered and the judge's order will serve to effectively decide parentage.

We also provisionally add that, in cases where a surrogate does not provide consent because they have died during the cooling-off period, legislation should clarify that once the surrogate's non-parentage is confirmed either by consent or by court order, the parentage relationship between surrogate and child is deemed to never have existed. This will ensure that, for succession purposes, the child is treated as that of the intended parents, and not the surrogate, in accordance with the parties' intentions. Moreover, parentage legislation should state that the surrogate's family members do not have standing to challenge the parentage declaration.

Proposals for Discussion:

Under the Sharing Tier, intended parents may apply to court to waive the surrogate's consent where consent has not been given because the surrogate has died, is incapacitated, cannot be located, or has refused to provide consent.

Under the Sharing Tier, parentage legislation should clarify that once the surrogate's non-parentage is confirmed by consent or by court order, the parentage relationship between surrogate and child is deemed to never have existed.

Under the Sharing Tier, when the surrogate has not provided post-birth consent because they have died, parentage legislation should state that the surrogate's family members do not have standing to challenge the intended parents' application to waive this consent.

5.9.4 Maximum Time Period

There may also be situations in which the surrogate is not refusing to provide consent, nor are they otherwise incapacitated or unable to be reached, but consent has nonetheless not been given. In these cases, we ought to consider whether a maximum time period or window ought to exist, after which point the intended parents may proceed to a judge to have parentage settled.

No uniform approach has developed as to the existence or length of a maximum window to settle parentage. Options range from having no stated maximum,[367] to 30-day, 60-day, 90-day,6 month or 1-year maximums to settle parentage via surrogacy.[368]

At present, Nova Scotia has no stated maximum time period as to when parentage may be transferred via surrogacy.[369] While in practice, parentage tends to be settled in the days or weeks after birth, there is nothing from stopping this transfer from happening years after the child is born.

The benefits of having a maximum time frame after which parentage must be settled judicially focus on certainty, and protection. Under this perspective, a child's parental status should not be left in flux indefinitely. Intended parents would be compelled go to court any time after the maximum window was exhausted in order to settle the parentage of the child. In addition, it protects a surrogate because it effectively precludes intended parents from proceeding to court until this period has elapsed. Imagine, for example, a surrogate who does not provide consent to non-parentage on day 7 – as imagined in this Tier. Without a maximum timeframe, the intended parents can take her to court on day 8. Where, however, a 30-day maximum is imposed, there is a buffer window of time in which a surrogate may still provide her consent without bringing the matter to a judge.

The benefits of having no maximum period to settle parentage focus on autonomy. If the parties want to have parentage settled, they will come to a judge after the sharing window has ended. There should be no concrete window after which judicial involvement is mandated.

We propose for discussion that legislation include a 30-day maximum window, after which if consent is not given, parentage must be determined judicially. This would give the surrogate more breathing space (the intended parents cannot take her to court on day 8) and will provide more certainty for the families. In terms of timing, this shorter window to encourages people to act. A 30-day window also accord with the time frames in the *Vital Statistics Act* for birth registration.[370]

Proposal for Discussion:

Under the Sharing Tier, legislation should provide that, if the surrogate has not provided consent to confirm her non-parentage 30-days after the child is born, parentage must be settled judicially.

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[367] *UPA (2017)*, *supra* note 43; Joint Law Commission Report, *supra* note 42; BC FLA, *supra* note 29, *PEI CLA*, *supra* note 29, Birth Regulations, *supra* note 24.
[368] Alta *FLA, supra* note 29 at s 8.2(4) (30 days post birth unless judge extends); Man *FLA, supra* note 29 at s 24.1(4) (30 days post birth unless judge extends); Sask *CLA, supra* note 29 at 62(8)(b); Ont *CLRA, supra* note 29 at (no stated maximum unless judicial application required, in which case 1 year); *HFEA, supra* note 185 at s 54, 54A. See contra, Joint Law Commission Report, *supra* note 42 at 11.20.
[369] Birth Regulations, *supra* note 24 at s 5.
[370] *VSA, supra* note 2 at s 4(2).

5.10 General Issues

Whichever tier applies, there are certain considerations about surrogacy that span all three. This section considers to what uses, if any, a surrogacy agreement may be put, the role of genetics in recognizing surrogacy, the role of a surrogate's spouse or partner, and any relationship requirements that ought to be placed on intended parents.

5.10.1 Uses of Surrogacy Agreement

Nova Scotia does not stipulate the uses to which a surrogacy arrangement may be put (i.e. is it enforceable or admissible as evidence of intent).

Most Canadian jurisdictions stipulate that surrogacy agreements are not enforceable as such.[371] The unenforceability has been defended as being in line with public policy and the best interests of the child. As explained by the Manitoba Law Reform Commission: "Allowing surrogacy contracts to be enforceable is consistently argued to be inconsistent with public policy, women's personal autonomy rights and the principle that no agreement can displace the court's inherent *parens patriae* jurisdiction to act in the best interests of the child."[372]

Internationally, under the American *UPA (2017)* surrogacy contracts are enforceable once signed. Several states, including California, have implemented this model. Issues with enforceability have been raised by academics,[373] who have cited cases where a surrogate who refused a reductive abortion was legally threatened with breach of contract.[374] Outside the United States, none of the international jurisdictions we reviewed (New Zealand, the United Kingdom, and Australia), had or recommended a system where surrogacy agreements were enforceable.

Quebec proposed surrogacy provisions would have parted from this trend of unenforceability. If passed, it would have provided that only the surrogate could unilaterally terminate a surrogacy agreement once it is signed (in other words, the intended parents cannot terminate the agreement – it would be enforceable as against them).[375] This position was defended as allocating the responsibilities associated with parentage appropriately on the intended parents. This

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[371] Alta *FLA, supra* note 29 at s 8.2(8); BC *FLA, supra* note 29 at s 29(6); Sask *CLA, supra* note 29 at s 62(12); Man *FMA, supra* note 29 at s 24.1(5); Ont *CLRA, supra* note 29 at s 10(9); PEI *CLA, supra* note 29 at s 23(5).
[372] Manitoba Issues Paper, *supra* note 36 at 33.
[373] Overall, *supra* note 242.
[374] *Cook v Harding*, 190 F Supp 3d 921 (CD Cal 2016)
[375] Bill 2, *supra* note 30 at cl 96, adding Art 541.8: Only the woman or the person who has agreed to give birth to a child within the context of a parental project involving surrogacy may, at any time before the child's birth, unilaterally terminate the surrogacy agreement by a notarial notice *en minute* or a notice made in writing and before two witnesses who have no interest in the surrogacy project. A copy of the notice shall be notified to the person alone or to each of the spouses who formed the parental project. Where there is a termination of the pregnancy, the surrogacy agreement is terminated without further formality.

arrangement would have also satisfied the frustrations raised by some Canadian fertility lawyers. For example, Sara Cohen, has criticized the *CLRA* because its lack of enforceability leaves surrogates without legal recourse if intended parents choose not to take the child.[376]

While most Canadian jurisdictions render surrogacy agreements unenforceable, many statutes state that they are admissible as evidence of the intended parents and/or the surrogate's intent. In Ontario, for example, surrogacy agreements are unenforceable, but may be used as evidence of all parties' intent.[377] Under the *Uniform Act* and Alberta's *FLA,* a surrogacy agreement can only be used as evidence of the intended parent(s)' intent, but not the surrogate's intent.[378]

We are of the view that Quebec's proposed model is preferrable. Surrogacy agreements should be enforceable as against the intended parents - meaning that, once entered, intended parents cannot walk away from their parentage obligations. This provides a level of certainty to surrogates and protects the child's rights. There should never be a situation in which no one bears responsibility for a child, and in our view, it is inappropriate for the default legal position to saddle the surrogate (who lacked any preconception intention) with this responsibility.

We propose, however, that the agreement should not be enforceable as against the surrogate. Enforceable surrogacy agreements as against surrogates could infringe her bodily autonomy and, in our view, are likely unconstitutional as well. While a surrogacy agreement may not be enforceable against a surrogate, in the event a dispute arises we support using surrogacy agreements as evidence of all parties' intent**.**

Proposals for Discussion:

Surrogacy agreements should be enforceable as against intended parents, but not surrogates.

Surrogacy agreements should be admissible as evidence of all parties' pre-conception intent.

5.10.2 The Role of the Surrogate's Spouse or Partner

Nova Scotia's Birth Regulations are silent on the status of a surrogate's spouse at the moment of birth.[379] As such, the common law presumptions would apply. This means that in Nova Scotia, the man married to a surrogate is provided a presumption of parentage.

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[376] Law Times, "Focus: Surrogacy law goes backward, say lawyers" (27 Feb 2017) *Law Times* online:< https://www.lawtimesnews.com/news/legal-analysis/focus-surrogacy-law-goes-backward-say-lawyers/262434>.
[377] Ont *CLRA, supra* note 29 at s 10(9), 11(4). See also BC *FLA*, *supra* note 29 at 29(6).
[378] *Uniform Act*, *supra* note 34 at s 8(11). Alberta *FLA, supra* note 29 at s 8.2(8).
[379] Birth Regulations, *supra* note 24 at s 5.

Several jurisdictions in Canada discuss the parental status of the surrogate's partner, and their status in relation to a surrogacy agreement. Ontario, British Columbia, Alberta, Saskatchewan, Manitoba and the *Uniform Act* exclude a surrogate's spouse or partner from being considered a child's parent at birth.[380] Northwest Territories specifically excludes presumptions of parentage flowing to the partner of a surrogate.[381]

Jurisdictions that do not address the parental status of a surrogate's spouse or partner have relied on provisions in a surrogacy agreement, constitutional litigation, declaratory powers, and/or the Court's the *parens patriae* jurisdiction to have a declaration of non-parentage issued regarding the partner of a surrogate.[382]

A constitutional challenge initiated in Manitoba, for example, grappled with this issue. Despite lacking a gestational, biological, or intentional link to the child, the surrogate's spouse in that province was recognized as a legal parent, while the intended parents were not.[383] The surrogate in that situation commented to the media:"[My husband] supported me wonderfully, but he has no biologically [sic] connection, he didn't grow her, he didn't birth her…[s]o having him listed on the birth certificate, when all he had as involvement was being married to me, seemed very strange and very old-fashioned."[384]

Internationally, under the American *UPA (2017)*, a surrogate's spouse or partner is a party to a surrogacy agreement,[385] and they contractually relinquish their parental rights in that document in the same way as the surrogate.[386]

In the United Kingdom, donor-gamete laws apply to parentage in the case of surrogacy. This means that when a child is born via surrogacy, the child's second parent will be the surrogate's spouse or civil partner, if she has one, so long as that person consented to the surrogate's treatment.[387] The Joint Law Commission Report has recommended that this law be changed for surrogacies that fall within its proposed "new pathway" after hearing from many parties who believed it was inappropriate for the surrogate's spouse or partner (who lacks any genetic, gestational or intentional parental relationship to the child) to nonetheless be considered a parent on birth.[388]

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[380] Ont *CLRA, supra* note 29 at s 8(4); BC *FLA*, *supra* note 29 at s 27(1)(b), (3); Alta *FLA*, *supra* note 29 at s 8.1(2), 8.1(3), 8.1(4); *Uniform Act*, *supra* note 29 at s 5(3); Sask *CLA, supra* note 29 at s 60(4).
[381] NWT *CLA, supra* note 32 at s 8.1(3).
[382] See, for example, *D(M) v L(L),* 2008 CarswellOnt 1290 at paras 41-47, which arose under Ontario's predecessor legislation. The Court drew on the *Courts of Justice Act* and its *parens patriae* jurisdiction to issue a declaration of non-parentage to the spouse of a surrogate.
[383] Blunt, *supra* note 51.
[384] *Ibid*.
[385] *UPA (2017)*, *supra* note 43 at s 803.
[386] *Ibid* at ss 804, 809.
[387] Joint Law Commission Report, *supra* note 42 at 4.45.
[388] *Ibid* at 8.52-53.

The New Zealand Law Reform Commission recommended in 2022 that their surrogacy laws to state that the surrogate's spouse or partner does not receive a presumption of parentage on birth of the child born. This, in their view, would simplify the law and is consistent with the intentions of the parties, in which the surrogate's spouse can play an important supportive (but non-parental) role.[389]

We are opposed to giving the surrogate's spouse or partner any role in parentage of a surrogate-born child, either through a parentage status or as a party to a surrogacy agreement. Including the spouse as a party to a surrogacy agreement sends the wrong message about the surrogate's bodily autonomy. It is inappropriate to give someone without an intentional, gestational, or biological link to a child to be given a path to parentage. We propose for discussion that a parentage statute exclude the spouse or partner of the surrogate from having a claim to parentage, or standing as a party to a surrogacy agreement.

Proposals for Discussion:

A surrogate's spouse or partner should not be a party to a surrogacy agreement.

Parentage law should state that a surrogate's spouse or partner does not receive a presumption or status of parentage at birth.

5.10.3 Genetic Link: Intended Parent(s) and the Child

This section considers whether the law should require a genetic link between the intended parents and the child born.

At present, in order to receive a declaration of parentage in a surrogacy, Nova Scotia requires at least one intended parent to have a genetic connection to the child born.[390] Where this genetic connection to intended parents is missing (i.e. if the child is conceived via a donated embryo, or donated sperm and a donated ovum) intended parents must adopt the child in order to be their legal parents.

In Canada, more recent legislation is moving away from this requirement. Ontario, Saskatchewan, Manitoba, Prince Edward Island, and British Columbia do not require a genetic connection between at least one intended parent and a child born via surrogacy.[391] Alberta does require a

[389] New Zealand 2022 Report, *supra* note 41 at 6.137-6.140.
[390] Birth Regulations, *supra* note 24 at 5(2)(e).
[391] Ont *CLRA, supra* note 29 at s 10; BC *FLA*, *supra* note 29 at s 29, (3); Sask *CLA, supra* note 29 at s 62. Man *FMA, supra* note 29 at s 24.1; PEI *CLA, supra* note 29 at s 23. British Columbia's *White Paper on Family Relations Act Reform* states that the majority of respondents did not think the requirements for intended parents to become parents should differ if neither of the intended parents are genetically related

genetic connection between at least one intended parent in order transfer parentage under surrogacy provisions.[392]

In its commentary to the *Uniform Act,* the Uniform Law Commission was originally of the opinion that, where there is no possible genetic link between intended parents and a child, intended parents should proceed with an adoption.[393] In their view: "[removal] could circumvent the public policy around adoption and create an inconsistent approach to protecting the best interests of the child. While it could be argued that this approach can be distinguished from adoption based on the presence of the intent to parent prior to conception, this seems a narrow distinction." However, the Uniform Law Conference walked back from this approach in amendments made to the *Uniform Act* in 2016:[394]

> It was initially contemplated that, where there is no possible genetic link between at least one of the intended parents and the child, adoption is the more appropriate path to parenthood to retain a consistent approach to protecting the best interests of the child. However, given that the intent to parent of the "intended parents" must exist prior to conception, this situation is arguably closer to that of "natural parents" than that of adoption…[J]urisdictions may choose to legislatively align the situation of "intended parents" with no actual or potential genetic link to the child …

The Saskatchewan Law Reform Commission recommended removing the genetic connection requirement, on the basis that it would ensure harmonization with other Canadian jurisdictions and ensure intended parents were treated equitably.[395] Before reaching its conclusion, it outlined the competing policy considerations at play:[396]

> [176] Arguments in favour of requiring a genetic link between the child and at least one of the intended parents reflects a concern that adoption processes may be circumvented. It is theoretically possible that individuals could claim they had a surrogacy agreement in place with a pregnant woman to allow them to claim the baby upon birth without going through the regular adoption procedures which require an extensive screening process. Arguments against requiring there to be a genetic link are based on the existence of a pre-conception intent to parent the child which differs from an adoption, a recognition that the (gestational) surrogate is also

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to the child (BC White Paper, *supra* note 37 at 30).
[392] Alta *FLA, supra* note 29 at s 8.2(1)(b), 8.1(1); *Uniform Act*, *supra* note 34 at ss 1, 8(1) and 8(3)(b), Birth Regulations, *supra* note 24 at s 5(2)(e).
[393] *Uniform Act*, *supra* note 34 at 16, commentary to s 8.
[394] ULCC Working Group Amendment, *supra* note 457 at 3 (commentary to s 8).
[395] Saskatchewan Final Report, *supra* note 35 at para 184.
[396] *Ibid* at para 176.

> not genetically related to the child, and equality concerns raised by requiring intended parents who are unable to contribute genetic material at a disadvantage.

In the Saskatchewan Law Reform Commission's consultations on this issue, several respondents believed that pre-conception intent distinguished surrogacy from adoption, and that it did not make sense to require the intended parents and the surrogate to move through the adoption process. Some respondents argued that it would be unfair to make a distinction between intended parents who can and who cannot provide their own genetic material, with only the latter being required to go through an adoption process.[397]

The Manitoba Law Reform Commission considered this issue and raised similar concerns with the role of genetics in a surrogacy context. While it was unable to formulate a recommendation on this issue without further research, it commented on the irrationality of requiring a genetic link the context of surrogacy:[398]

> In many ways, however, it seems incongruous to connect legal parentage solely to a genetic link, particularly when the surrogate mother will most often also have no genetic link to the child. All genetic parents may be unknown. Arguably, it also contravenes the principle that children should have equal status and protections regardless of the circumstances of their conception and certainty of status at the earliest reasonable time.[399]

Canadian reproductive rights expert Karen Busby has advocated for maintaining the genetic linkage requirement as a mechanism to assuage child trafficking concerns, especially in international surrogacy.[400]

Internationally, there is no consensus on the need for a genetic connection between at least one intended parent and the child. Several jurisdictions either require there be a genetic link between a child and at least one intended parent, or impose adoption-like proceedings where none exists. For example, the Australian Capital Territory's *Parentage Act* requires a genetic connection to an intended parent before recognizing the intended parent(s)' parentage via surrogacy.[401] Similar requirements exist in South Africa.[402]

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[397] Saskatchewan Final Report, *supra* note 35 at paras 176, 181.
[398] Manitoba Issues Paper, *supra* note 36 at 36-7.
[399] *Ibid* at 35.
[400] Busby, supra note 233 at 288.
[401] *Parentage Act (2004), supra* note 289 at 24(d).
[402] *Children's Act* (S Afr), *37 of 2005*, s 294. See: *AB v Minister of Social Development as Amicus Curiae: Centre for Child Law* (CTT 155/15) [2016] ZACC 43.

In 2022, New Zealand's Law Reform Commission recommended that the law should not require a genetic connection between at least one intended parent and a child in a surrogacy, because it would discriminate against people who are unable to contribute their own gametes. [403]

The Victorian Law Reform Commission preferred a genetic connection between intended parents and a surrogate-born child, but did not impose a genetic linkage requirement. The Commission was concerned that this requirement "would discriminate against people who are infertile and do not have gametes; donated embryos are more readily available than donated eggs, and people undergoing other forms of ART are permitted to use donated embryos if they are both infertile."[404] The Commission was also concerned about respecting intended parent(s)' desire to consciously and deliberately reproduce, and the difficulty of generalizing about the value of genetic connections in family relationships.[405]

With that said, the Victoria Commission recommended that all surrogacies be subjected to a thorough pre-conception screening process including counselling with a psychological screening element and ethics tribunal approval.[406] It also recommended that, if surrogacy was done outside of a clinic setting, intended parents be required to adopt the child.[407]

The American *UPA (2017)* imposes no genetic linkage requirement between the intended parent(s) and children born via surrogacy. States which have implemented this model (California, Vermont and Washington) also impose no genetic linkage requirement.[408]

In the United Kingdom, the current *Human Fertilization and Embryology Act, 2008*[409] requires a genetic link between at least one intended parent and a child born via surrogacy. The Joint Law Commission Report reviewed the policies behind this requirement. On the one hand, a genetic link requirement creates barriers to intended parents who cannot provide gametes. This discriminates against certain infertile people on the basis of a disability.[410] There are also dignity and worth implications that mitigate against a requiring a genetic connection. Stakeholders

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[403] New Zealand 2005 Report, *supra* note 41 at 7.67; New Zealand 2022 Report, *supra* note 41 at 6.101-6.103
[404] Victorian Final Report, *supra* note 40 at 177, 178, Recommendation 118.
[405] *Ibid*.
[406] *Ibid* at 174, 176. See also Chapter 5 for details on their ethics approval process, which was recommended as applying to surrogacies.
[407] *Ibid* at 190.
[408] *UPA (2017)*, *supra* note 43 at ss 802, 203, 809(d). See, for example, California: Cal Fam Code 7962(2).
[409] *HFEA, supra* note 185 at s 54A(1)(b); 54(1)(b).
[410] For example, single women who are infertile and unable to carry to term would be required to adopt their child, whereas single women who are infertile but can carry a child to term would be automatically recognized as a parent. Transgender persons who did not preserve their gametes prior to medical transition would also be disproportionately impacted. Joint Law Commission Report, *supra* note 42 at 12.39-41.

argued that a genetic link has no bearing on their relationship with their child, or the quality of their parenting. [411]

On the other hand, the Joint Law Commission Report stated that the genetic link requirement provides three benefits that protect a child born via surrogacy. First, it preserves a clear distinction between adoption and surrogacy. Removing the genetic linkage requirement erodes the difference between these schemes and raises questions about the function of screening adoptive parents versus intended parents to a surrogacy. It also could reduce the number of children who are adopted. Second, removing the genetic link requirement erodes a child's right to know their genetic origins. Removing the genetic linkage requirement will make it more difficult for children to locate their genetic origins, particularly in cases of international surrogacy. Third, removing the genetic link requirement could increase the risk of child trafficking or the commercialization of children. Without a genetic link, there are increased risks around the circumstances under which donor gametes are obtained, the possible use of eugenics, and/or the creation of "designer babies" with desirable traits.[412]

Ultimately, the Joint Law Commission opted for a combined approach – it provisionally recommends that a lack of genetic linkage be permitted in domestic surrogacy arrangements where it is medically necessary. However, given the increased concerns about exploitation, commodification and trafficking in the international context, it recommended a genetic linkage be required in cases of international surrogacy.[413]

In summary, requiring a genetic link between a child and an intended parent via surrogacy has been defended as protecting children from possible fraud, trafficking and commodification of children,[414] ensuring intended parents do not circumvent adoption processes,[415] and using a consistent approach to the best interests of the child.[416] The genetic linkage rule provides a clear conceptual distinction between surrogacy and adoption (particularly in traditional surrogacies), thus preserving the different screening mechanisms and treatment of intended parents in each regime.. The genetic link requirement also protects the developing right of children born by way of surrogacy to know (at least partially) their genetic origins, and acts as a safeguard against child trafficking, commodification of children, and eugenics practices to create "designer babies".

The policy arguments in favour of removing the genetic linkage requirement tend to focus on the intent, equality, and autonomy. All parties to a surrogacy possess a pre-conception intent regarding who the child's parents will be. This intention clearly distinguishes surrogacy from adoption proceedings. Requiring a genetic linkage creates barriers to persons who lack viable

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[411] *Ibid* at 12.42.
[412] Joint Law Commission Report, *supra* note 42 at 12.47.
[413] *Ibid* at 12.63.
[414] *Ibid* at 12.47.
[415] *Ibid* at 12.45.
[416] *Uniform Act*, *supra* note 34 at s 16-18.

gametes, which will disproportionately impact persons with disabilities, medical conditions, prior illnesses, women of advanced maternal age, and some transgender persons. If these people wish to reproduce and have reached an agreement with donors and a surrogate to do so, the state should not intervene and respect for the parties' desire to consciously and deliberately reproduce.[417]

It is also unclear why genetics should be the focus of parenthood in surrogacy proceedings. While it is difficult to make any generalizations about the value of genetic connections in families, the reasoning is more strained in the surrogacy context. Because most surrogacies are gestational, the surrogate also lacks a genetic connection to the child, and all genetic parents may be unknown. Arguably, imposing a genetic link requirement contravenes the principle that children should have equal status and protections regardless of the circumstances of their conception and certainty of status at the earliest reasonable time.[418]

We are not proposing a genetic linkage requirement in cases of surrogacy. Intention to parent was supposed to be the linchpin of parentage in surrogacy, not genetics. As such, in our view it does not make sense to prioritize a genetic relationship in this circumstance. We propose for discussion that Nova Scotia should not require a child born by way of surrogacy have a genetic connection with at least one intended parent.

Proposal for Discussion:

Nova Scotia should not require that a child born by way of surrogacy have a genetic link to at least one intended parent.

5.10.4 Relationship of Intended Parents to Each Other

This section considers whether Nova Scotia's parentage law should inquire into the relationship status of intended parents. The Birth Regulations do not require intended parents to be married, "marriage like" or in a conjugal relationship. They do not inquire into the relationship status of the intended parents in a surrogacy.[419]

Canadian jurisdictions are split on this issue. Nova Scotia, Ontario, Saskatchewan and Prince Edward Island do not impose a statutory requirement that intended parents live as conjugal or married partners.[420] Alberta, British Columbia, Manitoba and the *Uniform Act* all require

[417] Victorian Final Report, *supra* note 40 at 177-178.
[418] Man Issues Paper, *supra* note 36 at 35.
[419] Birth Regulations, *supra* note 24 at s 5.
[420] Ont *CLRA* and Sask *CLA* define "intended parent" as a party to a surrogacy agreement, other than the surrogate (Ont *CLRA, supra* note 29 at s 10; Sask *CLA, supra* note 29 at s 62(1)); PEI *CLA, supra* note 29 at ss 17(i), 23(2).

intended parents to be "spouses", "married or marriage-like" or living in a "common law partnership" if they want to rely on surrogacy parentage provisions.[421] No explanation has been given as to why relationship requirements were imposed in these jurisdictions. It may, however, stem from the genetic linkage requirement (in which a person without a genetic connection to a child can be a parent if they are "spouses" with the person whose genetic material was used to conceive the child).

Internationally, the United Kingdom's current *HFEA 2008* requires intended parents to be married, civil partners, or in an enduring family relationship (that does not fall within prohibited degrees of relation) in order to be granted a parental order.[422] The Joint Law Commission Report made three arguments to remove this requirement: [423]

> (1) The current law creates inconsistent treatment between single intended parents (who do not have to demonstrate anything about their relationships, or lack thereof) and dual intended parents (who must prove their relationship qualifies under an acceptable category).
>
> (2) Removing the relationship requirement clarifies the law because it reduces case law regarding how the law is applied. There should not be a relationship rule unless the Court is prepared to enforce it. By removing the qualifying relationship categories, there would be no need for a Court or other party to inquire into the quality of these relationships.
>
> (3) It is inappropriate to require people to discuss the intimacies of their relationship with a court in order to prove that their relationship qualifies to apply for a parental order. Many people would find this process difficult and intrusive.

On the other hand, the Joint Law Commission Report recognized that many people find the relationship requirement to be important, and in a child's best interests. It could be argued that requiring relationships to qualify in certain categories would ensure that the child (at least initially) is brought up within the nuclear family model. In this regard, the Joint Law Commission Report has expressed the opinion that categories of intended parents should continue to exclude persons who are in a prohibited degree of relationship with one another. Precluding siblings, for example, from becoming a child's legal parents would also harmonize parental order with the adoption law rules in England, Wales and Scotland.

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[421] BC *FLA*, *supra* note 29 at s 20(1); *Uniform Act*, *supra* note 34 at s 1(1) "surrogate"; Man *FMA, supra* note 29 at s 15 "intended parents". In Alberta, intended parents must be either married spouses or be in a conjugal relationship of interdependence of some permanence. A "Relationship of Interdependence" is defined as "a relationship outside marriage in which any 2 persons (i) share one another's lives, are emotionally committed to one another, and function as an economic and domestic unit *Adult Interdependent Relationships Act*, SA 2002, c A-4.5, 1 (1)(f).
[422] Joint Law Commission Report, *supra* note 42 at 5.7.
[423] *Ibid* at 12.19-12.29.

Australia's Victorian Law Reform Commission considered this issue in the context of sexual orientation. It recommended removing legal requirements that required intended parents to be either married or in a heterosexual *de facto* relationship because "a person's marital status or sexuality are not factors that are considered by child welfare authorities or experts to be predictors of harm to children".[424] Subsequent legal reforms in this territory do not impose a relationship requirement on the intended parents.[425]

In the United States, the *UPA (2017)* does not stipulate that intended parents be in a conjugal or married relationship.[426] In some individual states, however, laws transferring parentage only contemplate married and/or heterosexual relationships.[427]

In summary, the arguments in favour of imposing a relationship requirement on intended parents are premised on a belief that preserving the traditional family models is in a child's best interests. This requirement maintains societal norms and expectations about what a child's family would look like, and presumably promotes stability for a child born to intended parents. It promotes the upbringing of children within conjugal nuclear family models, whether or not the intended parents' relationship ends after conception. This requirement ensures that families created via surrogacy look like families created via sexual intercourse.

Arguments against the relationship requirement centre on the role of the government in policing private relationships. By imposing a relationship rule, the law promotes a particular family model as being in the best interest of a child, which may or may not be true. As noted by the Victorian Law Reform Commission, marital status has no correlation with harm to a child. Without evidence that children raised in non-marital, non-cohabitating (or perhaps non-conjugal) relationships constitutes a harm to children, the relationship requirement may add hurdles to intended parents without promoting the child's best interests. It may also waste judicial resources inquiring into the intimate details of a relationship that are not relevant in determining whether the child will grow up in a stable, loving environment.

We propose for discussion that Nova Scotia should not include a relationship requirement on intended parents in a surrogacy. In our view, the relationship status of the intended parents has no bearing on the salient issue of intention. It does not make sense to ask only those parents who conceive via surrogacy about their relationship status, where we do not do the same for children conceived via sexual intercourse or donated reproductive material.

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[424] Victorian Final Report, *supra* note 40 at 67.
[425] *Status of Children Act* 1974, *supra* note 185 at s 17(1) "commissioning parents", in relation to a child born under a surrogacy arrangement, means the person or persons who entered into the surrogacy arrangement for a woman to carry the child on behalf of the person or persons.
[426] *UPA (2017)*, *supra* note 43 at s 801.
[427] See, for example Arkansas, AR Code § 9-10-201(c) (2017).

Proposals for Discussion:

Nova Scotia should not inquire into the relationship status of intended parents via surrogacy.

Nova Scotia should not impose a specific relationship requirement on intended parents via surrogacy.

5.11 Inter-jurisdictional Surrogacies

The Intended Parent and Sharing Tiers ease the recognition of parentage in a surrogacy by relying on external points of contact (independent legal advice and implications for the Intended Parent Tier, and the presence of fertility clinics for the Sharing Tier) to ensure the parties fully understand their agreement, and mitigate the potential for exploitation. How should we proceed, however, when a surrogate is interjurisdictional– that is, when the surrogate is impregnated or receives some other surrogacy-related treatment outside of Nova Scotia (or Canada), but the birth occurs in Nova Scotia? While on the one hand, this type of movement may be a reality of the interjurisdictional fertility marketplace, on the other, it raises significant and potentially criminal concerns about human trafficking (in which a surrogate is moved across borders to facilitate the recognition of parentage).[428]

Canadian jurisdictions address international surrogacies in the context of recognition and enforcement only – i.e. situations where a surrogate-born child is born overseas and then comes to Canada. This is discussed at Chapter 10, below. They do not address situations where a child is conceived overseas, but born in the jurisdiction.

The New Zealand Law Reform Commission dealt with this issue in the context of recognition. They recommended that international surrogacies require a judicial application in order to be recognized in the country – they were not eligible for an administrative recognition.[429] In their view, without international standards for the conduct of surrogacy, New Zealand had to take further measures to ensure the child's interests were protected, that human rights law was being complied with, and that children and surrogates were protected from abuse and exploitation.[430]

Separately, the Joint Law Commission Report has proposed that only domestic surrogacies (defined as arrangements where all elements of the process, including pre-conception screening,

[428] Criminal Code, RSC 1985, c C-46, s 279.01. (1) Every person who recruits, transports, transfers… a person…for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable…(b) to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of four years in any other case. (2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid.
[429] New Zealand 2022 Report, *supra* note 41 at 9.108.
[430] New Zealand 2022 Report, *supra* note 41 at 9.112.

conception, pregnancy and birth take place in the United Kingdom) be eligible for their new pathway.[431] In their view:

> Given the wide disparity in surrogacy laws that exist worldwide, we think that the parental order [judicial] process provides significant safeguards that need to be maintained [for non-domestic surrogacies]. In particular, the application ensures that the child has genuinely been born through a surrogacy arrangement. The process also offers some safeguards against concerns of exploitation of women as surrogates and, in particular, the sale of children. These concerns may be particularly pertinent in the case of some international surrogacy arrangements.[432]

There are three potential options for recognizing parentage where conception occurs internationally. First, we could allow these surrogacies to proceed with the same access to the three tiers as a domestic surrogacy. So long as independent legal advice and implications counselling are obtained and a written agreement exists (wherever obtained), those intended parents would be recognized on birth. Where one of those criteria is missing, but the surrogacy is gestational, the sharing tier could be used (regardless of where the relevant fertility clinic is located). Only where the surrogacy was traditional and lacked a written agreement, independent legal advice or counselling would judicial involvement be required.

The benefits of this approach relate to consistency and comity. It is easier to have a regime that does not inquire into the location of conception. In addition, it demonstrates trust in the legal systems and medical professions around the world. The downsides to this approach relate to the potential for exploitation, trafficking, and enforceability. We don't know what safeguards that other fertility clinics use, or what their independent legal advice or implications counselling processes look like. To the extent these safeguards exist to protect surrogates and children from exploitation and/or trafficking, those safeguards are significantly weakened. In terms of enforceability, if we create different streams placed on the location of conception, there has to be some way to enforce this limitation. It is also difficult (short of asking people and trusting their response) to imagine how to monitor where people are when they conceive a child.

Second, we could eliminate the Intended Parent Tier and route all international surrogacies through either the Sharing (if they are gestational) or Judicial (if they are traditional) Tiers. This approach arguably better protects the surrogate. It ensures the surrogate is aware of their rights in our Province, and is required to actively affirm their decision not to be a parent of the child – rather than assuming that they is aware of the window to object. The downside of this approach is that it adds a layer of complexity and has questionable enforceability. For this to work, we must trust that people will disclose the international nature of their surrogacy, and proceed differently

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[431] Joint Law Commission Report, *supra* note 42 at 8.3, 16.86-16.88.
[432] *Ibid* at 16.89.

based on that disclosure. Without an external oversight body, it would be difficult to police this restriction.

Lastly, we could mandate all international surrogacies, no matter the details, proceed via the judicial route. Like the second option above, this approach better protects the surrogate and does a better job of ensuring that there is no potential for exploitation or trafficking. The downside of this approach relates to enforceability. Without an external oversight body, we are again trusting people to disclose the location of their conception and proceed judicially in light of that disclosure.

We ask the question: How should Nova Scotia assign parentage in situations conception occurs outside of Nova Scotia, but the child is born in Nova Scotia?

Question for Discussion:

How should Nova Scotia law assign parentage in situations where conception occurs outside of Nova Scotia, but the child is born in Nova Scotia?

6 Conception via Sexual Relations

This chapter considers the parentage laws Nova Scotia should have when a child is conceived by sexual intercourse. First, it considers Nova Scotia's current approach – which consists of presumptions that are grounded in biology. Next, it considers the limits of the current approach, which includes a discussion of: (1) the exclusion of unmarried couples from presumptions of parentage, and (2) the biological model of parentage as opposed to other models. The chapter then scans Canadian and international jurisdictions for alternatives to Nova Scotia's approach. Lastly, it considers policy rationales that relate to the biological foundation of parentage, and for extending presumptions beyond marriage.

6.1 Nova Scotia's Current Approach

Parentage of children born via sexual intercourse is mostly governed by the common law, but some elements have been modified by statute. As a reminder, the common law states:

- The woman who gives birth to a child is the child's mother (the presumption of maternity); and

- Her husband, if any, is the father (the presumption of paternity).

The presumption of paternity has been extended to husbands whose marriage ended during gestation, either by court order or death,[433] and whose children were conceived before marriage but born within it.[434] Statutes have also extended the presumption of paternity to fathers of children born within void or voidable marriages, or to unwed parents who subsequently intermarried.[435] Other discrete statutes (such as intestacy legislation) "legitimize" children who would be "illegitimate" (without lawfully recognized fathers) by virtue of the common law.[436]

These laws are built on a biological understanding of parentage. In regards to maternity, in the absence of ART or surrogacy the act of birth conclusively proves a direct biological connection exists. In relation to paternity, marriage establishes the presumption, but it can be rebutted if evidence shows that a direct biological connection does not exist. Alternatively, a person can prove paternity even without a presumption by showing a direct biological connection to the child born.

Historically, questions of parentage via sexual intercourse were focused on paternity. Presumptions of paternity could be rebutted only if it was not possible for a husband to have

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[433] Blackstone's Commentaries, *supra* note 22 at 456.
[434] *Ibid* at 454-5.
[435] For the current iteration of this rule, see *PSA, supra* note 8 at ss 47-49.
[436] See, for example, *ISA, supra* note 6 at s 16; *Fatal Injuries Act*, *supra* note 6 at s 11; *Compensation for Victims of Crime Act*, RSNS 1989, c 83 at s 2(1)(b).

sexual relations with his wife during the time of conception.[437] In modern times, evidence of paternity usually comes from biological testing. The *Parenting and Support Act* permits a blood test, genetic test, or other test to identify whether a person is a biological father in proceedings regarding custody, parenting arrangements, parenting time, contact time, interaction or child support.[438] The *Vital Statistics Act* authorizes genetic testing in order to make a declaration order with regards to a child's paternity.[439] Nova Scotia's *Civil Procedure Rules* also authorize a blood test, genetic test, or other test to establish paternity.[440]

These laws grew out of a time and culture focused on the question of "legitimacy", in which only children born within marriage were given a legal mother and father on birth. In modern times, there remains no presumption of paternity for children born outside of marriage in Nova Scotia. So, for example, an unmarried biological father must sign a statutory declaration affirming their direct biological connection to a child born if they wish to be named on a birth certificate.

6.2 Issues Raised by Nova Scotia's approach

There are four main issues with Nova Scotia's approach to parentage. First, it perpetuates the status and associated stigma of legitimacy. Courts have found it unconstitutional to treat children differently based on their parents' marital status.[441] As a response, certain Nova Scotia statutes provide for the equal treatment of "illegitimate" and "legitimate" children[442] – a piecemeal approach that (1) does not extend recognition beyond the statute in question, and (2) keeps the issue of legitimacy alive in public discourse.

Child status legislation is needed to comprehensively abolish the status of legitimacy. As articulated by the Law Reform Commission of Nova Scotia in its report on this issue: "[t]he fact that there is a distinction at all is discriminatory".[443]

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[437] *Preston- Jones v Preston-Jones*, [1951] 1 All E.R. 124; *Himmelman v. Himmelman* (1959), 19 D.L.R. (2d) 291. The evidence needed to rebut the presumption was that the husband had no "sexual access" to his wife at any time when she could have become pregnant. See also Blackstone's Commentaries, *supra* note 22 at 442-45 ("[Generally, during the coverture access of the husband shall be presumed, unless the contrary can be shewn; which is such a negative as can only be proved by shewing him to be elsewhere: for the general rule is, *praesumiturpro legitimatione."*).

[438] *PSA, supra* note 8 at s s 27.

[439] *VSA*, *supra* note 2 at s 11A.

[440] Nova Scotia Civil Procedure Rules, Royal Gaz Nov 19, 2008 at 59.55 – see *Miller v Staples Estate*, 2006 NSCA 140.

[441] *Surette v Harris Estate* (1989) 91 NSR (2d) 418 (SC) and *Tighe (Guardian ad litem of) v McGillivray Estate* 1994) 127 NSR (2d) 313 (CA). In *Tighe*, at para. 31, the Court of Appeal read into s 16 of the Act that the illegitimate child, "Shall be treated as if the child were the legitimate child of the child's mother or father," so that the child was not discriminated against on the basis on parentage.

[442] *Supra* note 436.

[443] NSLRC Legitimacy Report, *supra* note 21 at 10.

Second, the current laws treat married and unmarried parents differently. Unmarried fathers do not enjoy a presumption of parentage, and have to undertake some positive form of proof to be treated as such. The constitutionality of distinctions based on marital status has been a live issue in Canadian courts for decades. At the law stands today, it is constitutional for a statute to draw a distinction based on marital status where the law at issue concerns a couple's rights vis-à-vis each other (for example, access to property division schemes on relationship breakdown).[444] Where, however, the law is focused on the relationship of a couple to third parties, the constitutionality of these legislative distinctions is more doubtful.[445] By extending a presumption of parentage to married persons, unmarried parents and the children born of those relationships are denied automatic recognition. There is a compelling, albeit untested, argument to be made that such distinctions are unconstitutional.

Third, the laws use the binary, gender-specific language of mother and father, that may not fit all parents of children born via sexual intercourse. This is an issue discussed in more detail at Chapter 11, below.

Lastly, the biological underpinning of these laws imposes a narrow and colonial understanding of parentage that bears investigation. Of note, other conceptions of family and parent (extended biological family members and community members) have played a much greater role in African Nova Scotian and Mi'kmaq communities. There is a need to reform the law to recognize, as much as possible, the full range of parent-child understandings that which exist in Nova Scotia.

6.3 The Biological Foundation of Parentage

In all Canadian jurisdictions, parentage via sexual intercourse is expressly or implicitly grounded in biology.[446] While certain behaviours, such as marriage or cohabitation with a birth parent, create a presumption of parentage, these presumptions are subject to biological evidence. All jurisdictions permit biological testing as a means to prove a person is a biological parent.[447]

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[444] *Quebec (Attorney General) v A*, 2013 SCC 5.

[445] *Nova Scotia (Attorney General) v Walsh,* 2002 SCC 83, [2002] 4 SCR 325 at para 53, in which the majority distinguished the issue in that case (access to matrimonial property legislation) from another *Miron v Trudel*, [1995] 2 SCR 418, in which the Supreme Court found that a distinction between married and unmarried couples was unconstitutional: "The discriminatory distinction at issue in *Miron*, *supra*, concerned the relationship of the couple as a unit, to third parties. The marital status of the couple should have had no bearing on the availability of the benefit." As a result of *Quebec (Attorney General) v A*, 2013 SCC 5, the 15(1) analysis in *Walsh* may no longer be good law – but this point of distinction has not been challenged.

[446] PEI *CLA supra* note 29 at s 20(1); Man *FMA supra* note 29 at s 21(1); Ont *CLRA, supra* note 29 at s 7 (1); BC *FLA supra* note 29 at 26(1); Alta *FLA, supra* note 29 at s 7(2)(a); NB *FSA*, *supra* note 32 at s 1 definition of parent as including "natural father"; Nfld *CLA supra* note 32 at s 3(1); Que Civ Code – Title 2 chapter "Filiation by Blood", *supra* note 29; NWT *CLA, supra* note 32 at 2(1) "natural parents"; Yk *CLA, supra* note 32 at s 5.

[447] NS *VSA*, *supra* note 2 at ss 11A-C; Ont *CLRA, supra* note 29 at s 17.2; PEI *CLA, supra* note 29 at s 20(1); Man *FMA, supra* note 29 at s 24.5; BC *FLA*, *supra* note 29 at s 33; Sask *CLA*, *supra* note 29 s 68;

Section 17.2 of the *CLRA*, for example, permits the court to order a blood test, DNA test, or any other test as part of an application to determine a child's parentage:[448]

> **17.2** (1) On the application of a party in a proceeding in which the court is called on to determine a child's parentage, the court may give the party leave to obtain a blood test, DNA test or any other test the court considers appropriate of a person named in the order granting leave, and to submit the results in evidence.

Some commentators have criticized the biological foundation of parentage. In passing amendments to Ontario's *CLRA*, for example, some argued that the biological notion of parentage had outlived its usefulness, and that the continuing priority given to biology as the "real" marker of parentage makes a parent out of perpetrators of sexual assault, for example.[449] These critiques would prefer to see intention replace biology as the marker of parentage in all cases.

Separately, some people have emphasized the colonial heritage of the biological understanding of parentage. In a number of conversations, we have heard the direct biological linkages that ground parentage laws (and substantive rights that flow therefrom) do not reflect Mi'kmaq notions of familye or many African Nova Scotian families. It is much more common in these communities, we have been told, to see parent-child relationships exist in a wider net of biological and/or community connections.

This issue was flagged by the Law Reform Commission of Nova Scotia in the 1990s as part of its *Report on the Status of Child Born Outside Marriage*. One commissioner at that time advocated for removing the biological marker of parentage and replacing it with one that evaluated the "parenting relationship."[450]

On the other hand, maintaining the biological foundation of parentage has been defended as being essential for social and practical purposes. In Ontario, for example, the biological foundation was

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NB *FSA supra* note 32 at s 110; Nfld, *supra* note 32 at s 8(1); Que Civ Code *supra* note 29 at s 535.1; Yk *CLA, supra* note 32 at s 15; NWT *CLA, supra* note 32 at s 10; Nun *CLA, supra* note 32 at s 10. Possible exceptions exist in Saskatchewan and Quebec's legislation – in the former, a biological connection is only one behavior that creates a presumption of parentage, not proof thereof (Sask, *supra* note 29 59(1)(a)), in the latter, there are limited situations in which biological evidence can be used to rebut any presumption of filiation that flows from the act of birth or possession of status (Que Civ Code, *supra* note 29 at 523-532)

[448] Ont *CLRA, supra* note 29 at s 17.2.

[449] Snow, *supra* note 52 at 338.

[450] NSLRC Legitimacy Report, *supra* note 21 at 17: Commissioner Ring: "I disagree that biology should be the primary basis for determining the relationship between a parent and a child. A father and parent is more than just sperm. A parent is a caregiver, nurturer and someone who has a social relationship with that child and preferably with that child's mother. The parenting relationship is what is paramount."

maintained because it was viewed as essential to maintain a birth parent's recourse for from the father in cases of unintended pregnancy.[451]

In the *Status of the Child Born Outside Marriage Report*, a majority of the Law Reform Commission of Nova Scotia ultimately recommended maintaining the biological foundation of parentage. It reasoned:[452]

> The majority of the Commission felt that while these relationships [parent-child relationships in African Nova Scotian and Mi'kmaw families] and [assisted conception] must be considered, and in some cases recognized by law, the biological connection between the parent and child should remain the primary basis of legal rights and responsibilities. Many aspects of this issue are not easily reconcilable. For example, although social caregiving is recognized, there are equally important concerns about maintaining genetic and ethnic connections so that children can know their cultural heritage. The importance of these connections is recognized in the United Nations Convention on the Rights of the Child and in the concern about adoption of Aboriginal children by people who are not Aboriginal. …
>
> If the law continues to recognize the biological mother and father as parents irrespective of marriage, the child will have a legally recognized opportunity to know and benefit from both biological parents. As stated in the Commission's Discussion Paper, the Legal Status of the Child Born Outside Marriage in Nova Scotia: "[I]f the interest in genetic relationships and the importance of ensuring that people take responsibility for the care and maintenance of children is considered, it would not be useful to discount a biological connection." In addition to making recommendations to broaden the range of individuals who have an opportunity to participate in the child's life, this approach preserves existing rights.

We see the value in abolishing the biological foundation of parentage and replacing it with one based on intention. We note that many legal parents (knowingly or not) do not share a biological connection with their child. In these cases, and all cases, parentage could flow from their intention and actions post-birth.

At the same time, however, we are concerned about the unintended consequences that could flow from abolishing the biological foundation of parentage. In our view, it is important to impose child support responsibilities based on biological contributors irrespective of intent to parent, and imposing a purely intent-based model could muddy this critical area of family law. We are also concerned about ensuring a child had parents on birth, even where neither direct biological contributor intended to be a parent.

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[451] Dave Snow, Litigating Parentage, *supra* note 52 at 338.
[452] NS Legitimacy Report, *supra* note 21 at 17.

For these reasons, we propose for discussion that biological parentage should remain the foundation of parentage in cases of via sexual intercourse. There may, however, be space to include intentional legal parentage within children born of sexual intercourse by virtue of multiple parent households – an issue that is discussed in detail in Chapter 7, below.

We also oppose creating a legislative exception to parentage in cases of sexual assault, as done in the American model. While this idea may sound appealing on paper, there are several complexities that make parentage law an inappropriate location to punish perpetrators of sexual assault. For example, how would a birth parent prove a child was born of sexual assault, and what obligations would that place on them? How would this ban interact with presumptions of parentage in situations of marital rape? We are of the view that sexual assault is better dealt within the criminal law sphere.

Proposal for Discussion:

Biology should remain the foundation of parentage where conception occurs via sexual intercourse.

6.4 Extending Presumptions to Common Law Partners

With the exception of Nova Scotia and Quebec, all other Canadian jurisdictions extend presumptions of parentage beyond marriage.[453] They follow a very similar format to do so.[454] First, they maintain the presumption of maternity, by deeming the person who gives birth to a child conceived by sexual intercourse to be a parent.[455] Second, they legislate a list of behaviours in addition to marriage (for example: cohabiting in a conjugal relationship with the birth parent) which create a presumption of parentage/paternity. Ontario's *CLRA* is emblematic of this approach. Section 6 deems a person who gives birth to be a birth parent.[456] Section 7 creates a rebuttable presumption of parentage for the "other parent" based on that person's relationship with the birth parent:[457]

[453] In Quebec parentage is proven by the Act of Birth – presumptions are only expressly given to married spouses, Que Civ Code, *supra* note 29 at 523.
[454] BC *FLA*, *supra* note 29 at s 26; Alta *FLA, supra* note 29 at s 8; PEI *CLA, supra* note 29 at s 20; Man *FMA, supra* note 29 at 21; Yk *CLA, supra* note 32 at s 12; Nfld *CLA, supra* note 32 at s 10; NB *FSA*, *supra* note 32 at s 103; Nun *CLA, supra* note 32 at s 8(1); NWT *CLA, supra* note 32 at s 8; Yk *CLA, supra* note 32 at s 12; Ont *CLRA, supra* note 29 at ss 6, 7.
[455] Note that this does not disrupt surrogacy laws. Surrogacy cannot be performed via sexual intercourse. (*AHRA, supra* note 95 at ss 3 definition of "surrogate mother" as being confined to those who conceive via assisted reproduction procedure).
[456] Ont *CLRA, supra* note 29 at s 6.
[457] *Ibid* at s 7.

> **Other biological parent, if sexual intercourse**
>
> 7 (1) The person whose sperm resulted in the conception of a child conceived through sexual intercourse is, and shall be recognized in law to be, a parent of the child.
>
> **Presumption**
>
> (2) Unless the contrary is proven on a balance of probabilities, there is a presumption in respect of a child conceived through sexual intercourse that a person is, and shall be recognized in law to be, the parent referred to in subsection (1) if any of the following circumstances applies:
>
> 1. The person was the birth parent's spouse at the time of the child's birth.
>
> 2. The person was married to the child's birth parent by a marriage that was terminated by death or judgment of nullity within 300 days before the child's birth or by divorce where the judgment of divorce was granted within 300 days before the child's birth.
>
> 3. The person was living in a conjugal relationship with the child's birth parent before the child's birth and the child is born within 300 days after they cease to live in a conjugal relationship.
>
> 4. The person has certified the child's birth, as a parent of the child, under the *Vital Statistics Act* or a similar Act in another jurisdiction in Canada.
>
> 5. The person has been found or recognized by a court of competent jurisdiction outside Ontario to be a parent of the child.
>
> **Conflicting presumptions**
>
> (3) If circumstances exist that give rise to a presumption by more than one person under subsection (2), no presumption shall be made under that subsection.

"Spouse" is defined as meaning the person to whom a person is married or with whom the person is living in a conjugal relationship outside marriage.[458]

Thus, a presumption of parentage for an "other parent" can flow from three foundations:

[458] *Ibid* at s 1(1).

(1) being a "spouse" of the birth parent at birth – which includes married and common law couples

(2) being married or living in a conjugal relationship with the birth parent within 300 days of birth, or

(3) formal written acknowledgment.

The 300-day window is equal to a typical gestation period. It is meant to cover situations where a person was married to or living in a common law relationship with the birth parent at conception, but not birth of the child. Issues of timing are discussed below.

Internationally, it is less common to see unmarried partners be given presumptions of parentage. In England, unmarried partners are not presumed parents. Whether they live together or not, they must sign a document in order to receive parent status.[459] In Australia, some jurisdictions extend presumptions to domestic partners, while other do not.[460]

New Zealand has ambiguity in its law as a result of patchwork amendments. In its more conservative reading, its system is roughly aligned with Nova Scotia's: presumptions are extended to people married to the birth parent, but birth registration legislation permits domestic partners to have their names on a birth certificate. In a broader reading, presumptions of parentage for married partners have been extended to domestic partners.[461]

The American *Uniform Parentage Act (2017)* takes an interesting approach to this issue. There, presumptions of parentage are extended to persons (1) who are married to the birth parent, or (2) who "resided in the same household with the child for the first two years of the life of the child, including any period of temporary absence, and openly held out the child as the individual's child."[462] Thus, in addition to marriage, this approach carves out a space to create a presumption of legal parentage for caregiving adults based on their post-birth behaviours.

Unmarried partners under the *Uniform Parentage Act (2017)* are not given a presumption of parentage – their parentage is proven by a sworn document known as a voluntary acknowledgment of parentage (VAP) or a court order.[463] The VAP has the same effect as a court order, and prevents the signatories from contesting parentage on genetic grounds after two years, absent fraud. The American Uniform Act model also departs from the biological model in a limited

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[459]Government of United Kingdom "Parental Rights and Responsibilities" online: <https://www.gov.uk/parental-rights-responsibilities/who-has-parental-responsibility.>
[460] See, for example, ,*Parentage Act 2004, supra* note 340 at s 8; Aus, *Family Law Act (1975)* (53/1975) s 69Q; *Status of Children Act* 1974, *supra* note 185 at s 5.
[461] New Zealand 2005 Report, *supra* note 41 at s 4.2.
[462] *UPA (2017)*, *supra* note 43 at s 201 (1); s 204 (a)(1), and s 204 (a)(2).
[463] *Ibid* at Art 3 (Sections 301-313).

way. Like Canada, in most cases presumptions of parentage are rebuttable based on genetic evidence indicating a different biological parent. However, there are two exceptions to this:

- Sometimes, a person who is a presumed or alleged genetic parent can sign a document known a Denial of Parentage [DP] which severs their parent-child relationship. The DP may only be filed if a VAP is also being submitted by another person with regards to the same child. In some states, the combination of a DP and a VAP can displace the parent-child status between a genetic parent and a child, and replace it with an intended parent.[464] There must be consent of all parties, including the birth parent, in order to do this.

- The US model also has provisions which precludes the establishment of a parent-child relationship by the perpetrator of sexual assault.[465]

There are many reasons to extend the presumption of parentage to unmarried couples, including some constitutional issues to consider. From a legal perspective, the current law is vulnerable to at least two claims of discrimination contrary to s 15(1) of the *Charter*.

First, it is unconstitutional to treat children differently based on their parents' marital status.[466] While Nova Scotia has addressed this issue via discrete statutes that provide for the equal treatment of "illegitimate" and "legitimate" children,[467] in our view this is an inadequate response. The fact that the distinction of legitimacy remains at all in our law is discriminatory.[468]

Second, our law draws a distinction between married and unmarried couples, with unmarried couples being denied automatic recognition. The constitutionality of distinctions based on marital status is unsettled in Canadian law. [469] Because this law is focused on the relationship of a couple

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[464] *Ibid*. In Illinois, for example, the VAP and DP forms can only be used when the presumed parent is not the genetic parent (For example, where a child is born to a married woman where her husband is not the biological father). See: Illinois "Denial of Parentage" online: < https://www2.illinois.gov/hfs/SiteCollectionDocuments/hfs3416d.pdf>. Washington state has a broader use of these forms. There, the VAP and DP forms can remove a genetic parent and replace an intended parent: Washington State Department of Health, "Denial of Parentage" online: <https://doh.wa.gov/licenses-permits-and-certificates/vital-records/parentage/denial-parentage; https://doh.wa.gov/sites/default/files/legacy/Documents/Pubs//422-158-DenialOfParentage.pdf?uid=626efd622a29b >

[465] *UPA (2017)*, *supra* note 43 at s 614.

[466] *Surette v Harris Estate* (1989) 91 NSR (2d) 418 (SC) and *Tighe (Guardian ad litem of) v McGillivray Estate* 1994) 127 NSR (2d) 313 (CA). In this case, at para. 31, the Court of Appeal read into s 16 of the Act that the illegitimate child, "Shall be treated as if the child were the legitimate child of the child's mother or father," so that the child was not discriminated against on the basis on parentage.

[467] *Supra* note 436.

[468] NSLRC Legitimacy Report, *supra* note 21 at 10.

[469] *Quebec (Attorney General) v A*, 2013 SCC 5.

to a third party (the child's status) [470] there is a compelling, albeit untested, argument to be made that such distinctions are unconstitutional.

From a social perspective, statistics suggest that marriage is no longer the only social insignia upon which the public presumes a biological parent-child relationship exists. Statistics demonstrate that more people are living common law than ever before, and that common law partners are having children. Data from the 2021 Census indicates that 21% of Nova Scotia's cohabiting couples are not married, an increase from the national average of 6.3% in 1981.[471] Of those most recently surveyed cohabiting couples, 35% are living with children.[472] This suggests that there are sound public policy reasons to extend presumptions of parentage to common law partners.

On the other hand, some could argue against extending a presumption of parentage to unmarried couples. It could be argued that unmarried relationships offer a less concrete foundation upon which we can presume that children born are children of the relationship. In addition, some may also have religious or cultural views about children born outside of marriage.[473]

It could also be argued that there is no need to change the law. Unmarried partners are already functionally recognized as parents via mechanisms to get their name on a birth registration, and several international jurisdictions require unmarried parents sign documents affirming parentage. There are, however, two flaws in this argument. First, as outlined in Chapter 2, birth registration does not guarantee the substantive benefits of parentage. Second, some unmarried

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[470] *Nova Scotia (Attorney General) v Walsh,* 2002 SCC 83, [2002] 4 SCR 325 at para 53, in which the majority distinguished the issue in that case (access to matrimonial property legislation) from another *Miron v Trudel*, [1995] 2 SCR 418, in which the Supreme Court found that a distinction between married and unmarried couples was unconstitutional: "The discriminatory distinction at issue in *Miron*, *supra*, concerned the relationship of the couple as a unit, to third parties. The marital status of the couple should have had no bearing on the availability of the benefit." As a result of *Quebec (Attorney General) v A*, 2013 SCC 5, the 15(1) analysis in *Walsh* may no longer be good law – but this point of distinction has not been challenged.

[471] Statistics Canada, *Study:* Families, households and marital status: Key results from the 2016 Census (2017), at <https://www150.statcan.gc.ca/n1/daily-quotidien/170802/dq170802a-eng.pdf> [Statistics Canada, Key Results]

[472] Statistics Canada, "Census Profile – Nova Scotia" (2021) online:< https://www12.statcan.gc.ca/census-recensement/2021/dp-pd/prof/details/page.cfm?Lang=E&SearchText=Nova%20Scotia&DGUIDlist=2021A000212&GENDERlist=1,2,3&STATISTIClist=1&HEADERlist=0>

[473] The Law Reform Commission of Nova Scotia also summarized some arguments in favour of retaining the distinction between legitimate and illegitimate children raised by the Alberta Law Reform Institute including: "the institution of marriage and the stability of the family would be diminished; the distinction serves to uphold moral standards; and sexual promiscuity would be promoted. Although there were few written comments in response to the Discussion Paper, they generally supported the removal of the distinction either totally or with a few reservations in specific situations." NSRLC Legitimacy Report, *supra* note 21 at 6.

partners have themselves objected to these requirements on the basis that they make them feel "humiliated" and "shameful".[474]

We propose for discussion that presumptions of parentage should be extended to certain unmarried partners. From a legal, policy, and social perspective, distinctions based on marital status are outdated and work to the detriment of common law couples and their families. Nova Scotia's status as an outlier in this regard indicates that this change is possible without causing confusion or disturbing the recognition of traditional married families.

Proposal for Discussion:

Nova Scotia should extend a presumption of parentage to the common law partner of a birth parent.

6.4.1 What is a Common Law Partner?

If presumptions of parentage are extended to common law couples, we must consider how to define this group. There is no universal legal definition of a common law partner. Definitions that do exist tend to use two qualifying criteria:

(1) the character of the relationship (something more than roommates – commonly defined as a mix of cohabitation and conjugality) and

(2) duration of the cohabiting conjugal relationship.

In Nova Scotia, for example, several acts define common law partners as being two persons cohabiting in a conjugal relationship for at least one year,[475] while others require the length of cohabitation be at least two years[476] or more.[477] Each of these criteria are outlined below.

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[474] Carolyn Ray, "Halifax mom shocked by form for 'unmarried mother' to confirm baby's dad", *CBC News* (9 Nov 2019), available at: https://www.cbc.ca/news/canada/nova-scotia/unmarried-halifax-mom-letter-vital-statistics-1.5350634>.

[475] Acts that use a 1-year period to find common law partner status*: Personal Directives Act*, SNS 2008, c 8, s 2(b); *Workers Compensation Act*, SNS 1994-95, c 10, s 2(ab); *Hospitals Act*, RSNS 1989, c 208, s (ca); *Fatal Injuries Act*, *supra* note 6 at s 2(aa); *Insurance Act*, RSNS 1989 c 231 s 3(fa); *Involuntary Psychiatric Treatment Act*, SNS 2005, c 42, s 3(f); the *Labour Standards Code*, RSNS 1989 c 246, s 2(qa); the *Sales Tax Act*, SNS 1996, c 31, s 12T(b); and the *Personal Health Information Act*, SNS 2010, c 41, s 3(e).

[476] Acts that use a 2-year period to find common law partner status*: Parenting and Support Act*, RSNS 1989, c 160, s 2(m)(v); *Fatality Investigations Act*, SNS 2001, c 31, s 2(1)(d); *Members Retiring Allowances Act*, RSNS 1989, c 282, s 2(jc); the *Provincial Court Act*, RSNS 1989, c 238, s 23(1)(a); and the *Children and Family Services Act,* SNS 1990 c 5, s 3(1)(i).

[477] *Pension Benefits Act*, SNS 2011, c 41.

(a) Cohabitation, Conjugality and Marriage-Like Relations

All Canadian jurisdictions impose some requirement on the character of the relationship in order for a birth parent's partner to be a presumed parent. Presumably, this rationale flows from the fact that, because parentage is being allocated in the context of conception via sexual relations, the definition of common law couple should capture only those relationships in which it can be reasonably presumed a sexual relationship exists. In other words, roommates, family members, or other platonic partners who live with the birth parent should not be automatically presumed to be parents.

Canadian legislation relies on phrasing such as "conjugality", "cohabitation" or "marriage-like" relations in order to encapsulate the character of the common law relationship. The terms themselves "involve overlapping and interwoven concepts" which are difficult to disentangle.[478] For our purposes, it is noteworthy that "conjugality" means more than merely a sexual relationship, and "cohabitation" is not synonymous with living under the same roof. Rather, the terms represent an attempt to capture and encompass the modern-day concept of marriage.

The case of *Molodowich v Penttinen*, has emerged as an authoritative source for unpacking these concepts.[479] It offers a long list of non-exhaustive criteria that continue to be deployed in order to determine whether a relationship ought to qualify as conjugal/cohabiting and/or common law in order to access statutory rights benefits.[480]

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[478] (1980) 17 RFL (2d) 376 (Ont SC) [*Molodowich*] As to the meaning of "cohabit" vs "conjugal", the Court stated (at para 11): "Through the maze of my investigation I have come to the conclusion that "cohabit" and "conjugal" involve overlapping and interwoven concepts, each word, in a sense, an echo of the other and both an integral and essential element encompassed by the modern day concept of 'marriage'".

[479] *Ibid*. See Also, *Hodge v Canada (Minister of Human Resources Development)*, [2004] 3 SCR 357, 2004 SCC 65 at para 42 in which the court clarified that "'Cohabitation' in this context is not synonymous with co-residence. Two people can cohabit even though they do not live under the same roof and, conversely, they may not be cohabiting in the relevant sense even if they are living under the same roof."

[480] *Molodowich*, *supra* note 478 at para 16: (1) Shelter (a) Did the parties live under the same roof? (b) What were the sleeping arrangements? (c) Did anyone else occupy or share the available accommodation? (2) Sexual and Personal Behaviour (a) Did the parties have sexual relations? If not, why not? (b) Did they maintain an attitude of fidelity to each other? (c) What were their feelings toward each other? (d) Did they communicate on a personal level? € Did they eat their meals together? (f) What, if anything, did they do to assist each other with problems or during illness? (g) Did they buy gifts for each other on special occasions? (3) Services: What was the conduct and habit of the parties in relation to: (a) Preparation of meals (b) Washing and mending clothes (c) Shopping (d) Household maintenance; and (d) Any other domestic services? (4) Social (a) Did they participate together or separately in neighbourhood and community activities? (b) What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties? (5) Societal (a) What was the attitude and conduct of the community towards each of them as a couple? (6) Support (economic) (a) What were the financial arrangements between the parties regarding the provision of or contribution towards the necessaries of life (food, clothing, shelter, recreation etc.)? (b) What were the arrangements concerning the acquisition and ownership of property? (c) Was there any special financial arrangement between them

This list - which has been affirmed in Nova Scotia - has been the subject to criticism, particularly in relation to the questions which focus on the existence of a sexual relationship.[481] These critiques argue that sexual intercourse does not determine whether people are living as a unit which would qualify them for access to marital statutory regimes. While these critiques are valid, they are less forceful in the context of parentage presumptions that are themselves premised on the fact of sexual relations.

The Institute does not foreclose on the concept of extending parentage to other interdependent relationships that do not qualify as conjugal, cohabitating or marriage-like. This is an issue discussed at Chapter 7, below. Under the umbrella of conception via sexual relations, however, and in the context of extending presumptions of parentage outside the net of marriage, there is logic in maintaining some form of this terminology. The concepts of cohabitation and conjugality remain essential when assessing whether we can presume a child born of sexual relations is the product of their relationship.

We propose for discussion that the law should extend presumptions of parentage to persons who are cohabiting in conjugal relationships with a birth parent. These concepts, while imprecise, are nonetheless necessary to distinguish between persons we would want to capture (romantic partners) from those we do not (roommates or other platonic partners). They are also in alignment with our principles of reform in that they take functional approach to parentage and harmonize Nova Scotia's parentage law with other areas of the law, and other jurisdictions. The arguments against these terms tend to focus on their reliance on sexual relations. These arguments are less persuasive where the presumption exists because we can presume a sexual relationship exists. We note that this requirement should also be mirrored where other methods of conception are used (i.e. where unmarried couples use ART to conceive, the birth parent's common law partner should also be a parent – although in that case based on intent rather than biology).

Proposal for Discussion:

A common law partner should be defined as including persons cohabiting in conjugal relationship with a birth parent.

which both agreed would be determinate of their overall relationship? (7) Children (a) What was the attitude and conduct of the parties concerning children?

[481] See *Bakes v Bakes*, 2003 NSSC 130; (2003) 215 NSR (2d) 1 (SC); *Wittich v Wittich* (2005) 236 NSR (2d) 338 (SC). Some have described conjugality (here a proxy for sexual activity) as an irrational basis for the allocation of legal benefits and burdens: Brenda Cossman and Bruce Ryder, "What is Marriage-Like Like? The Irrelevance of Conjugality" (2001) 18 Can J Fam L 269, at 272.

(b) Duration Thresholds

Most Canadian jurisdictions do not impose a duration requirement to qualify as a common law partner for the purpose of parentage. All that is required is that the parties satisfy the cohabitation and conjugality requirements. For example:

- Ontario extends a presumption to people "living in a conjugal relationship with the birth parent."[482]

- British Columbia, Prince Edward Island, and Manitoba extend presumptions to persons living in a "marriage-like relationship" with the birth parent.[483]

- Newfoundland and Labrador, Yukon, Northwest Territories, and Nunavut extend presumptions of parentage someone who is "cohabiting a relationship of some permanence" with the birth parent.[484]

- New Brunswick extends presumptions to a man who was "cohabiting with the mother of the child."[485]

Other jurisdictions only extend a presumption to partners who satisfy a duration requirement:

- In Alberta, a male person is a presumed parent if "he cohabited with the birth mother for at least 12 consecutive months during which time the child was born and he has acknowledged that he is the father"[486]

- Saskatchewan extends presumption to a birth parent's "spouse" which is defined as including "a person with whom that person has cohabited as spouses continuously for a period of not less than 2 years."[487]

As a general matter, duration thresholds have been defended as demonstrating that a relationship is of a sufficiently serious nature so as to qualify for access to marriage-like statutory rights and obligations.[488] In the context of parentage, however, this argument is less compelling. This is the case for at least two reasons: first, having a child together may be able to stand as an adequate proxy the seriousness of a relationship; and second, because parentage law has important rights

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[482] *CLRA, supra* note 29 at s 1 "spouse".
[483] Man *FLA, supra* note 29 at s 21(2) 1. and 3. ; PEI *CLA, supra* note 29 at ss 20(2)(d) and (e).
[484] Nfld *CLA, supra* note 32 at s 10(1)(e), Yk *CLA, supra* note 32 s 12(1)(d), NWT *CLA, supra* note 32 s 8(1)(d), Nun *CLA, supra* note 32 at s 8(1)(d).
[485] NB *FSA, supra* note 32 at s 103(1)(d).
[486] Alta *FLA, supra* note 29 at s 8(1).
[487] Sask *CLA, supra* note 29 at s 55(1).
[488] ISA Discussion Paper, *supra* note 6 at 100.

implications for children, it may not be appropriate to impose a specific duration before a child can presumptively have a legal parent.

In *The Legal Status of the Child Born Outside Marriage in Nova Scotia* Report, the Law Reform Commission proposed that the Province extend a presumption of biological paternity to someone "cohabitat[ing] with [the] mother of a child in a "relationship of some permanence".[489]

We propose for discussion that there is no need to extend a specific duration requirement in order to extend a presumption of paternity to a common law partner. While we considered imposing a one-year threshold to align with federal tax legislation, on further consideration we believed that it was arbitrary to require people to live together for a certain period in order for their child to be presumed to have a parent.

Proposal for Discussion:

There should be no specific duration threshold imposed on persons to qualify as a common law partner for the purpose of parentage.

(c) Timing: Cohabitation and Conjugality at Conception and/or Birth

Finally, there is the question of the timing of the presumption extended to common law partners. That is, does the presumption of parentage flow to the person cohabiting in a conjugal relationship with the birth parent at conception, or at birth?

Historically, the presumption of paternity flowed from marriage to the mother at either conception or birth. A person who was married to a mother at or within 300 days of conception (the typical gestation period) was presumed to be a father. Even if not married at conception, however, a man benefited from a presumption of parentage if he was married to the mother by the time the child was born. This encouraged the practice of "legitimating" children conceived out of wedlock. [490]

Modern statutes have not strayed from this approach; they have merely extended the existing presumptions to common law partners. As outlined above, the Ontario *CLRA* extends a presumption of parentage to a "spouse" (which includes married and unmarried conjugal cohabitees) at birth, or a person married or living in a conjugal relationship with the birth parent at or within 300 days of birth. [491]

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[489] NSLRC Legitimacy Report, *supra* note 21 at Appendix C.
[490] Blackstone's Commentaries, *supra* note 22 at 444-445.
[491] Ont *CLRA, supra* note 29 at ss 1(1) definition of "spouse", 7(2).

The arguments in favour of restricting the presumption of parentage to persons cohabiting in a conjugal relationship at the time of conception relate to certainty. The moment of conception is the point at which direct biological links are forged. Therefore, a person's common law partner at conception is more likely to be the biological parent of the child. By extending presumptions to persons who may not have been around at conception, we are likely capturing people who do not share a biological link with the child. In addition, by choosing only one date, we are minimizing the chance that multiple persons will qualify for a presumption.

On the other hand, the benefits of extending the presumption to persons who qualify at conception or birth relate to practicality, equality, and harmonization. Practically speaking, it makes sense to permit hospital staff to treat the person in the delivery room as a parent, particularly if the birth parent is incapacitated and the child needs medical attention. As to equality, married persons are given the benefit of a presumption at both conception or birth. Therefore, common law partners should be treated the same way. Lastly, because most jurisdictions extend the marriage presumptions to common law partners, it helps bring clarity and consistency across Canada.

We propose for discussion that a presumption of parentage ought to be extended to a person cohabiting in a conjugal relationship with the birth parent at either conception or birth. While this makes the presumption more likely to require correction, we take the view that the presumptions ought to be the same for married and common law partners. This presumption should extend to persons living in common law relationships with the birth parent at birth, or within 300 days of birth. This 300-day rule equates to a typical gestation period, and covers situations when the exact date of conception is unknown. This equalizes the presumptions given to married and common law partners.

Proposal for Discussion:

A presumption of parentage should extend to a person who is cohabiting in a conjugal relationship with the birth parent at or within 300 days of birth.

6.5 Recognizing the Parentage of Other Groups

Modern parentage legislation also recognizes the parentage of other persons who have undertaken certain positive steps including:

> (1) signing a formal written acknowledgment (typically via Vital Statistics documents with the birth parent),[492]

[492] BC *FLA, supra* note 29 at s 26(2)(e) and (f); Nun *CLA, supra* note 32 at s 8(01)(b) and (c); PEI *CLA,*

(2) obtaining a court order in another jurisdiction or proceeding,[493] and/or

(3) undertaking a parentage test (a blood or DNA test).[494]

The rationale for these categories is that some people may not qualify for an automatic presumption of parentage, but may opt into this status where they take an active step affirming their biological parentage. As with other presumptions under the umbrella of conception by sexual intercourse, they are ultimately rebuttable on the basis of contrary biological evidence.

The arguments in favour of recognizing persons who fall into groups (2) and (3) relate to efficiency, comity, and access to justice. People who have already undergone biological tests and/or had their legal parentage recognized in other proceedings (for example, a child support hearing) should not have to re-prove their parentage. In the absence of contrary evidence, these people should be viewed as legal parents.

The arguments against this recognition relate to certainty. Different proceedings and jurisdictions may have different standards for proving parentage. In addition, different parentage tests (blood group tests versus DNA tests, for example) provide different levels of certainty as to biological parentage. Without re-confirming parentage, there remains a possibility that the determination in other proceedings is false. There is also concern that a determination of "legal parentage" in one proceeding may be confused with decisions on "parenting" rights and responsibilities (which can extend to people who do not have legal parentage).

The arguments in favour of recognizing persons who have signed a formal written acknowledgements as legal parents relate to family autonomy, practicality, and access to justice. There is no need for the law to intervene where both the birth parent and other parent affirm that they are the parents of a child born. Every day, people have children with persons who are not their married or common law spouse. The law should provide a path for them to be recognized short of a judicial declaration. It is unnecessary, disruptive, and wasteful of judicial resources to demand these people obtain judicial declaration as to parentage. A sworn statement is the best path to create a workable path for these people to be recognized. As with other presumptions, if it turns out this recognition is incorrect it is always rebuttable based on contrary biological evidence.

The arguments against having this path relate to certainty. As with all presumptions, we don't actually know if an actual direct biological connection exists. In this case, however, we do not have

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supra note 29 at s 20(2)(g); NB *FSA supra* note 32 at s 103(1)(e) and (f); Alta *FLA, supra* note 29 at s 8(1)(f); Sask *CLA*, *supra* note 29 at s 59(1) (c) and (d); Ont *CLRA, supra* note 29 at s 7(2) 4, Nfld *CLA, supra* note 32 at s 10(1)(d); Yk *CLA, supra* note 32 at s 12(1)(e), Man *FMA, supra* note 29 at s 21(2).

[493] Ont *CLRA, supra* note 29 at s 7(2) 5; Nun *CLA, supra* note 32 at s 8(01)(d), Yk *CLA, supra* note 32 at 12(1)(d), Nfld *CLA, supra* note 32 at s 10(1)(e); NB *FSA, supra* note 32 at s 103(1)(g), Alta *FLA, supra* note 29 at s 8(1)(g); Sask *CLA*, *supra* note 29 at s 59(1)(g); Man *FMA, supra* note 29 at s 21(2) 6.

[494] PEI *CLA, supra* note 29 at s 20(2)(f).

the proxies of marriage or common law partnership upon which we can assume the biological connection exists. We are simply trusting the parties are telling the truth in their sworn statement.

We propose for discussion that the law should extend a rebuttable recognition of parentage to people who fall into all three of these categories (i.e., have provided a sworn statement as to parentage, have a parentage test, or have had legal parentage determined in other proceedings).

Each of these paths provide a workable and relatively easy path to recognition for people do not qualify for automatic presumptions (i.e., marriage or common law partnership). It is not practical or efficient to require people who fall into these categories to proceed to court to prove their parentage. Judicial involvement should be avoided where it is not necessary. In the absence of a dispute, there is no need for the state to insert itself into these people's families.

Proposals for Discussion:

Nova Scotia should recognize the parentage of persons who sign a statutory declaration affirming their parentage.

Nova Scotia should recognize the parentage of persons who have had legal parentage determined in other court proceedings.

Nova Scotia should recognize the parentage of persons who have obtained a parentage test confirming their biological parentage.

Recognition of the parentage of persons who sign a statutory declaration, have had legal parentage determined in other court proceedings, or who have obtained a parentage test should be rebuttable based on contrary evidence as to biological parentage.

7 Multiple Parents

7.1 Introduction

This Chapter considers whether parentage law should recognize that a child may have more than two legal parents. This is a subject of interest to a wide variety of families including:

- those who have more than two-people involved in creating a child (such as in the context of sperm, egg and embryo donation and surrogacy);
- polyamorous families; and
- cultures with understandings of parent and child that stretch beyond direct biological descendants, such as in some newcomer, Mi'kmaq and African Nova Scotian families.

This Chapter begins with considering whether Nova Scotia should allow Courts to judicially recognize multiple-parent families. Then, it considers the policy rationales regarding the administrative recognition of some multiple-parent families. Finally, it considers the possibilities to recognize parentage for groups who are left out of the administrative model, and other novel policy considerations raised by multiple-parent families.

7.2 Judicial Recognition of Multiple-Parent Families

7.2.1 Beyond Parens Patriae Powers

Nova Scotia does not recognize that a child can have more than two legal parents. The common law does not contemplate a child having more than two legal parents; in the case of surrogacy, the Birth Regulations do not contemplate adding some parents without removing others.[495]

Judges may have the authority, however, to determine that a child has more than two parents using their *parens patriae* powers - an inherent jurisdiction that permits a judge to fill legislative gaps to protect minors.[496] *Parens patriae* jurisdiction is premised on locating a legislative gap and is not meant to be used to amend legislation or create new substantive rights. Several Canadian Courts outside of Nova Scotia have considered their *parens patraie* powers in deciding whether a child has more than two legal parents. For example:

- In *AA v BB*[497] the Ontario Court of Appeal was asked to recognize that a child had three parents: both women in a lesbian couple, and the man who had provided his sperm for the child's conception and remained involved in the child's upbringing. At birth, the child's

[495] Birth Regulations, *supra* note 24 at s 5(3).
[496] *Parens patriae* jurisdiction is discussed in more detail in Chapter 9. For discussion of *parens patriae* jurisdiction from the Supreme Court of Canada, see *Eve, Re*, [1986] 2 SCR 388, [1986] SCJ No 60 (SCC) at paras 72 – 76.
[497] *AA v BB, supra* note 1.

parents were the birth parent and the man who had provided sperm. The birth parent's lesbian partner was not recognized. She wanted to be a parent, but adoption would have eliminated the parental status of the man who had provided sperm – an outcome nobody wanted. The Court used its *parens patriae* jurisdiction to order that the child had more than two parents, finding it to be in the child's best interests.[498]

- In *Re C.C.,* the Newfoundland and Labrador Supreme Court was asked to declare that a child born within a three-person polyamorous relationship had three parents.[499] While the child's mother was known, the biological father was unknown and the two men in the relationship refused to undergo DNA testing to make this determination. The parties asked the Court to issue a declaratory order that the child had three parents. The Court used its *parens patriae* jurisdiction to declare that the child had three parents. The legislature did not contemplate the complex family relationships that are common in society today. The child was born into a stable and loving family and there was nothing, from the perspective of the child's best interests, to disparage about the relationship.[500]

- In *DWH v DJR*, an Alberta court used its *parens patriae* jurisdiction to rule that a child had three parents.[501] Alberta's predecessor to its current parentage statute did not automatically recognize the parentage of a non-genetic parent in a same-sex male interdependent relationship, as was the case for opposite-sex partners. The only way for the non-genetic male parent to be recognized as such was to go through the adoption process, which would result in the removal of the biological mother from the birth certificate (and depend to some extent on her consent). By the time the *Charter* issue arrived in Court, the legislative problem had been rectified. However, the Court relied on its *parens patriae* jurisdiction to hold that the child in this case had three parents. [502]

- In *Droit de la famille 191677,*[503] a dispute arose over a child's birth certificate after a known sperm donor (who was involved in a child's upbringing but not a parent) petitioned the court for a recognition of his paternity, and for removal of the non-genetic parent's name from the birth registration. The dispute arose after the lesbian parents divorced and the non-genetic parent transitioned to a man. The trial judge reluctantly granted the application because the known donor's involvement in the child's upbringing was not consistent with the Code's "parental project" provisions applicable in cases of artificial

[498] For more discussion of the impact of *AA v BB*, see Snow, *supra* note 52 at 330.
[499] *Supra* note 58.
[500] *Ibid* at para 34.
[501] *Supra* note 49.
[502] *Ibid* at paras 22-26 (2011 ABQB 791) and paras 56-63 (2013 ABCA 240).
[503] *Droit de la famille — 18968*, 2018 QCCS 1900 (appeal - *Droit de la famille 191677*, 2019 QCCA 1386, leave to appeal to SCC ref'd: *JM c CL,* et al., 2020 CanLII 25168 (CSC)).

insemination. In making the order, the Superior Court judge criticized the fact that Quebec law does not allow a child to have three parents.[504]

The Court of Appeal disagreed with the trial judge's conclusion on a parental project, and ultimately rejected the known donor's application (thus sidestepping the issue of the number of parents).[505] In so doing, it believed that the donor could have had his rights recognized via a status not dissimilar to an *in loco parentis* declaration, which would give him rights and responsibilities in relation to the child, but not a declaration of parentage.

- In *British Columbia Birth Registration No. 2018-XX-XX5815*,[506] the British Columbia Superior Court used its *parens patriae* jurisdiction to find that three persons in a polyamorous relationship (the birth parent and biological father who conceived via sexual intercourse, and a third woman in the relationship) were collectively the legal parents of a child. In reaching its conclusion, the Court held that recognition would secure the legal and financial relationship between the third parent and the child – including access to statutory and other benefits which would positively impact the child. The Court noted that all the declaration would give them security, peace of mind, and validation of the role each parent plays in the child's life. [507]

In response to this trend, some Canadian jurisdictions have clarified in legislation, a judge's ability to make an order that a child has more than two legal parents. Alberta has come out against the practice. The province has filled the *parens patriae* legislative gap by amending its laws to prevent a child from having more than two parents.[508]

Ontario, British Columbia and Saskatchewan have created an administrative legislative scheme for some multiple-parent families (discussed below). In addition, Ontario has expressly provided that a judge can use their general declaratory powers to find a child has more than two parents.

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[504] *Droit de la famille — 18968*, 2018 QCCS 1900 at paras 40-3 : [translated] «Now, instead of being able to formalize the situation with a three-parent filiation for the good of the child, [the parties] find themselves in a legal fight, trying to eliminate one of them. How can we conclude that this situation is in the best interest of the child? Of course, the role of the Tribunal is not to legislate. It does not promulgate the laws but applies them. That said, this case illustrates the usefulness of modernizing the Quebec situation with respect to three-parenthood. The Court invites the Quebec government to reconsider the recognition of three-parenthood or multi-parenthood, in the best interest of minor children like X. However, given the current state of the law, the Tribunal must proceed with the analysis of the legal debate between the parties, in accordance with the law as it exists.»
[505] *Droit de la famille 191677*, 2019 QCCA 1386, leave to appeal to SCC ref'd: *JM c CL,* et al., 2020 CanLII 25168 (CSC).
[506] 2021 BCSC 767.
[507] *Ibid* at paras 80, 81.
[508] Alta *FLA, supra* note 29 at ss 8.1, 8.2, 9(7) (parentage is always limited to a maximum of 2 persons). (See s 9(7)(b)).

No other jurisdictions, including recent reformers Manitoba, Quebec and Prince Edward Island, discuss multiple-parent families. In these and other Canadian jurisdictions, recognition of multiple-parent families still rests on the court's *parens patriae* jurisdiction.

Internationally, only the American *UPA (2017)* has a scheme to judicially recognize multiple-parent families. It has an option for enacting jurisdictions to state that, "a court may find that a child has more than two legal parents only when failure to do so would cause detriment to the child". [509] This was justified as being consistent with an emerging trend in which courts recognize more than two people as a child's parents, both within statutes and via common law.[510] The drafters cautioned however, it "stakes out a narrow, limited approach to the issue by erecting a high substantive hurdle before the court can reach this conclusion: a court can determine that a child has more than two legal parents only when failure to do so would cause detriment to the child."[511]

There are several benefits to legislatively clarifying a judge's authority to declare a child has more than two legal parents. Right now, it is uncertain if a judge would invoke their *parens patriae* jurisdiction to find a child has more than two parents. Typically, a judge would first have to be convinced that a legislative gap exists, which is itself a time-consuming endeavour. By addressing a judge's ability to order a child has more than two parents, the law bypasses this process and provides an answer to this query. This saves time and money for families and courts. In addition, given that judges are increasingly being asked to deal with this issue, it is important that the law provide guidance to ensure the expeditious and consistent resolution of cases.

On other hand, there are downsides to this approach. By setting down rules for judicial recognition of multiple-parent families (either to permit them or to allow them) we arguably freeze the law in a way that blocks the invocation of a flexible *parens patriae* jurisdiction. There is also an argument that this is not necessary. It may be argued that, at the time of writing, multiple-parent families are a discrete enough situation that they do not need to be addressed specifically in legislation. It may be argued that *Parens patriae* jurisdiction and other family law remedies (guardianship, *in loco parentis* etc) provide adequate responses to the claims of multiple-parent families.

We propose for discussion that Nova Scotia's legislation address judicial powers to order a child has more than two parents. This is an issue that is appearing with increasing frequency in Canadian courts. By providing judicial clarity on how to approach these questions, the law is

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[509] *UPA (2017)*, *supra* note 43 at s 613.
[510] *UPA (2017)*, *supra* note 43 at 56, commentary to s 613: Four states expressly permit a court to find that a child has more than two legal parents by statute. *See* Cal. Fam. Code 7612(c); Del. Code Ann. tit. 13, § 8-201(a)(4), (b)(6), (c); D.C. Code § 16-909(e); Me. Rev. Stat. tit. 19-a, § 1853(2). Courts in other states have reached that conclusion as a matter of common law. See, for example, *Warren v. Richard*, 296 So.3d 813, 815 (La. 1974).
[511] *Ibid.*

clearer and more predictable. It will save judicial resources and the expense associated with proving that the case is appropriate for *parens patriae* jurisdiction, which enhances our goals of certainty and increasing access to justice. Judges are increasingly dealing with applications to recognize parentage in multiple-parent families, whether or not provincial legislation specifically addresses it. It makes sense to formally recognize this issue which will save time, money and judicial resources.

Proposal for Discussion:

Parentage legislation should address a judge's authority to order a child has more than two legal parents.

7.2.2 Legislative Recognition of Multiple-Parent Families

We next have to consider how the legislation should recognize multiple-parent families. The benefits of permitting the recognition of multiple-parent families relate to equality, flexibility, functionality, and the child's interests. As the cases outlined above demonstrate, multiple-parent households already exist in Canada. In the past decade, some of these families have come to court seeking recognition, and judges have found that these families can provide a "stable and loving family models which, although outside the traditional family model, provides a safe and nurturing environment".[512] The law's failure to recognize non-normative family forms creates vulnerability and anxiety amongst the parents (particularly non-genetic parents), which penetrates the family unit and is not in the child's best interests. Non-recognized parents in multiple-parent families have reported stress, and power imbalance in dealing with (1) state authorities and (2) other recognized parents.[513] By permitting judges to rule that a child has more than two parents, we create space for flexibility in the law and the recognition of these different cultures and family forms.

The benefits of forbidding a judge from ordering a child has more than two parents relate certainty, protection, and necessity. The Quebec Comité consultatif sur le droit de la famille expressly rejected the concept of recognizing multiple-parent families. In its view, multiple parentage serves the interests of parents and not children. It also believed it was wrong to conflate the desire to have a role in a child's life with the status of legal parent. The status of donors or

[512] *Re CC, supra* note 500 at para 34.
[513] *AA v BB, supra* note 1 at para 15. Fiona Kelly, "Multiple Parent Families under British Columbia's new *Family Law Act*: A Challenge to the Supremacy of the Nuclear Family or a Method by which to Preserve Biological Ties and Opposite Sex Parenting?" (2014) 47:2 UBC Law Rev 565 at 569 [Kelly: Multiple Parent]. See also: Nola Cammu "'We are 3 parents but legally 2' Absent Legality present display" (2021) 42:5, Journal of Family Issues 1007.

"other" persons in the child's life, could be met by that province's equivalent to *in loco parentis* status. It stated:[514]

> The Committee also considered the possibility that some States are considering assigning three parents to a child born of assisted reproduction, namely the birth mother, her or her spouse and the author of the contribution of genetic forces. … After discussions, Committee members clearly rejected this option. Here as elsewhere, there is currently no reason to believe that it is in the best interests of the child born of assisted reproduction to have three parents in the strict sense of the term. In fact, there is every reason to believe that the states that have embarked on this shift first wanted to meet the needs and expectations of adults. …
>
> Of course, the donor may want to play an active role with the child. Together with the intended parent(s), he/she may aspire to become a true parent figure for the child. While the legitimacy of such a plan is beyond doubt, its implementation does not necessarily require attributing parentage to the donor. Filiation and parenthood should not be confused. Filiation inscribes the child on a genealogical axis, while parenthood confers the exercise of the rights and duties originally attributed to the parents, but nevertheless susceptible of delegation and subdivision, or even forfeiture. In the eyes of the Committee, it is through parenthood, and not parentage, that the legitimate expectations of the parties must be met [translated].

Some people we spoke with expressed concern that allowing multiple parent households will encourage judicial activism and create a slippery slope where parentage is extended in inappropriate circumstances. In addition, there is a concern that multiple-parent families will increase the complexity and uncertainty of family law disputes about parenting.[515] Even where there is no conflict, the primary care decisions about a child, including their schooling, medical care, religion, travel or other matters, will be more complicated in a multiple parent household.[516] Lastly, some may argue that the public may not be ready for multiple-parent families. Under this view, by creating space for their recognition in legislation, we harm the broader support for reforming parentage law.

We propose for discussion that legislation clarify that judges may declare that a child has more than two parents. We see little benefit in preventing judges, after reviewing the facts and individual circumstances, from making an order that they see as being in the child's interests. While there may be perceived risks associated with multiple parents (ie., complicated parenting

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[514] Quebec *Comité, supra* note 39 at 165.
[515] Kelly: Multiple Parents, *supra* note 513 at 574-5.
[516] Kelly: Multiple Parents, *supra* note 513 at 575, citing to Melanie Jacobs "More parents, more money: reflections on the financial implications of multiple parentage" (2009) 16 Cardozo J L & Gender 217 at 223.

time and decision-making arrangements if the parents separate) we note that this is an issue family law already grapples with. We also note that, while multiple-parent families are relatively novel, judges are already dealing with their presence and public perceptions should not stand in the way of recognition where it is in the child's interests.

Proposal for Discussion:

Nova Scotia's parentage law should permit a judge to declare a child has more than two parents.

7.3 Administrative Recognition of Multiple-Parent Families

7.3.1 Should there be an Administrative Path?

In addition to clarifying judicial powers, some Canadian jurisdictions have created administrative paths to permit some multiple-parent families to be recognized without judicial involvement. Ontario, British Columbia, and Saskatchewan each have a legislative framework to recognize some multiple-parent families on an administrative basis. For example, s. 9 of Ontario's *CLRA* states:

> 9 (1) In this section,
>
> "pre-conception parentage agreement" means a written agreement between two or more parties in which they agree to be, together, the parents of a child yet to be conceived.
>
> (2) This section applies with respect to a pre-conception parentage agreement only if,
>
> (a) there are no more than four parties to the agreement;
>
> (b) the intended birth parent is not a surrogate, and is a party to the agreement;
>
> (c) if the child is to be conceived through sexual intercourse but not through insemination by a sperm donor, the person whose sperm is to be used for the purpose of conception is a party to the agreement; and
>
> (d) if the child is to be conceived through assisted reproduction or through insemination by a sperm donor, the spouse, if any, of the person who intends to be the birth parent is a party to the agreement, subject to subsection (3).

> (3) Clause (2) (d) does not apply if, before the child is conceived, the birth parent's spouse provides written confirmation that he or she does not consent to be a parent of the child and does not withdraw the confirmation.
>
> (4) On the birth of a child contemplated by a pre-conception parentage agreement, together with every party to a pre-conception parentage agreement who is a parent of the child under section 6 (birth parent), 7 (other biological parent) or 8 (birth parent's spouse), the other parties to the agreement are, and shall be recognized in law to be, parents of the child.[517]

No international jurisdictions we reviewed had administrative schemes for recognizing multiple-parent families.[518]

The benefits of having an administrative regime for recognizing multiple-parent families relate to efficiency, certainty, family autonomy and access to justice. As a general matter, these principles speak in favour of minimizing the involvement of judges where possible. Arguably, where all parties are in agreement, there is no need to mandate judicial involvement. Requiring all multiple-parent families to go to court is invasive and expensive, in that it wastes money and scarce judicial resources. In the absence of a dispute, there is no need for judges to become involved as a matter of course. By creating an administrative path, we are respecting families' rights to choose how they are organized.

The drawbacks of having an administrative regime for recognizing multiple-parent families relate to the potential for abuse. Because multiple-parent families are the exception rather than the norm, arguably parentage in these cases is best dealt with via a case-by-case application in front of a judge. There may be concerns that multiple-parent provisions can create space for abuse and exploitation in patriarchal societies, in which parentage will be used as a form of control over

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[517] Ont *CLRA, supra* note 29 at s 9.

[518] The New Zealand 2005 Report, *supra* note 41 at 70-74 recommended something similar to the British Columbia model (a donor in addition to two intended parents), noting that concerns about added complexity were overblown because (a) these children were typically conceived after significant deliberation and planning, (b) family law already encounters parenting disputes where more than two parents are involved, (c) multiple parent families fit within indigenous family structures amongst Mäori, Pacific Island and other cultures and (d) that legal recognition of multiple parent families will soon be a necessity, as technology developments were on the verge of enabling a child to have three genetic parents (a technology which is a reality now, but is presently illegal in Canada – *supra* note 165.

The Victorian Law Reform Commission, *supra* note 40 at 138, 139 considered and rejected a proposal that would allow a donor, in addition to the birth mother and her partner, to "opt-in" to a legal parent status. The idea was rejected out of concerns for the uncertainty and complexity that would come from adding legal parents, especially in the case of conflict and separation.[518] They also had concerns about creating a new stream of adoption, or the pressure that may flow to intended parents if known donors were given a legal option to opt-in to legal parent status. Lastly, the Commission was guided by research indicating that "arrangements where the donor is regarded within the family as a parent of the child are relatively rare".

parents (and especially birth parents). Under this view, judicial oversight is necessary to minimize this potential for abuse.

We propose for discussion that Nova Scotia create an administrative path for some multiple-parent families to be recognized without judicial involvement. While we recognize concerns about potential abuse, we note that this provision is about adding parents only – it does not remove any parental status for any party. We also note that concerns about abuse can be mitigated by imposing limits on who may access the administrative regime, and how, an issue discussed below.

Proposal for Discussion:

Nova Scotia's parentage law should have an administrative path for some multiple-parent families to be recognized without judicial involvement.

7.3.2 Pre-Conception agreements

If there is an administrative regime for recognizing parentage, it is important to consider what parameters should be placed on this regime. Each of the three administrative regimes in Canada are premised on the existence of a pre-conception agreement:[519] a child can have more than two parents without having to go to a judge where, prior to conception, all parents reached an agreement.

The benefits of requiring that an agreement exist prior to conception relate to harmonization, consistency and certainty. Multiple-parent families are a novel area of parentage law. By implementing a model that is already in place in other Canadian jurisdictions, we reduce the risk of reproductive tourism and minimize the chances that the new law will create unintended consequences. In addition, by mandating an agreement exist prior to conception, we promote consistency by making parentage crystalizes at moment of conception, no matter how the child was conceived.[521] By making the point of conception the moment at which parentage crystalizes, we create a clear dividing line with adoption law.

On the other hand, it may be argued that this model may be unduly restrictive. The requirement of a pre-conception agreement may effectively preclude administrative recognition of many polyamorous families, particularly because in these families, where children are conceived via sexual intercourse, they may not necessarily have been pre-planned.

We propose for discussion that, in order to access the administrative regime, the intended parents must have reached an agreement prior to conception. The existence of a preconception agreement a minimal requirement which is consistent with our other recommendations. In our view, this is

[519] Sask *CLA, supra* note 29 at 61(1); Ont *CLRA, supra* note 29 at s 9(1); BC *FLA, supra* note 29 at s 30(1).

required in order to make an administrative regime workable. Cases where an agreement was not reached prior to conception are better dealt with by a judge. While we are concerned about being unduly restrictive as against polyamorous families, we address this issue separately, below.

Proposal for Discussion:

In order to access the multiple-parent administrative path, all intended parents must have reached an agreement prior to conception.

7.3.3 Writing Requirement

Writing is also a consistent feature of administrative schemes for recognizing multiple parentage. Each of the three Canadian jurisdictions that have an administrative process for recognizing multiple parents require that the agreement be in writing.[520]

The benefits of requiring that preconception agreements be written relate to certainty and minimizing the potential for abuse. Written agreements provide concrete evidence of intentions, which can reduce the potential for conflict or fraud. It also provides documentation that makes access to an administrative regime workable – without it, there is no method to control who can access the regime.

On the other hand, by requiring written agreements in order to access the administrative regime, we are disadvantaging some families who have not reduced their agreement to writing, but reached an agreement, nonetheless. On this view, these families should not be punished by requiring judicial intervention in the absence of a dispute.

We propose for discussion that, in order to access the administrative regime for recognizing multiple-parent families, the preconception agreement be reduced to writing. Without a writing requirement, we are concerned the administrative regime would be unworkable and chaotic. We also note that parties who do not satisfy the writing requirement are not barred from recognition entirely. As per our other recommendations, these parties can seek a judicial declaration in these cases.

Proposal for Discussion:

In order to access the multiple-parent administrative path, all intended parents must have signed a written agreement setting out their shared intentions.

[520] Sask *CLA, supra* note 29 at 61(1); Ont *CLRA, supra* note 29 at s 9(1); BC *FLA, supra* note 29 at s 30(1).

7.3.4 Maximum Number of Parents

Each jurisdiction with an administrative regime to recognize multiple parents imposes a maximum number of parents who can be recognized without judicial involvement. British Columbia permits a maximum of three parents. This regime was created to deal with parentage in cases of ART, and only permits a person who would otherwise be a donor or a surrogate to be a parent in addition to the two intended parents.[521]

Ontario and Saskatchewan permit a child to have a maximum of four parents administratively. In Ontario, a child can have up to four legal parents without having to go to a judge,[522] but if there are more than four intended parents, a judicial declaration is required. There is no express rationale for why a four-person maximum was selected - it was the product of the privately negotiated Minutes of Settlement from a constitutional challenge to their prior parentage legislation.[523] On a practical basis, we speculate that the four parent maximum serves to accommodate situations of ART, in which parents could be the intended parents, plus the sperm and egg / embryo donors, or a sperm/egg donor and that donor's spouse or partner. It would also presumably deal with most polyamorous families (with 4 or fewer partners) who entered a written preconception agreement.

The Ontario *CLRA* divides the legal processes based on whether the arrangement involves a surrogacy – but in both cases, where there are more than four intended parents, a judicial declaration is required to recognize all intended parentage.[524]

Saskatchewan, like Ontario, allows for up to four parents without requiring a judicial declaration in non-surrogacy situations.[525] In the context of surrogacy, Saskatchewan's legislation does not create different processes based on the number of intended parents to a surrogacy arrangement and does not create an upward limit on who may be a party to a surrogacy agreement.[526]

The benefits of creating a maximum number of parents relate to harmonization, clarity and protection. Administrative recognition of multiple-parent families is a novel area of law. As such, it is wise to use a model that is already in place in order to reduce the potential for unintended consequences and reproductive tourism. In addition, by creating a relatively small limit on the

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[521] BC *FLA, supra* note 29 at s 30(1)(b) only permits multiple parents in cases where there is (1) a birth mother, her spouse, and a donor (a situation of ART), or (2) a birth mother and two intended parents (a situation like a surrogacy, except that the person gestating the fetus will also be a parent).
[522] Ont *CLRA, supra* note 29 at ss 9(2)(a), 10(2) 3.
[523] Snow, *supra* note 52 at 334.
[524] Ont *CLRA, supra* note 29 at ss 9(2)(a); 10(2) 3, s 11(1).
[525] Sask CLA, *supra* note 29 at s 61(1)(2)(a).
[526] This may create an unintended situation where there can be an unlimited number of parents recognized administratively via surrogacy, but only 4 where there is not a surrogacy. This appears to be unintentional, and may in fact require parties to satisfy the rules for both multiple parent households and surrogacy.

maximum number of parents, we reduce the potential that this create extremely complicated family law scenarios, and the possibility that the law be used in unintended ways as a form of control or abuse.

The drawbacks of a maximum relate to heteronormativity and arbitrariness. There is nothing special about three or four parents, beyond which judicial oversight should be necessary. In this regard, the four-parent maximum appears to be arbitrary, and is likely couched in heteronormativity about the boundaries of what a "normal" family can look like.

We propose for discussion that there be a four-parent maximum on access to the administrative scheme for multiple-parent families. We recognize that for some families this may be unduly restrictive. However, given the novelty of this issue, we favour an approach that is in line with other Canadian jurisdictions to reduce the potential for unintended consequences and reproductive tourism. This requirement will only restrict access to an administrative regime. Multiple-parent families with more than four parents will still be able to seek a parentage declaration through the courts.

Proposal for Discussion:

In order to have multiple parentage recognized administratively, there must be four or fewer intended parents.

7.4.5 Eligible Methods of Conception and Family Forms

It is also possible to limit the methods of conception (sexual intercourse or assisted reproduction) or family forms (couples using a donor versus other non-normative families) that are eligible to access an administrative regime. For example, British Columbia only allows a child to have more than two parents in cases of assisted reproduction (which the Act defines as conception other than by sexual intercourse). It is only available where two intended parents reach out to a donor or someone who would otherwise be a surrogate: the eligible parents are - (1) the birth mother, her spouse, and a donor, or (2) a birth mother and two intended parents (a situation like a surrogacy, except that the person gestating the fetus will also be a parent).[527] British Columbia's approach has been criticized for being unduly restrictive and - based on its biological and assisted reproduction qualifications – of having "the practical effect of preserving biological ties and opposite-sex parenting."[528] It is also noteworthy that the British Columbia Law Institute is currently consulting on new parentage legislation that is looking at updating this approach.[529]

[527] BC *FLA, supra* note 29 at s 30(1)(b).
[528] Kelly: Multiple Parents, *supra* note 513 at 568, 581.
[529] Zara Suleman, "Reflecting All Families" Bar Talk (Oct 2021) online:

Ontario and Saskatchewan do not expressly limit the methods of conception or family structures that are eligible to access the administrative regime. However, given that they require a pre-conception written agreement, in practice the administrative regime requires advanced planning, and in this regard is more responsive to situations of assisted reproduction and/or surrogacy.

The policy arguments in favour of controlling which family forms may have multiple-parent households relate to control and the slippery slope. Given the novelty of multiple-parent households, there may be valid concerns about what unintended parties may access the regime. By controlling what family forms can access the administrative regime, there is greater oversight over multiple-parent families. It may also be that legislators expressly wish to restrict polyamorous families from being recognized as legal parents of a child born.

The policy arguments against stipulating the methods of conception and available family forms relate to functionality, flexibility and equality. Case law demonstrates that multiple-parent families already exist in Canada, both within and outside the donor-parent model. This is a quickly evolving area of the law, and efforts to constrain what families deserve recognition become outdated quickly. This is evident in the fact that, the British Columbia Law Institute is already looking at updating its multiple-parent provisions. On the issue of equality, expressly limiting who may access a multiple-parent regime creates distinctions that may prove to be constitutionally problematic in the future.

We propose for discussion that Nova Scotia should not prescribe which family forms or methods of conception can access multiple-parent families. The British Columbia approach seems as being unduly static and unable to keep pace with changing family forms. There is no principled reason to limit access to the administrative regime to certain families or certain methods of conception, so long as they met other qualifying criteria.

Proposal for Discussion:

Nova Scotia legislation should not expressly limit the types of relationships or methods of conception that must exist before a child can have more than two parents recognized administratively.

7.5 Intention to Parent Formed During Gestation

As outlined above, our proposed administrative regime is limited to situations where intended parents form their intention to conceive and parent a child prior to conception and reduce those intentions to writing. This regime excludes people who form their intention to parent after conception. The ability for someone to be a legal parent where their intention to parent formed

<https://www.cbabc.org/BarTalk/Articles/2021/October/Features/Reflecting-All-Families.>

after conception, but before birth, is a novel area of law which we are calling "gestational parentage". At present, it is an issue that is primarily being raised by polyamorous families in which pregnancy may not have been planned, but the other member of the relationship forms intention to parent before the child is born. In those cases, it is dealt with via *parens patriae* powers.

British Columbia Birth Registration No. 2018-XX-XX5815[530] raised the issue of gestational parentage. There, a polyamorous family (a birth parent, a biological father, and a third person who identified as female) sought to be jointly recognized as legal parents of a child born. The third person in the relationship did not have intent to parent prior to conception. Instead, "at some point" during the pregnancy, the birth parent, biological father, and the third person agreed that all three of them should be a "full parent" to the child yet to be born.[531] The court explained the conundrum brought on by the legislative gap:

> Put bluntly, the legislature did not contemplate polyamorous families. This oversight is perhaps a reflection of changing social conditions and attitudes… or perhaps is simply a misstep by the legislature. Regardless, the [*Family Law Act*] does not adequately provide for polyamorous families in the context of parentage.[532]

At present, no parentage laws we reviewed allow for gestational parentage – the matter remains a question of *parens patriae* powers. Only Ontario's *CLRA* expressly addresses this issue, and it appears to prohibit a judge from using their *parens patriae* powers to make an order in relation to gestational parentage. While it permits a judge to order a child has more than two parents, it mandates that to do so a judge must be satisfied that the intention to be multiple parents formed prior to conception:

> **13** (1) At any time after a child is born, any person having an interest may apply to the court for a declaration that a person is or is not a parent of the child.
>
> …
>
> (4) … [T]he court shall not make any of the following declarations of parentage respecting a child under that subsection unless the conditions set out in subsection (5) are met:
>
> 1. A declaration of parentage that results in the child having more than two parents.

[530] *Supra* note 506.
[531] *Ibid* at para 10.
[532] *Ibid* note 506 at para 68.

...

(5) The following conditions apply for the purposes of subsection (4):

...

> 3. There is evidence that, **before the child was conceived,** every parent of the child and every person in respect of whom a declaration of parentage respecting that child is sought under the application intended to be, together, parents of the child [emphasis added].

Academics Lynda Collins and Natasha Bakht have criticized this provision as being unduly restrictive for attempting to "foreclose the possibility of courts exercising their *parens patriae* jurisdiction to recognize certain non-normative families" even where a court finds it is in a child's best interests.[533]

The benefits of addressing gestational parentage in legislation relate to functionality, clarity and equality. Gestational parentage would provide recognition to a class of families that already exists in Canada. This is clearly an issue that courts have to grapple with, and thus far they have very little guidance. *Parens patriae* jurisdiction can be vague and uncertain in practice. In the face of this uncertainty, it is arguable that the law should codify recognition of parentage in these cases.

On the basis of equality, children born into these relationships are equally deserving of respect for their families. In addition, polyamorous families are the next frontier of human rights protection. There have been no cases which decide on the constitutional protection of a polyamorous family form, or the children born into these relationships. On this point, it is noteworthy that the judge in *British Columbia Birth Registration No. 2018-XX-XX5815* did not decide the claimant's constitutional arguments but noted that it had insufficient evidence to find their proposed analogous ground of "family status" could succeed.[534] With that said, permitting pre-birth parentage would extend multiple-parent family protections to polyamorous relationships.

On the other hand, recognizing gestational parentage is novel and its impacts are potentially complex and far-reaching. While the issue is being raised by polyamorous families, there are many other family forms who would potentially wanted to access gestational parentage, and the impact of such an order have not been fully fleshed out. If we create a class of pre-birth parentage for polyamorous households, there is arguably no reason we cannot do the same for all parents. For example, there may be cases of parentage via ART and/or surrogacies in which the intended parents, donors and/or surrogates change their mind during gestation and all wish to be parents together. It also could be possible for two-parent models, where, for example a single woman uses

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[533] Natasha Bakht and Lynda M. Collins, "Are You My Mother? Parentage in a Nonconjugal Family" (2018) 31:1 Can J Fam L 105 at 132 - 137.
[534] *Supra* note 506 at paras 83-91.

a sperm donor and then meets a partner who she wants to add a second parent. Essentially, this concern is that, by adding multiple parents and post-conception parent status, we undo some of the certainty created in other areas, and the entire concept of parentage becomes unwieldy.

We have heard compelling arguments on both sides of this issue. We are concerned that a purely pre-conception model may miss important people in the child's life. On the other hand, we are concerned that there may be unintended consequences to extending parentage beyond conception.

To craft a path within these concerns we provisionally propose that legislation include a section on polyamorous parentage. It should state that, if there are more than two persons living in a conjugal common law relationship at conception or birth, and they form the intention to parent during gestation, the parties may apply to a judge to recognize the parentage of more than two persons. This will ensure judges know they have the authority to make such an order. It also harmonizes the language of common law partners with non-polyamorous families.

Proposal for Discussion:

Nova Scotia law should state that if there are more than two persons cohabiting in a conjugal relationship at conception or birth, and they form intention to parent during gestation, the parties may apply to a judge to recognize the parentage of more than two persons.

7.6 Intention to Parent Formed Post-Birth

Finally, there is also the issue of what we are calling "post-birth parentage" – in which someone forms the intention to parent and acquires the status of legal parent after a child is born. No Canadian jurisdiction recognizes post-birth parentage.

The American *UPA (2017)* recognizes post-birth parentage in two respects. First, it extends a presumption of parentage to an "individual [who] resided in the same household with the child for the first two years of the life of the child, including any period of temporary absence, and openly held out the child as the individual's child."[535]

Second, the American *UPA (2017)* creates a *de facto* parentage regime that allows someone who has stood in place of a parent to claim legal parentage. The rule states:

[535] *UPA (2017)*, *supra* note 43 at s 204(2).

> 609 (a) A proceeding to establish parentage of a child under this section may be commenced only by an individual who: (1) is alive when the proceeding is commenced; and (2) claims to be a *de facto* parent of the child.
>
> …
>
> (d) In a proceeding to adjudicate parentage of an individual who claims to be a *de facto* parent of the child, if there is only one other individual who is a parent or has a claim to parentage of the child, the court shall adjudicate the individual who claims to be a *de facto* parent to be a parent of the child if the individual demonstrates by clear-and-convincing evidence that:
>
> > (1) the individual resided with the child as a regular member of the child's household for a significant period; (2) the individual engaged in consistent caretaking of the child; (3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation;(4) the individual held out the child as the individual's child; (5) the individual established a bonded and dependent relationship with the child which is parental in nature; (6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and (7) continuing the relationship between the individual and the child is in the best interest of the child.
>
> (e) Subject to other limitations in this [part], <u>if in a proceeding to adjudicate parentage of an individual who claims to be a de facto parent of the child, there is more than one other individual who is a parent or has a claim to parentage of the child and the court determines that the requirements of subsection (d) are satisfied, the court shall adjudicate parentage under Section 613</u> [competing claims to parentage] [emphasis added]

In explaining this legal development, the drafters of the *UPA (2017)* state:

> …Under this new section, an individual who has functioned as a child's parent for a significant period such that the individual formed a bonded and dependent parent-child relationship may be recognized as a legal parent. This provision ensures that individuals who form strong parent-child bonds with children with the consent and encouragement of the child's legal parent are not excluded from a determination of parentage simply because they entered the child's life sometime after the child's birth. Consistent with the case law and the existing statutory provisions in other states, this section does not include a specific time length requirement. Instead, whether the period is significant is left to the determination

> of the court, based on the circumstances of the case. The length of time required will vary depending on the age of the child.[536]

The idea of post-birth parentage is one that is of interest both within and outside the multiple-parent framework. There are a variety of families that would benefit from the recognition of post-birth legal parentage. For example, in our conversations during the course of this project, some members of the African Nova Scotian and Mi'kmaq communities emphasized how the status of "parent" and "child" in their communities extended beyond the colonial framework of a direct biological descendants. Grandparents, aunts and uncles, and wider community members frequently take on a *de facto* parent status with regards to children. A post-birth parentage model would create space for legal recognition of these families on the same footing.

Another example would extend to step-parent situations. Imagine, for example, a widow or widower who remarries and would like their new spouse to be a legal parent to their child without severing the parental status between the child and their deceased parent. This may be possible through legislative recognition of post-birth parentage.

On the other hand, extending parentage to the post-birth setting may introduce significant uncertainty into the law. For example, it arguably collapses the distinction between *parentage* (the topic of this report, which matters for rights such as inheritance and citizenship) and *parenting* (which relates care and control of children). Furthermore, post-birth parentage may also confuse parentage and adoption regimes, as the moment of conception is the hallmark of parentage legislation around the world. There may also be concerns about exploitation, and of birth parents signing post-birth multiple-parent agreements in situations of duress. For example, we heard from some concerned parties that the concept could exacerbate power imbalances within families (grandparents, for example, saying I will take care of this child but only if you include me as a legal parent to the child). It is also possible that creating space for this concept would cause confusion and increase litigation – where, for example, a possible *de facto* parentage regime existed and inheritance rights are at stake. Lastly, it may also be unnecessary, as existing legal mechanisms (guardianship, customary adoption etc.) already deal with many of the issues that would fall under the heading of post-birth parentage.

Given the novelty of this issue in Canada, we are unable to formulate a recommendation without wider discussions. We therefore ask the question: should Nova Scotia law recognize post-birth parentage?

Question for Discussion:

Should Nova Scotia parentage law recognize parentage where intention to parent was formed after birth of the child?

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[536] *UPA (2017)*, *supra* note 43 at 51.

8 Posthumous Conception

8.1 Introduction

Posthumous conception refers to situations in which a deceased person's reproductive material is used to conceive a child. Posthumous use of reproductive material is regulated by the federal *Assisted Human Reproduction Act* (AHRA).[537] The AHRA provides that posthumous conception may only be undertaken where a deceased person had previously provided written consent for their reproductive material to be used after death, and where their sperm or eggs are used for "the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner".[538] A common law partner is defined under these rules as: "in relation to an individual, a person who is cohabiting with the individual in a conjugal relationship at the relevant time, having so cohabited for a period of at least one year."[539] A spouse does not include "a person who, at the relevant time, lives separate and apart from the person to whom they are married because of the breakdown of their marriage."[540]

While the rules on consent and the uses to which the material may be put are dictated federally, it is up to provinces and territories to determine parentage in cases of posthumous conception. This chapter considers what Nova Scotia's parentage law should say about the parentage of posthumously conceived children, and what procedure should exist to recognize parentage in these situations.

8.2 Nova Scotia Law

Nova Scotia law does not contemplate posthumous conception. The common law recognized legal parentage of a husband who died after conception but before a child's birth.[541] Given scientific limitations of the time, of course, the common law did not need to develop a doctrine to deal with children who were conceived after a person had died.

In cases of surrogacy, the Birth Regulations of the *VSA* also do not contemplate posthumous conception. The Regulations require that all intended parents be alive at the time the surrogacy arrangement is entered, and that all intended parents apply to Court to transfer parentage.[542] This effectively negates the possibility of parentage for a deceased person via posthumous conception.

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[537] *AHRA, supra* note 95.
[538] *Ibid* at s 8(1) and (2). Assisted Human Reproduction (Section 8 Consent) Regulations, SOR/2007-137, ss 3(a)(ii), 6-9 [AHRA Consent Regulations]. The principle of consent is the cornerstone of the *AHRA*. See: *W (KL) v Genesis Fertility Centre*, 2016 BCSC 1621 at para 110.
[539] AHRA Consent Regulations, *ibid* at 1(1)
[540] *Ibid*.
[541] Blackstone's Commentaries, *supra* note 22 at 456. See also *Intestate Succession Act*, RSNS 1989, c 236, s 12 in which codifies the inheritance rights of a child born "en ventre sa mère".
[542] Birth Regulations, *supra* note 24 at 5(2), note the present text of the wording : **On application by the**

No Courts in Nova Scotia have had to address this issue. If presented to a court, it would likely be resolved by way of general declaration pursuant to the court's *parens patriae* jurisdiction.[543]

8.3 Jurisdictional Scan

8.3.1 Recognizing Posthumous conception

Four provinces in Canada (Ontario, Saskatchewan, British Columbia, and Prince Edward Island) provide explicit rules on how parentage is assigned in cases of posthumous conception.[544] They all take a similar approach which is premised on explicit written consent of the deceased to use their reproductive material after death. A deceased person is only recognized as a parent of a posthumously conceived child where, before they died, they gave written consent to be a parent of any child born using their reproductive material after death. This is a subtle distinction from the AHRA's requirements: the AHRA only permits posthumous conception to occur where the deceased provided written consent to the procedure; provincial parentage legislation only permits this person to be a parent where they expressly consented to the procedure, and to be a parent of the child born.

No other Canadian jurisdiction specifically addresses parentage in cases of posthumous conception. Jurisdictions other than those listed above, must rely on existing donor-gamete rules for parentage, and their interaction with vital statistics legislation. Neither of these schemes were designed to address posthumous conception, which can lead to frustrating results.

In Alberta, for example, existing donor-gamete laws can provide some paths to the deceased person's recognition (usually through genetics) as a parent.[545] However, that person cannot be listed on a birth registration because vital statistics legislation requires a signature from both parents.[546]

In other cases, the donor-gamete laws themselves are the barrier to recognition, because they require the intending parent to be a spouse or common law partner of the birth parent at the time

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intended parents in a surrogacy arrangement, the court may make a declaratory order with respect to the parentage…(a) **the surrogacy arrangement was initiated by the intended parents**;… (d) **the intended parents intend** to be the child's parents [emphasis added].

[543] See Chapter 9 for discussion of these powers. It is also possible, however, that an application for a judicial declaration as to paternity could be made under the genetic testing provisions of the *VSA, supra* note 2 at s 11A. This would not be available with respect to maternity.

[544] Ont *CLRA, supra* note 29 at s 12; Sask *CLA, supra* note 29 at s 63; BC *FLA, supra* note 29 at s 28; PEI *CLA, supra* note 29 at s 22.

[545] FLA *supra* note 29 at ss 8.1(2) (reproductive material or embryo provided by male person only), 8.1(4) (reproductive material or embryo provided by male person and female person), 8.2 (surrogacy). See discussion ALRI Report, *supra* note 38 at paras 28-30, 32.

[546] ALRI Report, *supra* note 38 at para 29.

of conception in order to be recognized as a parent.[547] The Alberta Law Reform Institute explained this issue:[548]

> [34] The [federal AHRA] Regulations provide that a donor may consent to the use of reproductive materials or embryos for reproductive purposes by the person who is the donor's spouse or partner at the time of the donor's death. However, the [Alberta legislation] refers to a person who was the donor's spouse or partner at the time of conception, i.e. when the reproductive material or embryo was implanted. As marriage and interdependent partnerships both end on death, the [Alberta legislation] creates a gap that does not exist under the federal legislation. Thus, even though the intending parent has consent to use the deceased genetic parent's reproductive material or embryos under the AHR Regulations and has consented to be a parent under the [Alberta legislation], the intending parent does not meet the [Alberta legislation] requirement of being a spouse or partner at the time of conception. This result also appears to be contrary to the provision in [Alberta legislation] section 7(6) which abolishes all distinctions between the status of a child born inside marriage and a child born outside marriage. Though initially targeted at illegitimacy, in the modern age it is not clear why the law would raise arbitrary distinctions against children whose parents' marriage ended by death.

Internationally, several jurisdictions recognize parentage in cases of posthumous conception. The American *UPA (2017)* recognizes parentage in cases of posthumous conception if two requirements are satisfied. First, the deceased person must have either provided express consent to be a parent of any child born posthumously, or there must be clear and convincing evidence of that intention. Second, the embryo must be in utero within 36 months of death, or the child born within 45 months of the person's death.[549]

In the United Kingdom, the *HFEA 2008* allows the deceased man to be treated as the father of a child born if they consented in writing to (a) the use of sperm after death and (b) to be treated as the father as any resulting child. The mother must then elect for the deceased person to be treated as the parent, and there must be no other person who would be presumed or recognized as a parent under other rules. The Act also has similar provisions for a woman in a relationship with another woman.[550]

The Australian state of Victoria recognizes a deceased person's parentage via posthumous conception "for the sole purpose of enabling the particulars of the deceased to be entered as the

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[547] See, for example, Nfld *CLA*, *supra* note 32 at s 12; NWT *CLA, supra* note 32 at s 8.1(1); Yk *CLA, supra* note 32 at 13(6).
[548] ALRI Report, *supra* note 38 at 34.
[549] Six states have implemented this version of the *UPA (2017)*, *supra* note 43 at 708.
[550] *HFEA, supra* note 185 at ss 39-47.

particulars of the child's parent in the Register of births".[551] In order to qualify, the deceased must have been in a relationship with the child's living parent; and the deceased expressly consented to posthumous use of their gametes by their surviving partner and to the parental status that flows from that decision.[552]

Thus, with the exception of the American states that have adopted the *UPA (2017)*, jurisdictions that recognize parentage in cases of posthumous conception tend to require express written consent from the deceased person to be a parent.

Several Canadian law reform commissions have also considered posthumous conception. All agencies that have done so have recommended that parentage of the deceased be recognized where express consent exists.[553] Some reform entities, however, have recommended restrictions on the purposes to which the parent-child status be recognized. For example, in its 1995 Report on the *Status of the Child Born Outside Marriage*, the Law Reform Commission of Nova Scotia considered legal recognition of the paternity of children posthumously conceived via sperm donation. It recommended that there be limits on the purposes for which the parent-child status would be recognized:[554]

> [T]he Commission is of the opinion that the rights of the child posthumously conceived by artificial insemination using the sperm of the mother's husband or partner should be the same as they presently are for children born during the lifetime of the presumed father. However, to extend all rights to the child conceived posthumously may be unfair in some circumstances involving third parties. For example, to extend the availability of *Fatal Injuries Act* benefits to a child posthumously conceived is open to abuse to the detriment of the third-party tortfeasor. The Commission recommends that legal recognition of the paternity of children conceived posthumously should apply for the purposes of inheritance, maintenance after death under the *Testators' Family Maintenance Act*, and birth registration.

Given that this report was focused on the issue of legitimacy, as a general matter the Commissioners recommended that further research on law and policy be carried out, with respect to the regulation of reproductive technology in Nova Scotia.[555]

The British Columbia *White Paper on the Family Relations Act*, Alberta Law Reform Institute's Final Report on *Assisted Reproduction After Death: Parentage & Implications,* and the

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[551] *Status of Children Act 1974* (Vic), *supra* note 185 at ss 37-40.
[552] Victorian Final Report, *supra* note 40 at 102.
[553] ALRI Report, *supra* note 38 at ix; Sask LRC, *supra* note 35 at para 283; BC White Paper, *supra* note 37 at 33; Manitoba Law Reform Commission, Report 118: *Posthumously Conceived Children: Intestate Succession and Dependants Relief* (Winnipeg: MLRC, 2008); *Uniform Act*, *supra* note 34 at s 7.
[554] NSLRC Legitimacy Report, *supra* note 21 at 26.
[555] NSLRC Legitimacy Report, *supra* note 21 at 28.

Saskatchewan Law Reform Commission have all recommended that a deceased person be treated as a parent of the child where express consent exists.[556] All three have, however, recommended different paths to recognition – an issue which is discussed in the next section.

As a matter of policy, the arguments in favour of providing for parentage via posthumous conception focus on intention, equality, and kinship:

- Because posthumous conception is not permitted without clear written consent as per the AHRA, we know that the deceased was aware that after-born children would be a possibility. We can use this, along with a written statement as to parentage, to obtain clear evidence that this person's intention was to parent an after-born child.
- Excluding posthumously conceived children from parent-child status discriminates against them based on the circumstances of their birth. Children have no control over their birth circumstances. It is important to ensure that a legal gap does not create a discriminatory class of children.
- Biological relationships between a child and parent retain a prioritized recognition in our legal system. Posthumously conceived children possess this genetic connection, and the law should be extended to recognize them.

There are, however, valid concerns that flow from a blanket recognition of posthumously conceived children. Most notably, the prospect that posthumously conceived children may be born in the future ties up other legal processes that flow into many other areas of law (such as estate administration). For this reason, laws such as the American *UPA (2017)* recommend a time limit on a posthumous recognition of parentage for the purposes of inheritance. [557]

It also could be argued that, given the exceptional nature of posthumously conceived children, there does not need to be legislation directed at this specific situation. If need be, a court would be able to exercise its declaratory powers to make a declaration of parentage on a case-by-case basis.

We propose for discussion that Nova Scotia legislation should recognize the parentage of a deceased person where a child is conceived posthumously. Equality dictates that children born in these situations should not face discrimination based on the circumstances of their birth. In addition, addressing this issue specifically would provide clarity and certainty. Posthumous conception has distinct interests and limitations as compared to other assisted conception laws that would benefit from specific rules describing how to ascribe parentage in these situations. Like other Canadian jurisdictions, we are of the opinion that recognition should require the deceased's prior written consent to be a parent of the child born. This is in keeping with the AHRA's focus on

[556] ALRI Report, *supra* note 38 at ix; Sask LRC, *supra* note 35 at para 283; BC White Paper, *supra* note 37 at 33.
[557] *UPA (2017), supra* note 43 at ss 708(b)(2).

consent and the deceased person's interest in knowing the uses to which their reproductive material will be put.

Where possible, this consent to be a parent should be worked into existing forms that are currently used to meet the AHRA's requirements on use of posthumous reproductive material. For example, if existing forms state: "I consent to the use of my genetic material posthumously", another line could be added stating: "I also consent to be the parent of a child conceived using my genetic material posthumously". We are assuming that most people who consent to the first option will likely consent to the second. However, if federal legislation changes and persons other than surviving spouses are able to use genetic material posthumously, it will be more important to ask these questions separately.

We are of the view that express limitations should not be built into the parent-child status for posthumously conceived children. In our view, any issues that flow from posthumously born children, like those in estate administration, should be addressed in those specific legislative enactments, rather than building them into the recognition of parentage itself. We propose for discussion that, if a parentage law on posthumous conception is passed, the Province of Nova Scotia should consider the implications this will have on other legislation, including vital statistics and estate legislation.

Proposals for Discussion:

Nova Scotia's parentage law should recognize parentage in cases of posthumous conception.

Parentage of posthumously conceived child should be recognized only where the deceased provided express written consent to be a parent of a child born.

The express consent required to recognize parentage of a posthumously conceived child should be added to existing forms that must be completed to use posthumously conceived reproductive material.

The Province of Nova Scotia should consider the implications of posthumously conceived parentage in estate administration legislation.

8.3.2 Methods of Recognition

Within the four Canadian jurisdictions that explicitly recognize posthumous conception, two approaches for recognition have emerged: a judicial model and an automatic model.

Ontario and Saskatchewan both require a judicial application by the surviving spouse before the parentage of a deceased person is established. The application can only be made after the child is born and it must be made within 90 days of the child's birth.[558] Ontario's CLRA states:

> **12** (1) A person who, at the time of a deceased person's death, was his or her spouse, may apply to the court for a declaration that the deceased person is a parent of a child conceived after his or her death through assisted reproduction.
>
> (2) An application under subsection (1) may not be made,
>
> (a) until the child is born; and
>
> (b) unless the court orders otherwise, later than 90 days after the child's birth.
>
> (3) The court may grant the declaration if the following conditions are met:
>
> 1. The deceased person consented in writing to be, together with the applicant, the parents of a child conceived posthumously through assisted reproduction, and did not withdraw the consent before his or her death.
>
> 2. If the child was born to a surrogate, the applicant is a parent of the child under section 10, and there is no other parent of the child.

Saskatchewan's legislation mirrors this language. This is roughly in alignment with the recommendations under the Canadian Uniform Law Conference's *Uniform Act*, which permitted the posthumously conceived child, in addition to the surviving spouse, to make this court application.[559]

British Columbia and Prince Edward Island do not require a court application to recognize parentage posthumously. Where a deceased person provided consent for use of their reproductive material after death, they are a parent where the child is born.[560] British Columbia's legislation states:

> **28** (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

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[558] Ont *CLRA, supra* note 29 at s 12; Sask *CLA, supra* note 29 at s 63.
[559] *Uniform Act*, *supra* note 34 at s 7(1).
[560] BC *FLA*, *supra* note 29 at s 28(1), (2).

> married to, or in a marriage-like relationship with, the deceased person when that person died.

Internationally, court applications are not required in cases of posthumous conception. The American *UPA (2017)* does not require a court application for parentage to be recognized posthumously,[561] nor does the legislation in the Australian state of Victoria.[562] Under the United Kingdom's *HFEA*, the surviving parent must "elect" for the deceased person to be treated as the parent.[563]

Avoiding unnecessary judicial applications would further access to justice. Requiring a new parent to go to Court to have their deceased partner's parentage recognized where the deceased has already consented to parentage seems burdensome, imposes additional expense, and uses judicial resources.

On the other hand, the court application route allows the surviving spouse's intentions to be determinative, as they can decide if they want the deceased to be recognized as a parent. If the deceased person's parentage is automatically recognized, it could frustrate this person's intentions, and have unintended consequences in other areas of law. It would, for example, interact with the ability of the surviving spouse's new spouse or partner to be recognized as a parent, and any substantive rights that flow from that. It may also create space for the deceased person's parents (the child's potential grandparents) to make a claim for access, which the surviving parent may or may not wish to facilitate. By only permitting the surviving spouse to make a court application regarding the deceased person's parentage, we place control over these contextual issues with the surviving parent.

We propose for discussion that a deceased person should automatically be recognized as a parent of their posthumously conceived child where they expressly consented to this. Consent and intention are the heart of posthumous conception. If a deceased person expressly consented to be a parent of an after-born child, their qualifying surviving spouse or common law partner (as per federal AHRA definitions) should not be able to retroactively alter this intention and treat the person as a donor rather than a parent.[564] We are also concerned that, if their recognition as parent is optional, this decision would be influenced by external factors such as estate inheritances or inclusion in a trust, which may not be in the child's interests. These factors should not influence whether a person is a parent of a child.

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[561] *UPA (2017)*, *supra* note 43 at 708.
[562] Victorian Final Report, *supra* note 40 at 102; *Status of Children Act 1974* (Vic), *supra* note 185 at ss 37-40.
[563] *HFEA, supra* note 185 at ss 39-47.
[564] AHRA, *supra* note 94 at s 1(1) A common law partner is: "in relation to an individual, a person who is cohabiting with the individual in a conjugal relationship at the relevant time, having so cohabited for a period of at least one year." See the same definition in the AHRA Consent Regulations, *supra* note 538 at 3(a)(ii).

Where a deceased person did not expressly consent to be a parent of an after-born child, however, the surviving spouse or partner should be given the option to have a court declare that person a parent. This court application should be made within 90 days after the child is born, but a judge should be permitted to extend this time frame in certain circumstances (for example, if the child is in a neo-natal intensive care unit).

Proposals for Discussion:

Where a deceased person provided express written consent to be a parent of an after-born child, they should automatically be recognized as a parent of the child.

Where a deceased person did not provide express written consent to be a parent of an after-born child, their parentage should only be recognized if their qualifying surviving spouse or common law partner obtains a judicial declaration of their parentage.

Where a judicial declaration is required, the application should be made within 90 days after the child is born, but a judge should be permitted to extend this time frame where necessary.

8.4 Other Parent(s) and Posthumous Conception

The prospect of parentage via posthumous conception interacts with our proposals for discussion regarding multiple parents. Consider, for example, a surviving spouse who remarries, but wishes to use their deceased partner's reproductive material to conceive. Should the surviving spouse, new spouse, and deceased person all be able to be recognized as parents?

Any use of posthumous reproductive material must comply with the AHRA's rules on posthumous conception generally. Those rules require that any posthumous use of reproductive material be based on express consent, and be for "the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner."[565]

This use of singular language clearly assumes that there is only one surviving spouse or common law partner. However, so long as a surviving spouse or partner is using the reproductive material for themselves, there is nothing that expressly limits the use for other parties in addition to a surviving spouse or partner.

While there is no case law on this issue, a plain reading of existing provincial statutes would appear to prevent multiple-parent families in cases of posthumous conception. Ontario and

[565] AHRA, *supra* note 94 at s 1(1) A common law partner is: "in relation to an individual, a person who is cohabiting with the individual in a conjugal relationship at the relevant time, having so cohabited for a period of at least one year." See the same definition in the AHRA Consent Regulations, *supra* note 538 at 3(a)(ii).

Saskatchewan, for example, use binary language to describe posthumous parentage. They also prevent deceased persons from being named a parent in cases of surrogacy where there is more than one other parent: [566]

> **12** (3) The court may grant the declaration [of parentage via posthumous conception] if the following conditions are met:
>
> 1. The deceased person consented in writing to be, together with the applicant [surviving spouse], the parents of a child conceived posthumously through assisted reproduction, and did not withdraw the consent before his or her death.
>
> 2. If the child was born to a surrogate, the applicant is a parent of the child under section 10, and there is no other parent of the child.

British Columbia's law also assumes a two-parent model. It states that, in cases of posthumous conception, 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."[567]

Internationally, the United Kingdom does not permit a deceased person to be recognized as a parent if another person would qualify.[568] The American *UPA (2017)* does not contemplate more than two parents for a child conceived posthumously.

The policy reasons in favour of permitting a parent by posthumous conception to be added as a "multiple parent" relate to intention and a child centred approach to the child's interests. This model aligns with an intentional or functional view of parentage which reflects a child's actual life circumstance of having more than two parents. In addition, by permitting a posthumously conceived child to have their deceased parent, in addition to surviving parents all recognized, the child is given a link to their genetic heritage and enjoys a parent-child status with support from at least two living parents.

However, we have concerns about the details of consent, as well as concerns about complying with federal legislation. Express consent is the bedrock of federal posthumous conception laws, and those laws assume a two-parent family structure (the deceased person and "the" spouse or common law partner). If we were to permit a posthumous, multiple-parent household, it may be that this would require the following elements of express consent from the deceased person, all of which the AHRA does not currently require:

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[566] Ont *CLRA, supra* note 29 at s 12(3).
[567] BC *FLA, supra* note 29 at s 28(2).
[568] *HFEA, supra* note 185 at ss 39-47.

(1) for the use of their reproductive material,

(2) to be a parent of any posthumously conceived child, and

(3) to be a parent, along with the surviving spouse and any other parent (who is likely not known at the time of death).

This is a very niche level of consent that may not require a dedicated legal regime.

We propose for discussion that it should be possible for a posthumously conceived child to have more than 2 parents (the deceased person, the surviving spouse, and at least one other party). We do not recommend that the deceased person be required to provide express written consent to be a parent in a multiple-parent family. While express consent is the bedrock of posthumous conception, we are concerned about giving a deceased person control over their surviving spouse or partner's marital choices after they die (for example: "I consent to the use of my reproductive material only if my spouse does not remarry" or "I consent to be a multiple parent so long as the third parent is not X").

Proposal for Discussion:

It should be possible for a posthumously conceived child to have more than 2 parents (the deceased person, the deceased person's surviving spouse, and at least one other party).

9 General Declaratory Powers

9.1 Introduction

General declaratory powers permit a court to use its discretion to declare that a person is, or is not, a parent of a child. They create space for a judge to make a determination of parentage for situations not dealt with by other parentage rules.

General declaratory powers can be statutory or inherent, and both play a central role in Canadian parentage law. Prior to modern legislation, parents who conceived by ART and/or surrogacy regularly relied on general declaratory provisions to recognize their status. In this regard, there are multiple court decisions out of Ontario,[569] British Columbia[570] and other provinces,[571] that use statutory declaratory powers to determine parentage. Where statutory powers were either absent or inadequate, judges have used their *parens patriae* powers,[572] which, as discussed above, is an inherent jurisdiction that permits a judge to act to protect persons who cannot protect themselves, and/or to fill a legislative gap.[573]

Modern parentage laws have not, however, eliminated the need for these statutory and inherent powers. General declarations continue to take a central role in determining parentage in Canada.[574] It has been suggested that the reason for this role flows from the diverse nature of families, and the inability for laws of general application to capture this diversity.[575] Whatever the reason may be, the existence of, and terminology employed to regulate, the exercise of general declaratory powers is central to parentage reform.

9.2 Nova Scotia

Nova Scotia does not have general declaratory provisions for parentage. Its closest proxies are located at sections 8 and 11A of the VSA. Section 8 permits a judge to make a declaration of parentage for people whose birth was not registered in accordance with that Act. It states:

> 8 (1) Any person whose birth has not been registered in accordance with Section 4 [birth registration], 5, 6 or 7 [delayed birth registrations, post-birth legitimation of

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[569] *Zegota v Zegota-Rzegocinski* (1995), 10 RFL (4th) 384, 1995 CarswellOnt 75; *R(J) v H(L)* (2002), 117 ACWS (3d) 276 (Ont SCJ); *D(M) v L(L)*, [2008] WDFL 2326 at paras 36-47.
[570] *N(BA) v H(J)*, 2008 BCSC 808.
[571] *W(JA) v W(JE),* 2010 NBBR 414; *M(WJQ) v A(AM)*, 2011 SKQB 317.
[572] *Rypkema v British Columbia*, 2003 BCSC 1784; *AA v BB*, *supra* note 1; *D(M) v L(L)*, [2008] WDFL 2326, 90 OR (3d) 127 at paras 48-68; *M (AW) v S (TN)*, 2014 ONSC 5420, 54 R.F.L. (7th) 155 (Ont SCJ); *M(MA) v M(TA),* 2015 NBBR 145.
[573] For discussion of *parens patriae* jurisdiction from the Supreme Court of Canada, see *Eve, Re*, [1986] 2 SCR 388, [1986] SCJ No 60 (SCC) at paras 72 – 76.
[574] See, for example, *ML v JC*, *supra* note 57; *MRR v JM*, *supra* note 153; *Re: D (D), supra* note 145.
[575] Robert Leckey, "One Parent, Three Parents: Judges and Ontario's All Families Are Equal Act, 2016" (2019) 33 Intl JL Pol'y & Fam 298.

> a child, and registration of deserted newborns] may, … apply to a judge of the county court for a finding that the said person was born in the Province on a certain date or before a certain date, and as to his parentage.[576]

At the time of writing, s 8 had not been considered in any reported decisions, nor in any scholarly work. Based on its wording, the provision appears to give standing to a person whose birth was registered improperly to rectify registration errors only. The law does not offer a general method to declare parentage for persons who are not entitled to register pursuant to the VSA.

Separately, s 11A of the VSA permits a person with an interest in the paternity of a child to make an application to the Supreme Court (Family Division) for a declaratory order as to the child's paternity. It states:

> **Paternity**
> 11A (2) The court may, on application by any person having an interest in the paternity of a child, make a declaratory order with respect to the paternity of the child.[577]

Judges have interpreted this provision as being constrained to the purpose of the VSA – that is, to assist in providing a record of birth. It has been interpreted as not being able to be invoked in a general way to determine paternity.[578] Moreover, this section is rooted in purely biological conceptions of paternity. A s 11A application can be accompanied by an order for genetic testing to locate the biological father of the child.[579] It does not address maternity or non-biological parentage.

9.3 Jurisdictional Scan

All other Canadian jurisdictions have a general provision permitting the Court to make a declaration of parentage in certain circumstances. These general powers can have a variety of parameters placed on them.

Some acts have triggering provisions which must be satisfied before the Court may invoke them. For example, British Columbia's statutory declaratory powers can only be used where "there is a dispute or any uncertainty as to whether a person is or is not a parent under this Part."[580] This triggering provision was the subject of discussion in *British Columbia Birth Registration No. 2018-XX-XX5815*.[581] In this case, a polyamorous family sought to have a third parent recognized, in addition to the two parents who conceived via sexual intercourse. Because there was no "dispute or any uncertainty" as to this third person's parental status under the Act (she was not a parent

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[576] *VSA*, *supra* note 2 at s 8.
[577] *VSA*, *supra* note 2 at s 11A.
[578] *(T) TL v B(G),* 2012 NSFC 8 at paras 11-14
[579] *VSA*, *supra* note 2 at s 11B(1).
[580] BC *FLA, supra* note 29 at s 31(1).
[581] *Supra* note 506.

under the Act), the parties couldn't rely on statutory declaratory powers.[582] Instead, the court had to turn to its *parens patriae* powers, which can only be invoked in limited circumstances, for example, where there is a legislative gap. In that case, the Court found a legislative gap existed, because the Act did not consider the possibility that a child conceived by sexual intercourse could have more than two parents.[583] The Court relied on its *parens patriae* powers to declare the child had three parents. While the Court ultimately found it had the authority to use its general declaratory powers, a significant amount of time (and presumably expense) was spent getting to this point. A broader general declaratory order would have eliminated this debate.

Other statutes have restrictions on how the general powers may be used. These restrictions generally fall into one of five camps and state that the general powers cannot be used when:

- the child has been placed for adoption;[584]
- the resulting order would result in the child having more than two parents;[585]
- either the parent or the child are not living at the time of the application;[586]
- the child is born to a surrogate (in which case a different regime must be relied on);[587] and
- the proposed parent formed their intention to be a parent after the child was conceived.[588]

Saskatchewan has one of Canada's most recently reformed parentage regimes. It provides a broad power that is only restricted in cases of adoption:

> 64(1) In this section and in section 65, "placed for adoption" means placed for adoption within the meaning of *The Adoption Act, 1998*.
>
> (2) Any person having, in the court's opinion, a sufficient interest may apply to the court for a declaratory order that a person is or is not recognized in law to be a parent of a child.
>
> (3) If the court finds on the balance of probabilities that a person is or is not in law a parent of a child, the court may make a declaratory order to that effect.
>
> (4) Subject to subsection (5), an application pursuant to this section must be made in the court.

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[582] *Supra* note 506 at paras 30-39.
[583] *Supra* note 506 at para 68.
[584] NB *FSA*, *supra* note 32 at s 100(7); BC *FLA*, *supra* note 29 at s 31(5); Alta *FLA, supra* note 29 at 9(7)(a); Man *FMA, supra* note 29 at s 23; Ont *CLRA, supra* note 29 at s 13(2); PEI *CLA, supra* note 29 at s 24; Sask *CLA*, *supra* note 29 at s 64.
[585] Alta *FLA, supra* note 29 at 9(7)(b); Ont *CLRA, supra* note 29 at s 13(4) and (5).
[586] NB *FSA*, *supra* note 32 at s 100(5).
[587] Alta *FLA, supra* note 29 at 9(2).
[588] Ont *CLRA, supra* note 29 at s 13(5) 3.

> (5) An application pursuant to this section may be made in the Provincial Court of Saskatchewan if it is joined with an application for support or maintenance for the child.
>
> (6) An application pursuant to this section may be made whether or not the person and the child whose relationship is sought to be established are alive.
>
> (7) No application may be made pursuant to this section if the child has been adopted or placed for adoption.
>
> (8) Notwithstanding any other Act or law, no extension of the time for the commencement of an appeal from a declaratory order shall be granted if the child has been adopted or placed for adoption.

Section 13 of Ontario's CLRA has more tightly constrained general declaratory powers. In addition to restrictions on adoption, the Court is not entitled to make a declaration as to parentage if (a) it would result in the child having more than two parents, or (b) it would give parental status someone not otherwise qualified by virtue of the statutory presumptions for conception via sexual intercourse, ART, or within pre-conception agreements *unless* four conditions are met:

1. The application for the declaration is made on or before the first anniversary of the child's birth, unless the court orders otherwise.
2. Every other person who is a parent of the child is a party to the application.
3. There is evidence that, before the child was conceived, every parent of the child and every person in respect of whom a declaration of parentage respecting that child is sought under the application intended to be, together, parents of the child.
4. The declaration is in the best interests of the child.

The limits built into s 13 were tested in the case of *ML v JC*.[589] As discussed above, in that case, a dispute arose between a man and a lesbian couple who had together made an oral agreement for both women to become pregnant with the man's sperm, with the intention being that the couple would parent one child and the man would parent the other. After only one woman became pregnant and delivered a child, a question arose as to whether the resulting child was the man's (via surrogacy) or the couples' (via sperm donation). The Court determined that there was no valid surrogacy, as its statutory requirements had not been met. However, the man was also not appropriately treated as merely a sperm donor, because he gave his sperm with the intention of being a parent. The CLRA's general declaratory provision provided no relief because the conditions in s 13(5) (set out above) were not met and the order would result in the child having more than two parents. The Court held that the CLRA failed to operate in the best interests of the

[589] *Supra* note 57.

child, and used its *parens patriae* jurisdiction to order the child had three parents notwithstanding the requirements of s 13:

> [105] In my view, the fact that the parentage sections of the amended *CLRA* do not permit a recognition of parentage for Mark constitute a legislative gap. It is contrary to the best interests of B.G. that she be deprived the legal recognition of the parentage of Mark, who is biologically, emotionally, and functionally a parent to her, and a loving, devoted parent at that. … I find that there is no other way to fill this gap than to exercise the Court's *parens patriae* jurisdiction.

Robert Leckey views this decision as providing a lesson to legislative drafters who seek to limit or remove judicial discretion. In his view, legislative drafters should exercise caution when attempting to remove judicial discretion because it is difficult for rules of general application to capture the variety of families that exist.[590]

Ontario's approach has also been criticized by academics (and non-conjugal post-conception parents) Lynda Collins and Natasha Bakht. In their view, Ontario's approach is a retrogressive attempt to fetter the Court's *parens patriae* jurisdiction in the event the intention to parent forms after conception. In their view, a better approach would let the child's best interests, rather than a strict approach to timing, guide these declarations.[591]

Internationally, general declaratory powers are less standardized than what exists in Canada. In the American *UPA (2017),* for example, there is no catch-all declaratory provision, but Article 6 provides a detailed scheme by which courts may adjudicate legal parentage in cases where there is an alleged genetic parent,[592] presumptive parent,[593] *de facto* parent,[594] acknowledged parent,[595] adjudicated parent,[596] parent by assisted reproduction,[597] or competing claims of parentage.[598] Parentage in cases involving surrogacy are resolved by a different regime. Section 6 stipulates who has standing to maintain a proceeding,[599] who is entitled to notice of, or intervention in, the proceeding,[600] permissible evidentiary considerations,[601] and jurisdictional matters.[602]

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[590] Leckey, *supra* note 575 at 311.
[591] Bakht and Collins, *supra* note 533 at 130-139.
[592] *UPA (2017)*, *supra* note 43 at s 607.
[593] *Ibid* at s 608.
[594] *Ibid* at s 609.
[595] *Ibid* at s 610.
[596] *Ibid* at s 611.
[597] *Ibid* at s 612.
[598] *Ibid* at s 613.
[599] *Ibid* at s 602.
[600] *Ibid* at s 603.
[601] *Ibid* at s 606.
[602] *Ibid* at s 604, 605.

The exact processes to pursue vary in each situation. For example, in dealing with a claim by an alleged genetic parent, genetic tests are generally relied on.[603] When adjudicating parentage for a child conceived by assisted reproduction, parentage is determined with an emphasis on the best interests of the child, as well as the details surrounding the nature of conception and the parties' intentions and knowledge regarding the child's genetics.[604]

In contrast the American-styled scheme, the United Kingdom's declaratory powers are relatively unconstrained and brief. Section 55A of the *Family Law Act, 1986*[605] permits any person with a sufficient personal interest to apply to the High Court or family court for a declaration of parentage.[606] The application may be refused if it is not in the best interests of the child.[607]

Some Australian jurisdictions contain general declaratory provisions that are roughly similar to Canadian approaches. The Australian Capital Territory's *Parentage Act, 2004*,[608] for example, contains a general declaratory provision that permits a child's parent, an alleged parent, a child, the registrar general, or someone else having a proper interest to apply to court to declare that a particular person is the parent of a child.[609] The Court may refuse to hear the application if it is not in the child's best interests.[610]

Lastly, New Zealand's *Status of Children Act, 1969* has a general declaratory power as it relates to paternity only.[611] Only eligible parties may bring a claim, but it may be initiated whether or not the alleged father and child are living. There is no general declaratory power specific to determinations of parentage in cases where a child is conceived by way of assisted reproduction.

9.4 Policy Rationales

Restrictions on general declaratory powers serve a number of purposes. First, they seek to control what judges can and cannot do when presented with novel fact patterns. If, for example, parentage laws do not allow a child to have more than two parents, restricting a judge's ability to make this order helps ensure they do not stretch the law beyond the legislature's intention. This would appease opponents worried about the potential floodgates of a broad declaratory power.

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[603] *Ibid* at s 607, 506.
[604] *Ibid* at s 613(a) and (b).
[605] *Family Law Act 1986* (UK) 1986, 34 Eliz 2, c 55.
[606] *Ibid* at s 55A(3).
[607] *Ibid* at s 55A(5).
[608] *Parentage Act, 2004, supra* note 289.
[609] *Ibid* at s 15.
[610] *Ibid* at s 17.
[611] *Status of Children Act 1969*, *supra* note 175 at s 10.

Second, restrictions can help constrain the consequences of a parentage order on other areas of law. If, for example, an order can only be made where parents are alive, we eliminate situations where a child may retroactively claim inheritance rights from a long-deceased parent.

Third, restrictions on declaratory powers prevent people from circumventing the requirements in related areas of law. For example, all Canadian jurisdictions prevent the use general parentage declarations in relation to a child who has been placed for adoption. This would prevent parties from using biological or other evidence be declared parents of a child whose legal parentage has been transferred via the adoption regime.

The force of these restrictions must, however, be balanced against the Court's *parens patriae* jurisdiction. On multiple occasions, Canadian courts have used this power to maneuver around statutory restrictions. *Parens patriae* jurisdiction is not unlimited, and cannot be relied upon to fix all the problems created by constrained legislation. It is premised in large part on locating a legislative gap and is not meant to be used to amend legislation or create new substantive rights. With that said, it is a powerful tool in the context of parentage that mitigates many restrictions built into statutory declaratory powers.

We propose for discussion that Nova Scotia's parentage laws should contain a broad declaratory power. We take this view for reasons of certainty and access to justice. We believe that, no matter what legislative scheme is created, there will be families in unanticipated situations that the legislation does not address. In these situations, the Court should be given a wide clarifying role. While we hope that the role for judges will be minimized through new parentage laws, they nonetheless play an important role where needed, and should be given wide berth to correct imperfections and locate parents in unanticipated situations.

We also propose that, aside from children who are adopted, there should be no express restrictions on when this power may be used (for example, a dispute or uncertainty in the act, cases of surrogacy, more than two parents). Several of the existing restrictions, such as those about a maximum number of parents and the requirement that parties be alive at the time of the order, do not make sense in light of our other recommendations. In any event, case law has demonstrated that these restrictions are clumsy in practice, as Courts grapple with unexpected fact patterns and families. In other words, these restrictions do not appear to prevent Courts from acting, as *parens patriae* jurisdiction has stepped in to circumvent statutory restrictions.

As to the timing restrictions, we are of the view that general declaratory powers should not expressly prevent judges from issuing a declaration where intention to parent formed after conception. We also, however, ask for input on post-conception parentage at Chapter 7, above.

We also propose that there should be no statutory limit on who can apply to be declared a parent. In making this recommendation, however, we did consider the possibility that persons with other caregiving relationships in relation to a child (such as persons standing *in loco parentis*, grandparents etc.) could use this provision to make an application for parentage. In our view, people in these caregiving relationships typically have other legal remedies to address their

relationships with children. Given that parentage laws are concerned with who is a parent at the moment of birth, many people in these relationships will not be eligible for a parentage declaration. However, this is an issue that should be considered within the larger context of post-conception parentage, which is discussed at Chapter 7.

On the point of adoption, however, for the sake of clarity and certainty we do see value in restricting the use of parentage declarations for children who are adopted. The parentage of these children ought to be dealt with under adoption rules, so as to not create confusion or unintended consequences.

Proposals for Discussion:

Parentage legislation should allow judges to make orders declaring parentage.

General declarations of parentage should not be available in cases where the child in question has been adopted.

There should be no further restrictions on when general declaratory powers may be issued.

10 Inter-Jurisdictional Matters

10.1 Introduction

Assisted reproduction is a global industry – with intended parents travelling around the globe to access reproductive technologies, reproductive material, surrogates, and friendly legal regimes.

Nova Scotia is an active participant in this global network – particularly in relation to surrogacy. On the one hand, Nova Scotians travel internationally take advantage of different legal regimes that offer easier and/or quicker access to services.[612] On the other hand, Nova Scotia is increasingly recognized as a destination for people who wish to have a child in a place that permits surrogacy, along with a public health care system and proximity to US fertility clinics.[613]

The interjurisdictional dimension of fertility services raise a number of legal and public policy questions that bear on parentage law. In drafting a parentage law, we should turn our minds to these considerations. This Chapter considers (1) how Nova Scotia courts should approach interjurisdictional parentage disputes; (2) when Nova Scotia will recognize and enforce parentage that has been recognized outside of the Province; and (3) when Nova Scotia law will apply to foreign parties.

10.2 Interjurisdictional Parentage Disputes

This section considers the role that Nova Scotia courts should respond to interjurisdictional parentage disputes. Such disputes often raise complex fact patterns and questions. Imagine, for example, a situation where French parents have child via surrogate in Thailand and then move to Ontario. They then separate. One parent moves to Nova Scotia and brings a court action here claiming the other is not a legal parent.

This section discusses whether a Nova Scotia court assume jurisdiction over such a dispute, and if it does, what law should apply.

10.2.1 Assuming Jurisdiction

A Nova Scotia court can only assume jurisdiction over a matter where it has some foundation upon which that jurisdiction is grounded. A Nova Scotia court can assume jurisdiction over a dispute when: the parties submit to the jurisdiction, there is an agreement (such as a surrogacy agreement) stating that Nova Scotia has jurisdiction over the matter, a person named in the action

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[612] Katy Fulfer, "Self-Sufficiency for Surrogacy and Responsibility for Global Structural Injustice" in Vanessa Gruben et al, eds, *Surrogacy Law in Canada: Critical Perspectives in Law and Policy* (Toronto: Irwin Law, 2018) 245.
[613] Karen Busby and Pamela M White, "Desperately Seeking Surrogates: Thoughts on Canada's Emergency as an International Surrogacy Destination" in Vanessa Gruben et al, eds, *Surrogacy Law in Canada: Critical Perspectives in Law and Policy* (Toronto: Irwin Law, 2018) 213.

is ordinarily resident in Nova Scotia, or there is a real and substantial connection between Nova Scotia and the facts on which the proceeding against that person is based. [614]

There is a non-exhaustive list of statutory factors which provide clarity on when a "real and substantial connection" exists. Among other things, disputes in which the parties seek "a determination of the personal status or capacity of a person who is ordinarily resident in the Province" is adequate to satisfy this factor.[615] On this basis, under the current law if there is a parentage dispute that seeks to declare the personal status of a surrogate, intended parent, child or other party of someone ordinarily resident in Nova Scotia – this arguably constitutes a "real and substantial connection" such that Nova Scotia could assume jurisdiction over a matter.

In other cases where this connection does not exist, parties would have to demonstrate other connecting factors that would constitute a real and substantial connection. Even if Nova Scotia can jurisdiction over a matter, however, it may decide not to if there is a more appropriate forum.[616]

Most Canadian jurisdictions do not create specific rules with respect to when a court can assume jurisdiction in parentage disputes. Alberta and Quebec are the exception to this general rule:

- Alberta's law states that its Courts have jurisdiction to determine parentage via surrogacy if the child is born in Alberta, and that its Courts have jurisdiction to determine a dispute as to parentage if the child is born in Alberta, or an alleged parent resides in Alberta.[617]
- The Quebec *Civil Code* holds that "Québec authorities have jurisdiction in matters of filiation if the child or one of his parents is domiciled in Québec. They have jurisdiction in matters of adoption if the child or plaintiff is domiciled in Québec."[618]

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[614] *Court Jurisdiction and Proceedings Transfer Act,* SNS 2003, c 2.
[615] *Ibid,* s 11(j).
[616] *Ibid,* s 12(a) – (e). The court may decline which the court may consider when comparing the appropriateness of jurisdictions, including: (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum; (b) the law to be applied to issues in the proceeding; (c) the desirability of avoiding multiplicity of legal proceedings; (d) the desirability of avoiding conflicting decisions in different courts; (e) the enforcement of an eventual judgment; and (f) the fair and efficient working of the Canadian legal system as a whole. The case of *Olney v Rainville* 2009 BCCA 380 provides an example of how this situation could arise in the context of parentage. There, the mother of a child made a petition to have her current husband declared the father of the child. Despite having never lived in British Columbia, the child was domiciled in British Columbia because that was his mother's domicile (as per that province's *Infants Act*). The fact that the child was domiciled in the province was used to ground the Court's jurisdiction over the matter. The court ultimately, however, declined jurisdiction because it was not a convenient forum.
[617] Alta *FLA, supra* note 29 at 8.2(11); 9(6).
[618] Que Civil Code, *supra* note 29 at Art 3147.

The arguments in favour of having specific rules for assuming jurisdiction in parentage disputes relate to clarity, certainty, and access to justice. Parentage cases are arguably unique and raise novel issues that may create ambiguity when a Court considers its authority to assume jurisdiction. The law should specifically state when our Province's courts will assume jurisdiction to avoid any confusion.

If, for example, we have concerns about recognizing parentage in surrogacies, Nova Scotia law could specifically state that Nova Scotia courts will always assume jurisdiction over births that occur in the Province. This would ensure that truly international parentage disputes (cases where no parties have any connection to Nova Scotia other than the act of birth) can nonetheless be adjudicated in Nova Scotia courts. It also provides certainty to parents and surrogates that, no matter where the parties travel around the world, they know that they can have their matter heard in the court where the child was born. This will avoid situations where they must search the globe for a court that will assume jurisdiction over the matter.

On the other hand, it may not be necessary to have specific rules for the assumption of jurisdiction in parentage disputes. Under this view, the general rules on assuming jurisdiction are broad enough to handle disputes about parentage.

We see the benefit in stating that Nova Scotia should always be able to assume jurisdiction over cases where a child was born in the province. It provides a concrete foundation upon which parents and surrogates know they can always have their matter heard. We seek input on this, and ask the question: should Nova Scotia have specific rules for assuming jurisdiction in the context of parentage disputes? If so, should Nova Scotia law state that it can always assume jurisdiction over cases where the child was born in Nova Scotia?

Questions for Discussion:

Should Nova Scotia have specific rules for assuming jurisdiction in the context of parentage disputes?

If so, should Nova Scotia law state that it can always assume jurisdiction over cases where the child was born in Nova Scotia?

10.2.2 Choice of Law

If a Nova Scotia court does assume jurisdiction, the question remains as to what law ought to apply. These "choice of law" issues can arise where more than one jurisdiction is involved in the facts that lead to a dispute. For example, per the hypothetical outlined above, if French parents have child via surrogate in Thailand and then move to Ontario and later Nova Scotia – what law would apply to a parentage dispute?

At common law, questions of personal status are determined under the law of a person's domicile.[619] At common law, a "legitimate" child is assigned their father's domicile at their date of birth,[620] and an "illegitimate" child takes their mother's domicile at their date of birth.[621]

There are several problems with relying on the common law of domicile to govern the choice of law in a parentage dispute. For starters, domicile is itself tied up with the question of parentage. It is difficult to locate domicile where the issue of parentage is the fact in dispute. Second, domicile propagates the offensive concept of illegitimacy, which this project seeks to abolish. Third, it is outdated, because not all families have a parent who identify as either a mother or a father. Other families may have more than one parent who identifies as a father or mother.

However, while domicile is undoubtedly problematic, it is also difficult to locate an adequate replacement for it. Some Canadian jurisdictions have, in non-parentage situations, replaced the concept of domicile with habitual or ordinary residence. [622]

Domicile and habitual or ordinary residence are related concepts, all of which are focused on locating a person's personal law. While they are both aimed at locating a person's true "home", they have nuanced differences related to their proof (domicile having subjective as well as objective elements vs residence which is more objective in focus) and permanence (residence generally being easier to change).

For our purposes, habitual or ordinary residence offers the benefit of removing any references to gender or legitimacy. It does not, however, disentangle the choice of law rule from the concept of parentage. An infant's habitual residence is tied to their "custodial parent".[623] In cases where there is no clear habitual residence at birth, the court will look at the parents' intended residence for the child. In addition, a newborn may have no or several ordinary residences.

No parentage statutes discuss this issue specifically. Some provinces, however, have separate statutes that modify or abolish the common law of domicile as it applies to children. For example, British Columbia's *Infant Act* states:

Domicile of infant

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[619] *Olney v Rainville, supra* note 616 at para 33. *Udny v Udny* (1869), L.R. 1 Sc. 441 (Scotland H.L.).
[620] *Udny, ibid*.
[621] *Udny, ibid*, *Children's Aid Society of Eastern Manitoba v. St. Clements (Rural Municipality)* (1952), 60 Man R 229 (Man CA). See also *Montano v Sanchez* [1964] SCR 317, in which an adult child's entitlement to a share of her father's Ontario estate depended on whether she was a "legitimate" child. The answer to this question depended on whether the law in Mexico - her father's domicile at the time she was born – recognized legitimation by subsequent intermarriage.
[622] See for example, *The Domicile and Habitual Residence Act*, CCSM, 1999, c D96, s 8(1); *Infants Act*, RSBC 1996, c 223, s 28; *Family Law Act,* RSO 1990, c F3, s 67; *Equality of Status of Married Persons*, SS 1984-85-86, c E-10.3, s. 4(2).
[623] *Jackson v Graczyk,* 2007 ONCA 388 at para 27.

> **28** The domicile of an infant is,
>
> (a) if the infant usually resides with all of the infant's parents and those parents have a common domicile, that domicile,
>
> (b) if the infant usually resides with one parent only, that parent's domicile,
>
> (c) if the infant usually resides with a person who is not a parent of the infant and that person has guardianship or custody of the infant, that person's domicile, or
>
> (d) if the infant's domicile cannot be determined under paragraph (a), (b) or (c), the jurisdiction with which the infant has the closest connection.[624]

Section 28(d) is particularly interesting to this project. Under it, where parentage is itself the issue in dispute, the infant's domicile can be assigned without having to first identify the child's parents.

The policy considerations in favour of either abolishing or modifying the common law of domicile relate to modernizing the law and making it functional for parentage. The common law of domicile is expressly patriarchal and steeped in issues of legitimacy which this project seeks to abolish. Insofar as domicile is a question of parentage, it cannot be reliably used where the dispute in question is about parentage. On the other hand, the policy arguments against such a modification relate to necessity. This is a very discrete situation that will very rarely find its way to a court. Under this view, it is unnecessary to address this issue in a statute.

The policy considerations in favour of moving from the law of domicile to habitual or ordinary residence relate to modernization and making the law less discriminatory. There is a general movement towards favouring habitual residence over domicile, and changing the choice of law rules in this case to habitual residence would be in harmonization with that movement. It also removes discriminatory references to gender and legitimacy. On the other hand, however, moving to habitual residence does not solve the problems of being entangled with the question of parentage.

It may be possible to craft a third solution that builds on section 28(d) of the British Columbia *Infant's Act*. We could, for example, craft a bespoke choice of law rule for parentage disputes. For example this provision could read:

> Questions or disputes of parentage will be governed by the law of the place with the closest, most enduring and substantial connection to the circumstances of birth and

[624] *Infants Act*, RSBC 1996, c 223, s 28.

.

the parenting of the child, which circumstances shall include but are not limited to the following:

(a) location of birth;

(b) location and/or provisions of any pre-conception agreements or contracts in relation to parentage intentions;

(c) location of ordinary or habitual residence of the child; and

(d) location of birth registration.

Such a provision would respond to the actual needs and unique context of parentage. On the other hand, it may not be necessary to craft a specific choice of law rule for this issue.

This is an issue that we seek input on. We therefore ask the question: What choice of law rule should exist for parentage disputes?

Question for Discussion:

What choice of law rule should exist for parentage disputes?

Should Nova Scotia replace domicile as the choice of law rule governing parentage disputes?

If so, should the choice of law for parentage disputes be habitual or ordinary residence? What do you think of our proposed language for an individualized parentage choice of law rule?

10.3 Foreign Parents in Nova Scotia

This section outlines what happens when people from outside of Nova Scotia have a child in the province. This most frequently arises in the context of surrogacy, in which foreign intended parents use Nova Scotian surrogates to have a child in the Province.

Nova Scotia law applies to all births that occur in the Province – regardless of whether the birth involves foreign intended parents, surrogates, or other connections to foreign jurisdictions. This makes sense from a practical perspective - Nova Scotia hospitals and other birthing centres should not be expected to know or apply foreign laws.

Other legal systems become involved after the child is born, when the foreign intended parents return home with their child. Once Nova Scotia's parentage laws are applied, foreign intended parents must then navigate their home jurisdiction's laws in order to have their status recognized in their home jurisdiction.

From a conflict of laws perspective, this issue does not raise much in terms of obligations on Nova Scotia law. From a policy perspective, however, this may influence how parentage is recognized in cases where parties use foreign fertility services and give birth in Canada. This is discussed at section 5.11, above.

10.4 Foreign-born Children

From the perspective of Nova Scotia law, matters become more complicated when people have children elsewhere, and then seek to have their status recognized in Nova Scotia. This situation occurs most often in the context of surrogacy, in which intended parents who are resident in Nova Scotia travel to a jurisdiction to have a surrogate-born child, and then return to Nova Scotia after the child is born. It could also arise in any situation where a child's parentage was determined elsewhere, and the intended parents seek to have their status recognized in Nova Scotia.

In both of these cases, these families are generally arriving in Nova Scotia with either (a) an out-of-province birth certificate, or (b) other documentation, including a foreign court order declaring the child's parentage.[625] This section considers what Nova Scotia should do in each of these cases.

10.4.1 Current Practice

Nova Scotia does not have specific statutory provisions regarding the recognition of interprovincial or international parentage.[626] As a matter of practice, many parents who have their names listed on an out-of-province birth certificate simply rely on that document for everyday parenting responsibilities without undergoing a formal recognition process in the Province. In

[625] In the case of children born in other Canadian provinces, these children will generally be issued a birth certificate from the place where the child was born. In the case of children born outside the country, the Government of Canada will only issue passports to children who can demonstrate their legal parentage in the country of origin via an original birth certificate or other relevant birth records. Canada. Immigration, Refugees and Citizenship Canada. "Who is a parent for citizenship purposes when assisted human reproduction (AHR), including surrogacy arrangements, is involved?" online:< https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/canadian-citizenship/admininistration/identity/who-parent-purposes-where-assisted-human-reproduction-including-surrogacy-arrangements-involved.html>.

[626] There is dedicated legislation dealing with interjurisdictional parenting orders (child support and custody *Interjurisdictional Support Orders Act*, SNS 2002, c 9; *Reciprocal Enforcement of Custody Orders Act*, RSNS 1989, c 387). In practice, we have been told that interjurisdictional parenting orders generally function as follows: Where there is a parenting order from another reciprocating Canadian jurisdiction, an applicant may go to the prothonotary and get the order stamped, at which point it operates as if it was made in Nova Scotia. International parenting orders cannot be recognized or enforced without a judicial application. If a court application is required, the judge will review whether the originating court had appropriately assumed jurisdiction, whether new evidence has become available, or whether there were issues of fraud or duress that ought to be considered before recognizing or enforcing the judgment. In the international context, judges may also consider public policy reasons why a law, while technically correct in the issuing Court's jurisdiction, should not be recognized and enforced in Nova Scotia. Orders that are not written in English must be translated to English.

other cases, however, these parents may want their parentage formally recognized in Nova Scotia. This would be important if, for example, the laws differ between jurisdictions.

If the parties have a foreign parentage court order they seek to have recognized in Nova Scotia, there are different paths that may be available, based on whether the judgment came from within or outside Canada:

- If the child was born in another Canadian jurisdiction, the *Enforcement of Canadian Judgments and Decrees Act*[627] may apply, although this is not clear. The *ECJDA* applies to "a declaration regarding rights, obligations or status in relation to a person or thing."[628] The Act does not, however, apply to judgments that "relate to the care, control or welfare of a minor, other than a Canadian civil protection order" (which may or may not include foreign parentage orders).[629] It is therefore not clear if this Act applies to parentage disputes. If the *ECJDA* applies, a judgment issued by another Canadian jurisdiction can be registered in Nova Scotia by paying the fee prescribed by regulation and by filing a copy of the judgment, certified as true by a judge, registrar, clerk or other proper officer of the court that made the judgment with the registry of the Supreme Court of Nova Scotia.[630] Upon registration, the judgment is given the same force and effect as a judgment of the Canadian court in which it has been registered.

- If, however, the *ECDJA* does not apply, or if the order came from somewhere outside Canada, this order would be recognized and enforced pursuant to the common law.[631] This would require an application to Court for recognition and enforcement of a foreign judgment. The common law queries whether the original court properly assumed jurisdiction over the matter,[632] in which case the judgment will be recognized and enforced in Nova Scotia unless it was obtained by fraud, is contrary to the principles of natural justice, or is contrary to public policy.[633]

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[627] SNS 2001, c 30 [*ECJDA*].
[628] *Ibid* at s 2(aa)(iii).
[629] *Ibid* at s 2(aa)(vi).
[630] *Ibid*, s 5.
[631] The *Reciprocal Enforcement of Judgments Act*, RSNS 1989, c 388 would not apply, as it only applies to "judgments" which, per s 2(b), includes "a judgment or order of a court in a civil proceeding, whether given or made before or after the commencement of this Act, whereby a sum of money is made payable or recoverable and includes an award in an arbitration proceeding if the award, under the law in force in the reciprocating state where it was made, has become enforceable in the same manner as a judgment given by a court in that state, but does not include a support order as defined by the *Interjurisdictional Support Orders Act*"
[632] *Beals v Saldanha,* 2003 SCC 72.
[633] *Ibid.* See also *Pro Swing Inc. v ELTA Golf Inc* 2006 SCC 52 which extended the types of foreign judgments that would be enforced in Canada.

If the parties do not have a foreign parentage order, their parentage would have to be recognized by way of a general declaration, discussed at Chapter 9.

10.4.2 Recognition and Enforcement of Foreign Parentage Orders

Most Canadian provinces and territories follow a very similar format in recognizing foreign parentage declarations. There are generally two streams of recognition based on whether the original parentage declaration came from within or outside Canada. For example, section 16 of Ontario's CLRA states:[634]

> **Extra-provincial declaratory orders**
>
> **16** (1) In this section,
>
> "extra-provincial declaratory order" means an order, or part of an order, that makes a declaration of parentage similar to a declaration that may be made under section 13 [general declarations], if it is made by a court or tribunal outside Ontario that has jurisdiction to make such an order.
>
> **Recognition of Canadian orders**
>
> (2) Subject to subsection (3), a court shall recognize an extra-provincial declaratory order made in another jurisdiction in Canada.
>
> **Exception**
>
> (3) A court may decline to recognize an extra-provincial declaratory order made in another jurisdiction in Canada if,
>
> (a) evidence becomes available that was not available during the proceeding that led to the making of the extra-provincial declaratory order; or
>
> (b) the court is satisfied that the extra-provincial declaratory order was obtained by fraud or duress.
>
> **Recognition of non-Canadian orders**
>
> (4) Subject to subsection (5), a court shall recognize an extra-provincial declaratory order that was made in a jurisdiction outside Canada if,
>
> (a) the child or at least one parent of the child was habitually resident in the jurisdiction of the court or tribunal that made the extra-provincial declaratory

[634] Ont *CLRA, supra* note 29 at s 16.

order at the time the proceeding that led to its making was commenced or at the time the extra-provincial declaratory order was made; or

(b) the child or at least one parent of the child had a real and substantial connection with the jurisdiction of the court or tribunal that made the extra-provincial declaratory order at the time the proceeding that led to its making was commenced or at the time the extra-provincial declaratory order was made.

Exception

(5) A court may decline to recognize an extra-provincial declaratory order made in a jurisdiction outside Canada,

(a) in the circumstances described in clause (3) (a) or (b); or

(b) if the extra-provincial declaratory order is contrary to public policy in Ontario.

Effect of recognition of order

(6) An extra-provincial declaratory order that is recognized by the court shall be deemed to be an order of the court under section 13, and shall be treated for all purposes as if it were an order made under that section.

(a) Interprovincial Declarations

Ontario, Prince Edward Island, Newfoundland and Labrador, Manitoba, Saskatchewan, British Columbia, Yukon, Northwest Territories and the *Uniform Act* recognize and enforce parentage declarations from other Canadian jurisdictions in a similar fashion.[635] Per s 16(2) and (3) of the CLRA (above) a Court will recognize and enforce a parentage declaration from another Canadian

[635] Nfld *CLA, supra* note 32 at s 14; Ont *CLRA, supra* note 29 at s 16(2); PEI *CLA, supra* note 29 at s 27; Man *FMA, supra* note 29 at s 26; Sask *CLA, supra* note 29 at s 70; BC *FLA*, *supra* note 29 at s 35(1); Yk *CLA, supra* note 32 at s 19; NWT *CLA, supra* note 32 at s 11.1(3). New Brunswick and Nunavut lack express statutory provisions. In Alberta, legislators address extra-jurisdictional declarations of parentage within the *Vital Statistics Act,* under the heading, "Amendment of parentage on birth record," which addresses circumstances where an application can made to amend "the particulars of parentage" *Vital Statistics Act,* RSA 2000, c V-4 s 11(3)-(4). In Quebec (per Que *Civ Code*, *supra* note 29 at Art 3155, 3166) decisions made outside of Quebec are recognized and declared enforceable unless: it was not a final or enforceable decision, it was rendered in contravention of fundamental principles of procedure, is invalid on grounds of *res judicata*, it is against public policy, or it amounts to enforcing foreign tax laws. It does not distinguish between interprovincial or international decisions. Per article 3166*,* a foreign jurisdiction has authority in matters related to filiation where the child or one parent is domiciled in that state or is a citizen of that state. In matters of filiation, a decision rendered outside of Quebec will be recognized where the child or the parent lives in that state or is a citizen of that state where the decision was rendered, and no other exception applies.

jurisdiction unless evidence becomes available that was not available during the original proceeding, or the original order was obtained by fraud or duress. Canadian law reform agencies have been in favour of this approach.[636]

The policy arguments in favour of this model relates to clarity, harmonization, efficiency, comity, and access to justice. For reasons of comity and efficiency, Nova Scotia should facilitate the recognition and enforcement of parentage declarations made in other Canadian provinces. At present, there is no clarity on how this is done, and requiring a general court application to do so is expensive, inefficient, and out-of-step with the interjurisdictional reality of fertility services.

The policy arguments against this model focus on the protection of children and families. Under this line of reasoning, Nova Scotia should not be blindly recognizing foreign parentage declarations without a judge looking at the facts of each case. Parentage laws in Canada vary considerably, and as such, Nova Scotia should consider each case individually before recognizing and enforcing a parentage declaration from another province or territory.

We propose for discussion that Nova Scotia's parentage law implement the dominant Canadian model to recognition and enforcement of interprovincial parentage orders. Where a parentage declaration is made in another Canadian jurisdiction, we recommend that Nova Scotia recognize and enforce the judgment unless new evidence becomes available that was not available during the original proceeding, or unless the original declaration was obtained by fraud or duress.

Proposal for Discussion:

Nova Scotia should recognize and enforce parentage declarations issued in other Canadian provinces or territories unless new evidence becomes available that was not available during the original proceeding, or unless the original declaration was obtained by fraud or duress.

(b) International Declarations

Ontario, British Columbia, Saskatchewan, Prince Edward Island and Canada's *Uniform Act* recognize a parentage order made outside Canada if:

(a) the child and at least one parent were habitually resident in the originating jurisdiction, or

[636] BC White Paper, *supra* note 37 at 41; Manitoba Issues Paper, *supra* note 36 at 38. Saskatchewan Final Report, *supra* note 35 at 91-92.

(b) the child or at least one parent of the child had a real and substantial connection with the originating jurisdiction at the time the extra-provincial declaratory order was made.[637]

The Court may, however, choose not to recognize and enforce the judgment if (a) evidence becomes available that was not available during the original proceeding, (b) the original order was obtained by fraud or duress, or (in some jurisdictions) (c) the order is contrary to public policy.[638]

In terms of policy, the arguments in favour of having rules to recognize and enforce international parentage orders relates to clarity, comity, and access to justice. Having these rules helps streamline recognition and clarifies what Nova Scotians who have their children in other countries must do once returning to the Province. It also helps avoid the uncertainty and inconsistency which we have heard exists for the recognition of other family law orders. Lastly, these rules provide clarity over the common law insofar as it spells out specific grounds (habitual residence, domicile, etc.) upon which the Court can recognize and enforce the judgment.

The policy arguments against these rules focus on protection of children and families, and the existence of the common law. Under this line of reasoning, the common law is able to handle recognition and enforcement of international parentage orders. Insofar as these laws streamline recognition of international parentage orders, this could be viewed as a "rubber stamp" process over questionable and exploitive fertility practices overseas.

We propose for discussion that our parentage laws include a rule on recognizing and enforcing international parentage orders. In our view, these rules clarify the process for parents who are resident in Nova Scotia and clarifies the grounds upon which the Court can recognize a foreign judgment, over and above what the common law provides.

Proposal for Discussion:

Nova Scotia should recognize and enforce parentage declarations issued outside of Canada where the original jurisdiction had a real and substantial connection to the original jurisdiction, or where either the child or a parent was habitually resident in that jurisdiction.

[637] Ont *CLRA, supra* note 29 at s 16(4); Sask *CLA*, *supra* note 29 at s 71; BC *FLA*, *supra* note 29 at s 36(1); PEI *CLA*, *supra* note 29 at s 28(1); *Uniform Act, supra* note 34 at s 16.
[638] Ont *CLRA, supra* note 29 at s 16(5), BC *FLA*, *supra* note 29 at s 36(3); PEI *CLA, supra* note 29 at s 28(2). Saskatchewan, Newfoundland and Labrador, and Manitoba do not include this additional public policy exception for international judgments. Sask *CLA*, *supra* note 29 at ss 72, 73; Man *FMA, supra* note 29 at s 28; Nfld *CLA*, *supra* note 32 at s 16.

10.4.3 Other Requirements

While most Canadian jurisdictions take a fairly consistent approach to recognizing and enforcing international parentage declarations, there are some small variations. We discuss two of those variations here: (1) the originating court's jurisdiction on the basis of domicile vs. habitual residence, and (2) the need to file additional legal documents.

On the first issue, while Ontario (set out above), British Columbia, Saskatchewan, Prince Edward Island and Canada's *Uniform Act* ask whether the originating jurisdiction was the "habitual residence"[639] of a parent or child, Newfoundland and Labrador, Manitoba, and Yukon alternate between *domicile* and *habitual residence*.[640] For example, section 15 of Newfoundland and Labrador's *Children's Law Act* states:

> 15. An extra-provincial declaratory order that was made outside Canada shall be recognized and have the same effect as if made in the province where
>
> (a) at the time the proceeding was started or the order was made, either parent was domiciled,
>
> (i) in the territorial jurisdiction of the court making the order, or
>
> (ii) in a territorial jurisdiction in which the order is recognized;
>
> (b) the court that made the order would have had jurisdiction to do so under the rules that are applicable in the province;
>
> (c) the child was habitually resident in the territorial jurisdiction of the court making the order at the time the proceeding was started or the order was made; or
>
> (d) the child or either parent had a real and substantial connection with the territorial jurisdiction in which the order was made at the time the proceeding was started or the order was made. [emphasis added]

The pros and cons raised by both relying on domicile as opposed to habitual residence are outlined at s 10.2, above. Because here we are looking at domicile and/or habitual residence as a ground for recognition and enforcing a judgment, we avoid the circularity problems that these terms presented in the choice of law context. However, the other policy considerations, and particularly

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[639] Ont *CLRA, supra* note 29 at s 16(5), BC *FLA*, *supra* note 29 at s 36(3); Sask CLA, *supra* note 29 at ss 72, 73; PEI *CLA, supra* note 29 at s 28(1)(a).
[640] Nfld *CLA, supra* note 32 at s 15; Man *FMA, supra* note 29 at s 27; Yk *CLA, supra* note 32 at s 20.

those related to the promotion of equality, simplicity and modernization by abandoning domicile, still apply in this discussion.

We propose for discussion that Ontario's approach (relying on habitual residence alone) should be preferred over Newfoundland and Labrador's. In our view, given the problematic and outdated facets of locating domicile, habitual residence is a better connecting factor to list in modern parentage legislation.

Aside from this domicile / habitual residence distinction, Canadian jurisdictions also vary in the legal documents that must be filed before an international parentage order will be recognized and enforced. In Newfoundland and Labrador, for example, in order to have an order from outside of Canada recognized and enforced, the applicant must file an opinion from a lawyer from both jurisdictions involved, and a verified translation where needed:[641]

> 17. (1) A copy of an extra-provincial declaratory order, certified under the seal of the court that made it, may be filed in the office of the registrar but where the extra-provincial declaratory order is made outside of Canada, the copy shall be accompanied by
>
> (a) the opinion of a lawyer licensed to practice in the province that the declaratory order is entitled to recognition under the law of the province;
>
> (b) a sworn or affirmed statement by a lawyer or public official in the extra-provincial territorial jurisdiction as to the effect of the declaratory order in that jurisdiction; and
>
> (c) where necessary, a translation, verified by affidavit.

Saskatchewan imposes a similar requirement to file extra-provincial parentage declarations with the Registrar of Vital Statistics.[642]

The pros of these requirements relate to certainty. Nova Scotia courts should have official translations and legal opinions on the effect of foreign legal order before recognizing it. The cons of these requirements relate to access to justice. Additional legal hurdles will add time and expense to the recognition and enforcement process.

We propose for discussion that, in order to have a foreign judgment recognized and enforced in Nova Scotia, we should not require a legal opinion from the issuing and receiving jurisdictions. In our view, in practice this would be a cumbersome and expensive process that would slow

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[641] Nfld *CLA, supra* note 32 at s 17; PEI *CLA, supra* note 29 at s 31(2); Man *FMA, supra* note 29 at s 29(1); Yk *CLA, supra* note 32 at s 22.
[642] Sask *CLA*, *supra* note 29 at s 71.

recognition of parentage. We do, however, support the requirement to get an official translation where the judgment is in a foreign language. In our view, this is necessary for judges to conduct its analysis on whether the order should be enforced (for example, we cannot know if an order is contrary to Canadian public policy if we cannot read it).

Proposals for Discussion:

Nova Scotia should not, as a matter of course, require legal opinions from the issuing and receiving jurisdictions in order to recognize and enforce a foreign judgment.

Nova Scotia should require foreign parentage orders to be translated into one of Canada's official languages in order to be recognized and enforced in our province.

10.5 Out-of-Province Birth Certificates

Most Canadian parentage laws do not consider cases where parents seek recognition of their foreign birth certificate, rather than a foreign court order. Prince Edward Island, the *Uniform Act*, Saskatchewan Law Reform Commission, and Manitoba Law Reform Commission have, however, contemplated this situation and include/recommended the following provision:[643]

> 29 The persons listed as the parents of a child on a birth certificate issued by a jurisdiction outside Canada who would not be presumed to be the parents of that child under this Act may apply to the court for a declaratory order that they are the parents of that child.
>
> (2) The court may make an order sought under subsection (1) if the child would otherwise have no parents.
>
> (3) The court may consider a birth certificate issued by a jurisdiction outside Canada as evidence for the purpose of making an order under this section.

The policy arguments in favour of including this provision relate to clarity. Parents who do not have an international court order, but do have a birth certificate, are given a clear path to have their parentage recognized in the Province.

The policy arguments against such a provision relate to necessity. While speculative, it may be that most jurisdictions do not include this specific section because general declaratory powers are

[643] PEI *CLA, supra* note 29 at s 29; *Uniform Act, supra* note 34 at s 18; Sask *LRC supra* note 35 at para 291-293; Man Issues Paper, *supra* note 36 at 38.

already broad enough to handle this situation. A specific rule permitting parents to seek a general declaration is not necessary.

We seek input on this issue. We therefore ask the question: should Nova Scotia's parentage law include a provision on recognizing foreign birth certificates?

Question for Discussion:

Should Nova Scotia's parentage law include a provision on recognizing foreign birth certificates?

11 Other Issues

This Chapter considers several issues of a general nature that should be considered in implementing a parentage law. First, it considers language and terminology of parentage laws. Second, it considers the location of parentage laws. Third, it considers transition provisions. Lastly, it considers consequential amendments.

11.1 Language and Terminology

Most Canadian jurisdictions continue to use gender specific language (mother / birth mother / father) in their parentage laws.[644] The drafters of the Uniform Law Commission of Canada's *Uniform Child Status Act*, for example, defended their continued reliance on this language on the basis that it "builds on the history of parentage determinations in the common law."[645]

Some recent reforms saw provinces (Ontario, Saskatchewan and Manitoba) moving away from these labels towards the gender-neutral term "parent" and "birth parent".[646] In the case of Ontario, the Attorney General was bound by Minutes of Settlement to ensure that a reformed *CLRA* contained trans-inclusive notions of parentage. Removing gender specific language of parentage helped accomplish this goal.[647] Ontario's legislation has replaced the terms mother and father with parent, birth mother with birth parent, and "biological father" with "person whose sperm resulted in conception through sexual intercourse".[648]

Internationally, the American *Uniform Parentage Act (2017)* has opted for the gender-neutral language of parent, noting that gender specific labels were "unnecessary".[649]

As a matter of policy, Nova Scotia's current reliance on the terms "mother" and "father" can be defended as being in line with the common law, most legislative schemes, and the common parlance in the public sphere.

On the other hand, however, gender specific labelling is arguably unnecessary, and is not trans-inclusive. Our reforms seek to make the law equal and reflective of the families that exist in Nova Scotia. It also seeks to locate parentage for the wide variety of ways children are conceived. Imposing a binary gendered language restricts the law's ability to accomplish this task. Using the

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[644] See, for example, BC *FLA*, *supra* note 29 at s 20(1); Alta *FLA*, *supra* note 29 at at ss 1(b.1), 7; PEI *CLA, supra* note 29 at at s 9.
[645] *Uniform Act*, Commentary *supra* note 34 at 6.
[646]Ont *CLRA, supra* note 29 at s 1(1) – "birth parent"; Sask CLA, *supra* note 29 at s 55(1) "birth parent"; Man *FMA, supra* note 29 at s 15 – "birth parent". Notably, Prince Edward Island's new parentage legislation continues to use gender specific language (PEI *CLA, supra* note 29).
[647] Snow, *supra* note 52 at 334-335.
[648] Ont *CLRA, supra* note 29 at ss 1(1) – "birth parent"; 7(1).
[649] *UPA (2017)*, *supra* note 43 at s 201 and commentary at 10.

word "parent" or "birth parent" in place of "mother"/ "birth mother"/ "father" is a relatively easy way to make the law more inclusive and flexible, without sacrificing legal recognition or rights.

We propose for discussion that Nova Scotia's parentage laws should use the label of parent, as opposed to mother/father/birth mother. In our view, the label "parent" is easy and understandable and makes the law more inclusive and reflective of all families in Nova Scotia today. It also permits the law to contemplate different types of family forms (for example, multiple-parent families, surrogacies) without being restricted by binary gender roles.

Proposal for Discussion:

Parentage legislation should use the word "parent" and "birth parent" instead of "father", "mother" and/or "birth mother".

11.2 Location of Parentage Laws

This section considers whether Nova Scotia's parentage laws should be drafted as a stand-alone piece of legislation, or incorporated as an amendment into other parenting legislation.

Within Nova Scotia, parenting time, custody, contact, and child support are addressed in the *Parenting and Support Act*.[650] Children's protective services and adoption are dealt with in the *Children and Family Services Act*.[651] Guardianship of children's property is dealt with in the *Guardianship Act*.[652]

Canadian jurisdictions tend to include parentage provisions in "children's law" statutes that also cover child support, custody, parenting time and contact with children, and/or guardianship of children's property. Adoption and child services are typically dealt with in separate legislation. For example, Ontario's *Children's Law Reform Act* deals with parentage, decision-making responsibility, parenting time, contact and guardianship.[653]

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[650] *Supra* note 8.
[651] *Supra* note 12.
[652] *supra* note 13.
[653] Ont *CLRA, supra* note 29 (child protective services and adoption are dealt with under the separate *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sch 1). BC *FLA*, *supra* note 29 (covers parentage, "care of and time with children", and protection from family violence. Adoption is dealt with in the *Adoption Act*, RSBC 1996, c 5, while Child Protective Services is dealt with in the *Child, Family and Community Service Act*, RSBC 1996, c 46). Alta *FLA*, *supra* note 29 (covers parentage, guardianship, support, custody, parenting time); Sask *CLA*, *supra* note 29 (covers parentage, guardianship, support, parenting decision-making powers and parenting time); Man *FMA, supra* note 29 (covers parentage, support, custody, access); Yk *CLA, supra* note 32 (covers parentage, guardianship, support, custody, access); Nun *CLA, supra* note 32 (covers parentage, guardianship, support, custody, access); NWT *CLA, supra* note 32 (covers parentage,

Internationally, in the United States, the *Uniform Parentage Act (2017)* is limited to determinations of legal parentage - it does not govern parenting time or contact with children.[654] Australia's Capital Territory has a *Parentage Act* that determinations of parentage only.[655] Questions of parenting time, contact and guardianship are built into other pieces of legislation.

Initially, we had contemplated advocating for the international approach, in which parentage is addressed in separate legislation. It was thought that this would be more practical and politically appealing to introduce new legislation rather than open up existing legislation to amendments.

On reflection, however, we were also persuaded by arguments that parentage laws ought to be included in the *Parenting and Support Act*. Including parentage in this legislation harmonizes our laws with other Canadian jurisdictions and would provide clarity to persons seeking to understand legal status, rather than requiring people to look to several statutes to understand the parent-child relationship.

We therefore ask the question: Should Nova Scotia's parentage laws be introduced as a stand-alone piece of legislation, or be incorporated into the *Parenting and Support Act*?

Question for Discussion:

Should Nova Scotia's parentage laws be introduced as a stand-alone piece of legislation, or be incorporated into the *Parenting and Support Act*?

11.3 Temporal Application of Laws

This section considers how should Nova Scotia's parentage laws should apply in time, i.e. should it only apply to births on a go forward basis, or should it reach back in time?

For example, imagine a family was formed via sperm donation by sexual intercourse 10 years ago. What is the legal status of that child today? As a practical matter, this issue will come up as a result of some legal trigger. For example:

- A donor/parent dies and their will leaves their estate to "my children";
- A donor/parent dies intestate, and lawyers are looking for "issue";

guardianship, support, custody, access); Nfld *CLA*, *supra* note 32 (covers parentage, guardianship, support, custody, access).

[654] *UPA (2017)*, *supra* note 43.

[655] *Parentage Act 2004, supra* note 340.

- A "donor" had been visiting the child regularly, but now the child's other parents are not including them in family events.

In each of these situations, the relationship of the child to their parents or donors is determined by parentage laws. Where these laws are different at the time of the legal trigger from what they were at the time of birth, we must decide what law applies.

In the absence of clear statutory language, the Court will presume that legislation is *prospective* - meaning it only impacts the future legal effects of future acts (i.e. it impacts the future legal rights that flow from parentage to children born on or after the Act coming into force).

However, clear language can change this to make the law:[656]

- have a *retroactive* effect (change the *past* legal effects of *past* events).
- have a *retrospective* effect (change the *future* legal effects of *past* events).
- interfere with *vested rights* (concrete rights held by particular persons).[657]

There is a general trend in several Canadian jurisdictions to give parentage laws a limited retrospective effect, but prevent them from interfering with vested rights. Prince Edward Island, Saskatchewan, Manitoba, Yukon, Northwest Territories, Nunavut and Newfoundland and Labrador take this approach. Their laws cover three issues with regards to timing:

- When interpreting any Act or regulation ("enactment"), the new parentage laws are used, regardless of when those enactments were passed, or the facts upon which the interpretation is based upon exists; but
- The new parentage laws cannot affect a disposition of property made before the new laws came into force; and
- The new parentage laws do not affect "instruments" made prior to the new law coming into force. "Instrument" is not defined in the respective Acts but has been judicially interpreted as "[a] formal legal document whereby a right is created or confirmed, or a fact

[656] See, for example, *Hayward v Hayward*, 2011 NSCA 118 where the Nova Scotia Court of Appeal considered s 19A of the *Wills Act*, RSNS 1989, c 505, which revokes testamentary gifts made to ex-spouses. The deceased had created a will when he was married, prior to the enactment of section 19A. He later divorced, but did not change his will, and died shortly after section 19A came into force. A dispute arose as to whether s 19A was prospective (only applied to wills drafted after s 19A was enacted) or retrospective (it changed the legal effect of wills drafted prior to the enactment of s 19A). The Court of Appeal held that the implied intent of the law indicated it had retrospective effect.

[657] Ruth Sullivan, *Statutory Interpretation* 3d ed (Toronto: Irwin Law, 2016) at 342, 363. A right is considered vested when (1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) the legal situation must have been sufficiently constituted at the time of the new statute's commencement (see also 2005 SCC 73 (CanLII), [2005] 3 SCR 530 at paras 29-40).

> recorded; a formal writing of any kind as an agreement, deed, charter, or record drawn up and executed in technical form.[658]

Part 1 is retrospective: it changes the future legal rights of a child that may have been born long ago. For example, imagine an intestacy occurs today which involves a (now adult) donor-conceived child. The determination of whether that person counts as "issue" would be made using current parentage laws. That child's right to inherit would be determined under current laws, regardless of when they were born or what their status was when they were born.

Part 2 expressly limits the interference with vested rights. For example, imagine a person who qualifies as a child of a long-deceased person under the new parentage laws. This person cannot use the new laws to demand a portion of their deceased parent's already distributed estate. Those rights have already vested in the deceased's other heirs. These laws are prospective in nature.

Part 3 indicates that, when it comes to instruments, the law is prospective in nature only. For example, a will that states "I leave my estate to my children" would only include the persons who qualify as children on the date the will was made.

Prince Edward Island provides an example of a recent provision that takes the approach outlined above:

> 18. Application - general
>
> (1) Subject to subsection (2), this Part applies to
>
> (a) an enactment made before, on or after the coming into force of this section; and
>
> (b) an instrument made on or after the coming into force of this section.
>
> (2) This Part does not affect the disposition of property under an enactment or instrument before the date this section comes into force.
>
> (3) In an enactment or instrument, a reference to a person or group or class of persons described in terms of relationship to another person by blood or marriage includes a person who comes within that description by reason of the parent-child relationship as determined under this Part.[659]

The benefits of this limited retrospective approach relate to modern values, clarity, and harmonization.

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[658] *Re Lambert Island Ltd. & Attorney-General of Ont,* [1972] 2 OR 659 at 666 (HC).
[659] PEI *CLA, supra* note 29 s 18.

The new parentage laws are designed to better meet the realities of modern Nova Scotian families. If parentage is being determined in a contemporary context, it is better that the determination be made pursuant to contemporary values. In this regard, there is a compelling case that some of the old laws are discriminatory. By making the new laws retrospective, we are making the choice not to apply discriminatory laws to determine current legal rights.

On the issue of clarity, the current parentage law in Nova Scotia is a mix of uncodified and confusing common law presumptions. By making the new law retrospective, lawyers and members of the public can clearly locate and determine their status. Lastly, on the point of harmonization, most Canadian jurisdictions have opted for this approach, and it is helpful without a compelling reason to the contrary to follow this approach.

On the other hand, it may not be fair to assign people a status different from their understanding when the child was conceived. People who conceived in the past may have had certain expectations and intentions about what their status vis-à-vis the child would have been, which would have been informed by the laws in place at that time. It is unfair to change those laws based on modern values. There are also rule of law implications for retrospective laws. People should be entitled to structure their affairs and rely on the law as it exists. By making the law retrospective, we are assigning new consequences to old arrangements, in contravention of the rule of law.

We propose for discussion that Nova Scotia's parentage law have a limited retrospective effect, in that they apply retrospectively to past enactments. Without it, we will blunt the impact of modern parentage laws as they arise for children already born. This is out-of-step with our goal of making the law more equal and inclusive.

Proposal for Discussion:

Nova Scotia's parentage laws should be applied when interpreting legislative enactments, no matter when the events leading to that interpretation arose.

11.4 Prior Dispositions of Property

Given the presumptions that all laws are prospective in nature, it is not legally necessary to state points at which laws are prospective only. For example, it is not necessary to state that parentage laws cannot be used to affect a prior disposition of property or prior instruments.

Because of this presumption, some Canadian provinces, such as Ontario, are silent on the points. But while there is no legal difference as between these approaches, there may be a practical benefit to stating that parentage laws cannot be used retrospectively or retroactively. By making these

statements explicit, we offer clarity and make unnecessarily litigation less likely. Several Canadian jurisdictions specifically that that parentage laws cannot affect past dispositions of property.[660]

We propose for discussion that parentage legislation expressly state that it does not affect prior dispositions of property or prior instruments. While these statements may be unnecessary, inclusion is a relatively simple way to avoid unnecessary litigation and as such, saves judicial time and advances access to justice.

Proposal for Discussion:

Parentage legislation should expressly state that it does not impact prior dispositions of property or instruments created before the laws were passed.

11.5 Consequential amendments

The passage of parentage legislation in line with our proposals for discussion will require consequential amendments be made to several pieces of legislation in Nova Scotia. These may include:

Change of Name Act, RSNS 1989, c 66

This Act has different processes to change the name of a child based on whether they are born in or out of "wedlock".[661] This discriminatory language ought to be removed. It also does not use trans-inclusive language when referring to parents (mother and father instead of parents).

Children and Family Services Act, SNS 1990, c 5

This Act governs the protection of children from situations or risk of abuse or neglect, and adoptions in the province.[662] It has two definitions of parent: a general one that covers interventions, and one specific to adoption. Both of these definitions should be amended in light of new parentage legislation:

- A "parent or guardian" under the CFSA's non-adoption provisions includes a child's "mother" or "father" who also have custody or reside with the child, or have an application before the court regarding care, custody or support for the child.[663] The words mother and father ought to be replaced with a reference to persons who are

[660] PEI *CLA, supra* note 29 s 18(2); BC *FLA, supra* note 29 s 22.
[661] *Change of Name Act*, RSNS 1989, c 66, s 8.
[662] *Supra* note 12.
[663] *Supra* note 12 at s 3(r).

parents under parentage statute. The limitations on their recognition under the CFSA (regarding custody and care of the child) can remain.

- The CFSA adoption provisions contemplate the transfer of legal parenthood from biological parents to adopting(ive) parents. A "mother" is a child's biological mother, and on this ground, she also qualifies as a "parent".[664] A "father" is a person who shares a biological connection with a child, but he will only be recognized as a "parent" (and thus be entitled to notice, consent, and participation in adoption proceedings) if he was in a married or common law relationship with the mother.[665] References to biological mothers and fathers ought to be removed, and replaced with references to persons who are legal parents pursuant to parentage laws.

Similar changes must be made to the *Adoption Information Act*, SNS 1996, c 3.[666]

***Fatal Injuries Act*, RSNS 1989, c 163**

This Act defines "parent" as including "father, mother, grandfather, grandmother, stepfather and stepmother" and "child" as including a "son, daughter, grandson, granddaughter, stepson and stepdaughter". [667] This definition should be changed to use non-binary language (parent, step-parent, grandparent, child, grandchild, stepchild). It should also refer to parentage legislation as to clarify who qualifies as a child or parent (in addition to grandparent-child or stepparent-child relationships).

***Intestate Succession Act*, RSNS 1989, c 236**

This Act refers to "issue" as being "lawful lineal descendants" of an ancestor.[668] This definition should be amended and expressly tied persons who are recognized as legal parents under parentage laws.

This Act also makes reference to illegitimate children. This ought to be removed.

***Parenting and Support Act*, RSNS 1989, c 160**

At present, the PSA defines "parent" as including "(i) a person who is determined to be the parent of a child under this Act, (ii) a person who has demonstrated a settled intention to treat a child as the person's own child, but does not include a foster parent under the *Children and Family Services Act*, and (iii) a person who has been ordered by a court to pay sup-port for a child."[669]

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[664] *Supra* note 12 at s 67(1)(e).
[665] *Supra* note 12 at s 67(1)(d), s 67(1)(f).
[666] SNS 1996, c 3, s 3(h) and(i).
[667] *Fatal Injuries Act, supra* note 6 at s 2(c).
[668] *ISA, supra* note 6 at s 2(b).
[669] *PSA, supra* note 8 at s 2(i).

In other words, this definition labels many people who have parenting rights and responsibilities in relation to a child – including those who have been found to stand *in loco parentis* to a child - as "parents". In order to avoid confusion as between parentage (legal parents) and parenting (which could include legal parents, persons who stand *in loco parentis* to a child, or guardians), we may require more concrete boundaries around when the label "parent" is employed. There are several ways to do this:

- In Ontario, Part 3 of the CLRA uses the word "parent" only to apply to legal parents, while everyone else has standing as someone other than a parent. It permits "a parent of a child" or "any person other than the parent of a child, including a grandparent" to apply to a court for a parenting order or decision-making responsibility and parenting time with respect to a child.[670] Similarly, Saskatchewan permits "[a] parent or other person having, in the court's opinion, a sufficient interest" to seek an order relating to decision making responsibility, parenting time or other order relating to the care and control of a child.[671]
- Prince Edward Island has rules that permit "either or both of the parents of the child; a person, other than a parent, who stands in the place of a parent or intends to stand in the place of a parent to the child; or a Children's Lawyer" to make an application for a parenting order.[672] If that order granted, that person who made the Order is then considered a "parent" for all other purposes in the Act.[673]

Second, the PSA includes various "possible father" or "father" provisions that refer to persons in relationship to "mothers". This language should be amended to be non-binary (replace father with parent and mother with birth parent). Family Division forms should also be amended to reflect this change.[674]

Third, the PSA has rules to legitimate children born in void or voidable marriages.[675] If provisions are maintained, they ought to be amended to exclude offensive references to legitimacy and placed alongside parentage provisions. For example, Prince Edward Island's legislation states:

> 18 (5) For the purposes of this Part, (a) where two persons go through a form of marriage to each other and at least one of them does so in good faith, they live together and the marriage is void,
>
> (i) they are deemed to have been married for the period they lived together, and (ii) the marriage is deemed to be terminated when they stop living together; and (b)

[670] Ont *CLRA, supra* note 29 at s 21.
[671] Sask *CLA*, *supra* note 29 at s 8(1).
[672] PEI *CLA, supra* note 29 at s 39.
[673] *Ibid* at s 1(1)(s).
[674] *Family Court Rules*, NS Reg 20/93.
[675] PSA, *supra* note 8 at ss 47, 48.

> where a voidable marriage is declared a nullity, the persons who went through the form of marriage are deemed to have been married until the date of the declaration of nullity.[676]

Fourth, the PSA has rules to legitimate a child where their parents subsequently intermarry.[677] These provisions ought to be removed and replaced with a provision that removes the status of legitimacy. For example, Prince Edward Island's legislation states

> 19. (1) For all purposes of the law of the province, (a) a person is the child of the person's 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 shall be as determined under this Part.
>
> (2) For greater certainty, there is no distinction in law between the status of a child born inside marriage and a child born outside marriage.[678]

***Testators' Family Maintenance Act*, RSNS 1989, c 465**

The TFMA defines a child as including a child (i) lawfully adopted by the testator, (ii) of the testator not born at the date of the death of the testator, (iii) of which the testator is the natural parent"[679] (emphasis added).

This definition (and particularly the wording of "natural parent") will have to change to refer to statutory parentage laws.

***Wills Act*, RSNS 1989, c 505**

The *Wills Act* defines issue as "lawful lineal descendants".[680] This definition should be amended to refer to persons who are parents pursuant to statutory parentage laws.

***Vital Statistics Act,* RSNS 1989, c 494**

When new parentage legislation is passed, it is crucial that its rules are aligned with the rules on birth registration under the VSA. This can be ensured by having Vital Statistics legislation make specific reference to parentage legislation. For example, Ontario's *Vital Statistics Act* permits "parents" to register their child's birth – it relies on the CLRA's definition of parent in order to ensure the parentage and registration regimes mirror each other.[681] Regulations passed under

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[676] PEI *CLA, supra* note 29 s 18(5).
[677] PSA, *supra* note 8 at ss 49, 50
[678] PEI *CLA, supra* note 29 s 19.
[679] *TFMA, supra* note 6 at s 2.
[680] *Wills Act*, RSNS 1989, c 505, s 2(a).
[681] *Vital Statistics Act,* RSO 1990, c V, s 9.

Ontario's VSA provides specific detail on who must register as a parent where conception occurs via sexual intercourse, ART, surrogacy, or multiple-parent families, and what must be submitted. Again, these rules mirror and make reference to Ontario's parentage legislation.[682]

Aside from this general matter, there are four amendments that must be made to the VSA. First, the VSA requires "mothers" "fathers" and "parents" to register the birth of a child. These terms are not defined. An amended VSA should remove references to mothers and fathers (to make the statute non-binary), and refer to parentage legislation to interpret the definition of "parent".[683]

Second, sections 4(4) and 4(5) of the VSA create rules for the registration of a mother's husband. These provisions should be amended or removed and refer to the parentage statute in relation to who qualifies as an "other parent" and as such, is entitled to add their name to a birth registration.

Third, s 6 creates a process to "legitimate" a child where their parents subsequently intermarry. This provision should be removed.

Fourth, ss 8 and 11A-C of the VSA permit a court to make a finding as to parentage. In order to clarify the division between parentage and registration, the court's power to make parentage findings should be contained in parentage legislation.

Birth Registration Regulations, NS Reg 390/2007

The Birth Regulations permit same-sex couples to register as parents on a birth registration. If the VSA is amended to comprehensively define "parents" by reference to parentage laws, and all persons who are parents under parentage laws may register as such under the VSA, sections 1-4 of the Birth Regulations will no longer be necessary.

Section 5 of the Birth Regulations, which governs parentage via surrogacy, will no longer be necessary as surrogacy provisions will be included in parentage laws. Rules for registering surrogate births will still be required, but this should be contained in a reformed VSA.

Other Acts

In addition, several Acts rely on the language of "mother", "father", "daughter" and/or "son" from which legal rights and responsibilities flow. This language ought to be changed in order to make the legislation non-binary (parent instead of mother and father, child instead of daughter and son). In addition, where necessary, these Acts should make reference to statutory parentage laws.[684]

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[682] General, RRO 1990, Reg 1094, s 2.
[683] *VSA*, *supra* note 2 at s 4(2).
[684] *Marriage Act*, RSNS 1989, c 436; *Elections Act*, SNS 2011, c 5 s 24(3); *Municipal Government Act*, SNS 1998, c 18, s 77(4); *Assessment Act*, RSNS 1989, c 23 s 14A; *supra* note 13 at s 2(a); *Municipal*

Questions for Discussion:

Do you agree with these proposed consequential amendments? Why or why not?

Do you know of any other Acts that may need to be amended?

Conflict of Interest Act, RSNS 1989, c 299, s 4(b).