UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

ASSISTED HUMAN REPRODUCTION

REPORT OF THE JOINT ULCC-CCSO WORKING GROUP

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I. What is the environment in which we need to understand and discuss child/parental status legal issues?

[1] Assisted human reproductive [AHR] technology has created new opportunities for parenthood for opposite sex couples with fertility problems[1] through donated gametes, implantation of embryos, and by allowing a woman who cannot bring a baby to term to have a gestational mother bring the child to term[2].

[2] While the majority of those accessing assisted human reproductive processes are in opposite-sex relationships, it is noteworthy that these new reproduction options have also provided opportunities for same-sex couples or single persons to have children[3].

[3] There are many issues that arise when considering AHR:

- how to establish parent/child status;
- how to regulate the use of AHR to promote the interests of potential parents and of children;
- how to deal with birth registry to recognize use of AHR;
- how to deal with international standards to avoid unsafe, unethical practices that have safety risks for potential parents and children, including the use of genetic material that is not adequately screened for health risks; and
- how to provide for adequate training of donors for health or social history reasons.

[4] However, as interesting as these issues are, the challenge this paper addresses is how to deal with establishing parent/child legal status.

A. Increasing Use of AHR as Method for Establishing Families:

[5] Infertility is a real barrier to many Canadians who wish to create a family. It is estimated that there is a 7 – 8.5% infertility rate in Canada[4]. This equates to over a quarter of a million couples in Canada being affected.[5] The demand for AHR may increase as: more couples seek infertility services, especially those waiting until later in life to start a family, people become more comfortable with using such treatment, costs are decreasing[6] and fewer children are available for adoption. Certainly, fertility for women decreases after the age of 30. The causes of infertility are multiple however for both males and females. Often, couple infertility can be attributed to more than one cause.

[6] That said, there are concerns that access to AHR is limited by the lack of access to a broader range of donors. There are also concerns about lack of legal certainty around the status of the donor *vis-à-vis* their obligations and rights towards a resulting child or the rights or protections for donors, recipients or children towards each other, including relevant information.[7]

[7] There are two basic types of AHR treatments:

- Artificial Insemination [AI] – non-intercourse insemination leading to fertilization within the body of the woman; and

- *In vitro* fertilization [IVF] – fertilization outside the body of the woman.

[8] As well during IVF, more embryos can be created than are needed for immediate use, and often these are frozen for transfer into the woman at a later date – this is Frozen Embryo Transfer [FET].

[9] IVF and FET are being used by many people in Canada for creating their families, according to data collected annually by the Canadian Fertility and Andrology Society. In 2007, there were over 13,000 treatment cycles performed by Canadian fertility clinics, an increase of 10.7% from 2006. Births from IVF and FET treatments represent approximately 1% of all births in Canada: 3,530 children were born from cycles (and resultant pregnancies) started in 2005, compared with 354,617[8] total live births in 2006.

[10] The vast majority of IVF and FET treatments are done with the gametes (egg and sperm) of the intended parents and the embryo is gestated by the intended mother. Donated gametes are used in a relatively small number of treatments. Donated reproductive material could be the sperm, the egg, the embryo, the womb (surrogacy), or any or all of these. Among IVF treatments where the intended mother gestated the pregnancy[9] (2,909 children), 92% of children (2,675) were created from both the egg and sperm of the intended parents, while 8% of the children (234) were from some or all donated gametes.[10]

[11] Surrogacy with IVF or FET is rare. Of the 3,530 births from IVF or FET treatment cycles started in 2005, only 38 children were born to surrogate mothers (1.1% of all IVF-FET births) compared with 3,492 children gestated by the woman intending to be the parent. Of those 38 children involving surrogates, 19 were created using both the egg and the sperm from the intended parents. The other 19 involved donation of either the egg or the sperm, but no surrogate births involved both donated eggs and sperm (i.e. no genetic or biological link to any intended parent.)

[12] AI is thought to be done much more frequently than IVF because of its relative ease of use and lower cost.[11] A 1991 survey by the Royal Commission on New Reproductive Technologies estimated that between 4 and 15 times more children are born as a result of AI than IVF.[12] Statistics on AI are difficult to collect because of the wide variety of medical practitioners (family doctors, obstetrician/gynecologists) who perform these treatments. In terms of the use of donated sperm in AI procedures, there are no current Canadian estimates of the number or proportion of AI procedures that use donated sperm. Presumably, the proportion of AI procedures with donated sperm would be significant, since opposite-sex couples with viable and compatible gametes would engage in intercourse for natural fertilization rather than assisted insemination, and lesbian couples and single women would require access to donated sperm.

[13] While this deals with information on Canadian AHR procedures, it likely undercounts the number of Canadian children born as a result of foreign AHR procedures, as Canadians may also use AHR clinices in the US, Mexico, Europe, India, Asia and Latin America; there is currently no ability to track these procedures.

B. Increasing Legal Uncertainty and Challenges:

[14] Advances in AHR have made determining the legal parent-child relationship more complicated in certain cases. The existing legislation is inadequate, as the concepts do not take into account AHR techniques and this leads to challenges in the courts with judges making decisions in a policy vacuum.[13] If this situation is not remedied, there is great potential for the law to develop in an inconsistent ad hoc way. From the child's perspective, inconsistency in child status rights may arguably be inherently unconstitutional, since birth registration is a foundation document from which citizenship and the right to participate in society flows. As well, the differential treatment of families presents inequity for non-traditional family forms.

[15] Changes to the law in this area would respond to the realities of AHR by clarifying the parent/child relationship in such cases. These changes will need to address any remaining fundamental unfairness that exists for same-sex couples and their children, be sensitive to gender equality issues and will need to recognize children born in different family structures. For example, although in Canada same-sex relationships are legally recognized, same-sex couples may still experience different treatment in terms of the registration of their children's births. While differences in treatment often reflect the historical purposes of the birth registration process, accommodation is needed to recognize equivalent parental and child rights in these situations.

[16] Because parentage laws and birth registration are the societal markers of legal parentage, same-sex couples have commenced numerous court challenges to ensure their inclusion in this fundamental element of family formation. Many Canadian jurisdictions have experienced *Charter* challenges to these two legislative frameworks, and these challenges will continue if legislatures are slow to respond.

[17] Opposite-sex couples who use AHR have not encountered the same difficulties in registering their children's births. However, they face the same legal uncertainty as same-sex couples do in establishing parentage where the child is conceived using donated third party genetic material.

[18] There has been increasing demand for recognition of parental status in recording of birth registry. Birth registration is the process through which all births that occur in a province or territory get documented. It serves two equally important purposes: provides information for health surveillance (mother and child data) and establishes a source of information used to issue proof of the legal status of an individual – name, age, citizenship and legal parentage. Vital Statistics registries have faced human rights and *Charter* challenges concerning who is entitled to be registered as a parent where AHR is used. Some of the issues raised impact on parentage and others on the registry process or information needs.

[19] As this paper deals only with parentage, the issues relating to the type of registration records to be kept by Vital Statistics will not be dealt with. Further work may be required on the *Uniform Vital Statistics Act* to define how to adequately record information related to situations involving AHR for health surveillance reasons and to adequately address the information needs or expectations of donors, recipients or children born through AHR.

II. Background to the Development of this Report

[20] In 2002, CCSO Family Justice established a working group to look at the issues of determining parent-child status and registering births of children born as a result of (AHR). While work initially focused on amendments to the *Uniform Child Status Act,* the CCSO Working Group identified that mere amendments to that uniform Act would not be possible without a more fundamental review of the policy issues involved. Thus, beginning in 2005, the CCSO Working Group started a broader policy review and looked at a number of reports on this topic.[14] Through 2006-07, the CCSO Working Group finalized the policy approach.

[21] In 2007, Federal Provincial Territorial Ministers and Deputy Ministers Responsible for Justice approved the principles and policy approach proposed by the CCSO Working Group and directed that a joint working group with the Uniform Law Conference of Canada and CCSO Family Justice be formed. This occurred in fall 2007 and the newly formed Working Group met by telephone and in person to review the existing uniform legislation, proposals and principles as endorsed by Ministers, and to address drafting policy and issues to create a new uniform Act.

[22] As well, representatives of the Working Group consulted on the "number of parents/multiple parent" issue, along with "posthumous conception issues" with representatives from the Vital Statistics Council and AHR Canada on June 12 and 13, 2008, in Ottawa; with representatives from AHR Canada, the Fertility and Andrology Society, and Society Obstetricians and Gynaecologists of Canada on February 20, 2009; with representatives from the CBA having expertise in family law, wills and estates, and concerns of gay and lesbian couples in February/March/April 2009; and with legal academics in March 2009.

III. Defining the Policy Issues

A. Why is Parentage Important?

[23] There are two related policy questions that must be resolved:

- who are the legal parents of a child at the moment of birth; and
- who are entitled to register as the child's parents

[24] These issues may seem to be the same, but they are quite different. Typically, common law provinces and territories have child status legislation that defines who a child's parents are.

[25] In addition, they have birth registration provisions in their vital statistics legislation that require and permit the administrative act of registration of parentage. There is substantial interplay between these two types of legislation. For example, a man who certifies the birth registration is presumed to be the father in several child status statutes, and likewise, a person who receives a declaration of parentage under child status legislation is generally permitted to amend birth registration.

[26] To accommodate same-sex parentage and to respond to court challenges, some jurisdictions have changed their registration process without changing their child status law. Proceeding in this manner allows the administrative fact of registration to drive the legal child status policy development process. Because child status is a legal status and registration is a reflection of that status, the policy work on determining parentage must precede or occur together with work to change vital statistics legislation.

[27] It is important in this discussion not to confuse the issues of parental status and parenting roles/responsibilities. Provincial and territorial family laws recognize that persons who are not parents may have responsibilities or roles for children based on their relationship to the child and in the child's best interests. So even where a person is not recognized as a legal parent, that person may still be found to have some parenting role in the life of the child in terms of a person of sufficient interest under custody and access regimes or as a person *in loco parentis*.

Legal Parentage:

[28] The 2005 New Zealand Law Reform Commission Report on legal parentage points out the focus of reform:

[29] There are legal responsibilities and duties that parenthood places upon adults in relation to the children they have brought into the world. The "status" or powers and rights that go with parenthood are not "benefits", but are the means by which parents' responsibilities to children can be exercised, so as to provide the security and protection that children, as vulnerable members of our society, need. In order to exercise the full range of parental responsibilities, the relevant adults need to have the full powers and rights of parenthood.[15]

[30] The Report devotes a chapter to explaining what legal parenthood is and why it is important and states:

> A legal parent is to be differentiated from the general use of the word "parent", which may refer to the genetic, biological or social relationship a person has with a child. At present, a child can have only two genetic parents, a genetic mother and genetic father, and the law has only ever recognised two legal parents for a child. Surrogacy techniques, however, mean that a child can have three "biological parents", and recent technological developments mean that it may

soon be possible for a child to have two genetic mothers plus a gestational one as well as a genetic father. [16]

Registration:

[31] Since 2001, there has been development in the law of birth registration, mostly through successful challenges to existing registration regimes. However, the issue of child status – who are the parents of a child at birth – has been less litigated, and is less understood by the public.[17]

B. Best Interests of the Child:

[32] The discussion about parental/child status and the intriguing issues around methods of AHR needs to take place in the context of the understanding that fundamentally AHR is about the creation of a child. Thus, the best interests of the child need to be a central focus.

[33] In 2008, a CBC radio program, Ideas, had a discussion on AHR. It explored with children of AHR their concerns and interests. Children born from AHR have concerns about being recognized within the dialogue and development of law and policy. The rights of the child need to be recognized and protected in these processes both before and after birth. The child's need for information on the genetic parents and siblings must be considered.

[34] A statement made by one of the children in the CBC program points out the need to consider the children's perspective when discussing even the term "donor":

> *...the word donor implies a gift, something that I send away from myself, never to be seen again. I think we sometimes talk about the gift of life in comparing to organ donations….the kidney doesn't particularly care whether I'm here or not….the gift of life is not a gift to the recipient parents of the reproductive tissue; it's the gift of life to the child. And, the child, unlike blood cells or kidneys, does care who they're connected to. Using these words, alters our reality and I think we need to use words that reflect the true reality, from the perspective of the child, who is the point of going through any assisted reproductive technique in the first place….So, why do we leave the child's perspective out in our language, in our laws, in our contract, in our daily discourse, as if the child is an after thought rather than the sole purpose of going through any of this in the first place?*[18]

C. Guiding Principles:

[35] The following principles were approved by the Ministers and Deputy Ministers Responsible for Justice to guide the policy work on AHR. The Working Group used these principles to explain and to help assess the options for reform considered and the approach recommended.

- Respect Canada's obligations under the *UN Convention on the Rights of the Child*, including:
    - protecting the child from discrimination
    - recognizing the best interests of the child is a primary consideration
    - ensuring the status of the parent/child relationship is protected from birth[19];

- avoid the commodification of children and reproductive abilities[20];

- promote equality of treatment of children regardless of the means of their conception[21];

- recognize that women and men perform distinct roles in reproduction, which may merit distinct treatment for the woman who gives birth;

- while recognizing that generally a child has a maximum of two legal parents, there are specific situations where it is appropriate to recognize additional legal parents (added this year by the Working Group - changed from the previous principle of two legal parents); and

- promote clarity and certainty of parent/child status at the earliest possible time in the child's life (added this year by the Working Group).

D. Evolving Law:

[36] Existing provincial legislation as it relates to parentage generally now recognizes the birth mother as the mother even in surrogate situations and, based on presumptions, defines who the other parent is. As well, the same presumptions apply where AHR was used as in cases of natural birth. There has been traditionally an acceptance that a child has a maximum of two legal parents, but that other adults can take on parenting roles through their actions and relationship with the child or the child's parent.

[37] The Ontario Court of Appeal case of *A.A. v. B.B.* (see attached Appendix A: Review of Case Law) recognized that a child can legally have two mothers and a father. The case, while argued by some as leading to a reordering of parental rights, is also argued as more related to the development of methods of conception and parenting and the role of *parens patriae*:[22] "…the case turns not on the sexual orientation of the parents, but rather on the applicability of the *parens patriae* jurisdiction and the doctrine of the best interests of the child…."[23] and it is a case of the court acting to fill a perceived legislative gap.

[38] A different result was reached in a New Zealand case of *P v K*[24], where the donor who gave sperm to a lesbian couple on the basis of a written agreement that he would have a role in the child's life, including access, applied to be considered a "parent" under legislation that would give him rights of guardianship and contact. The court ultimately held that he was not a "parent", but rather a donor, but found that he could have "guardianship" rights along with the lesbian parents. The court took into account the agreement between the parties, the child's best

interests, and the right of the child to know his parents under the *UN Convention on the Rights of the Child.*

[39] The New Zealand Law Commission Report concludes the discussion on this issue by stating that:

> In conclusion, the international judicial approaches to the difficulties facing families created by known-donor insemination are diverse. In all cases the courts are constrained by legislative schemes that usually make no provision for the legal parenthood of a same-sex partner or a known donor father who had agreed with the women to be a full legal parent to the child.[25]

[40] However, the issues go beyond the three parent scenario and involve a potentially increasing array of biological material. For example, a recent UK proposal to mix the nucleus from one egg with an egg from a donor along with the sperm donor means that the child would have three genetic parents.[26] If we consider the potential for partners of these donors to be potential parents, then this creates a potential of six parents, and, if none of the genetically related persons or their partners intend to parent but rather intend to donate to another couple, then this creates the potential for eight parents.

IV. The Recommended Approach

[41] The potential indicators for parentage are the act of birth, genetics and intention to parent. The current law of parentage in most common law jurisdictions is based on biological presumptions. Parentage begins with the act of birth: the birth mother is the legal parent of the child, and a man who shares a conjugal relationship with the birth mother is presumed to be the father. This approach to parentage does not always work well in the AHR context. The result is to exclude some persons who have started families using AHR from acquiring automatic parental status by operation of law on the birth of a child.

[42] The challenge in developing a scheme for determining parentage that accommodates both natural conception and AHR is to balance the aforementioned potential indicators of parentage in a way that best reflects the guiding principles.

[43] The recommended approach is: to recognize the birth mother link, to equalize the natural and assisted conception models so that the two processes are treated the same as much as possible, and to consider the intentions of those who wish to parent. In all instances, a court process remains for persons who are left out of the determination of parentage at birth but who seek to be named as parents after birth.

<u>Parental status at birth:</u>

1. The birth mother is the child's legal mother at the time of birth.

[44] This applies whether or not the child is conceived using the birth mother's egg or a donor's egg. This provides stability for the child and treats natural and assisted conception the

same. It complies with the requirement in Article 7(1) of the UN Convention that a child has a right to a name, nationality and to know his or her parents from birth. This is also consistent with the treatment of mothers under existing Vital Statistics legislation for AHR and natural conception.

2. Unless a statutory provision (like a presumption) provides otherwise, the genetic father and the birth mother are the parents of a child.

[45] Again this is consistent with existing law and the exceptions will be set out in the uniform Act to deal with donors in AHR process and surrogacy.

Changing Birth Mother Status:

3. There are two means by which the birth mother can relinquish her parental status and another person can gain parental status: adoption and surrogacy.

[46] The surrogacy approaches are outlined below. The status of the birth mother is recognized because of the biological connection to the child. In addition, there may be emotional attachments between the birth mother and the child.[27]

Presumption of the "other" parent:

4. The parental status of the other parent will be presumed from that person's conjugal relationship with the birth mother except in cases of surrogacy or unless the presumptions are rebutted.

[47] This presumption applies whether or not there is a genetic link between the birth mother or the other parent and the child. This approach provides stability for the child and equal treatment of natural and assisted conception. Since the child is not conceived through natural conception, proof of lack of a genetic link between the presumed parent and the child will not rebut the presumption of parentage. In order to rebut the presumption, the presumed parent will have to prove on the balance of probabilities that he or she did not consent, or prior to conception withdrew consent, to be the child's parent. Where the parent arguing to rebut the presumption provided the egg or sperm, it will be hard to establish that consent was lacking.

[48] This approach is similar to the law in Quebec[28] and in some Australian states.

[49] This means that the birth mother and a person with whom she shares a conjugal relationship, whether of the same or opposite sex, should be able to jointly register the child's birth with a Vital Statistics registry. With the presumptions in place, birth registration should be straight forward as the parents should not have to go to court to get declarations of parentage. There may be a need for Vital Statistics legislation amendments to deal with the new rules on parentage.

5. In cases of natural conception, the current presumptions of parentage continue to be available for fathers.

[50] The presumptions can be rebutted by proving on the balance of probabilities that the presumed father is not the child's father. Currently, this is often done using DNA evidence to show that there is no genetic link between the presumed father and the child.

Court Role:

6. When necessary, courts continue to be able to make declarations of parentage where contested. In cases of multiple parents, if the persons follow the legislative requirements, a declaration of parentage will result except where contrary to public policy.

[51] The courts can confirm or rebut a presumption of parentage in circumstances where a presumption is challenged or where the circumstances fall outside the presumption. By clearly setting out expectations on what is required to be dealt with by the parties prior to conception, greater certainty can be attained in terms of parental status.

Third Party Donors:

7. In all cases, third party donors of genetic material have no parental rights or responsibilities unless there is an express legislative provision otherwise.

[52] This is based on the fact that, generally, a third party donor does not intend to be the child's parent. The clarification of the role of donor is important to remove any barrier to altruistic donation and also to give certainty to the donor, the child and the "parents" as to the status and responsibilities of the donor at law.[29] A donor can, of course, always voluntarily provide benefits to the child.

Surrogacy:

8. Surrogacy arrangements are not enforceable.

- In all cases the surrogate will be recorded as the birth mother of the child and the surrogate's consent to relinquish her parentage will have to be obtained after the child's birth before the intended parents can be registered as the child's parents. If the surrogate consents to relinquish her parentage, no presumption would operate in favour of her spouse or conjugal partner because surrogacy is an exception to the presumptions rule.

- Intended parents in situations of surrogacy will be required to obtain a court declaration to be recognized as the child's legal parents.

[53] The Working Group considers that it is not consistent with public policy or with the overarching responsibilities of the courts as *parens patriae* to allow surrogacy contracts to be

enforceable. Note the *Jane Doe v. Alberta*[30] case that references the inability of an agreement between the parties to bind the hands of the court.

[54] The Working Group considered two options for determining the parentage of children born using surrogacy. The majority of the Working Group recommends an approach based on a genetic link with at least one of the intended parents and intention to parent.

[55] Under this approach, parentage in surrogacy situations would be determined based on the provision of genetic material for the child's conception by at least one of the intended parents. Legislation would allow the genetic parent and that parent's spouse or conjugal partner to apply for a declaration of parentage. If the surrogate mother, after the birth of the child, consents to the application, the court could make the declaration of parentage in favour of the genetic parent and the genetic parent's spouse or conjugal partner. Where the surrogate mother consents to the declaration, no presumption would operate in favour of her spouse or conjugal partner because surrogacy is an exception to the presumptions rule. While the CCSO Working Group initially contemplated that jurisdictions could decide whether court overview or administrative process was needed, this Working Group suggests that a court declaration approach ensures certainty of process. (A jurisdiction could choose to allow the transfer of parentage to occur administratively through a registration process rather than require a court application.)

[56] An option considered, but not accepted, would allow surrogacy without a genetic link between at least one of the intended parents and the child. The concern is that this approach 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 intent to parent being present prior to conception, this seems a narrow distinction.

[57] In the US, practice with respect to the status of surrogate mothers varies by state and this lack of consistency has been criticized; it appears the American Bar Association is undertaking to draft model legislation to provide a legal framework to regulate surrogacy agencies.[31] In the UK, genetic parents can apply for court declaration that they are the legal parents of a child born from surrogacy.[32] The order must be sought within six months from birth.

<u>Multiple Parents</u>:

9. While generally the child will have a maximum of two parents, in specific circumstances where:

- there is an agreement among the parties prior to conception setting out their intention, declaring the genetic/biological link of at least one of the intended parents and the intent for each party to have parental status;

- all parties have received legal advice before entering into the agreement; and

- steps are taken to finalize the parental/child status within a set short time period after the child's birth;

a court on application shall make a declaration of parental status based on the agreement, except where contrary to public policy.

[58] In terms of multiple parent scenarios, these are most likely to occur in the situation of same-sex couples where there is a donor who wishes to be a legal parent and less frequently in the situation of a woman who carries and gives birth to a child for intended parents who wishes to continue to be legal parent even after releasing the child to the intended parents.

[59] The principle concern in these cases is to provide certainty and clarity (1) in the best interests of the child, (2) for the potential parents, (3) for the donor in terms of parentage, and (4) regarding legal responsibilities and status in dealing with estates, benefits, support, etc. While such agreements should be recognized, some expectations should be placed on the parties as well some limitations. For example, a court review and declaration is required to establish the change in parentage – as is proposed for surrogacy arrangements– to ensure that all the legal requirements were followed and to ensure that the arrangement is in the public interest. For example, situations where an agreement proposes to limit or eliminate the responsibility of a proposed "parent" to provide child support would appear not to be in the public interest or in the child's best interests.

[60] The proposed approach here is similar to the New Zealand Law Commission recommendation to allow a known donor to opt into parenthood[33] based on criteria and a two stage process involving consent prior to conception or birth with final approval upon proof that the donor is the genetic parent. They recommend an approach in which the parties must take counselling on the issues raised by their planned family and complete sworn statements that the donor will be a genetic parent and legal parent. There would also need to be evidence that all three parties have received independent legal advice.[34] The Victorian Law Reform Commission recommended a model similar to the New Zealand model.[35]

[61] Millbank also endorses an opt-in approach for multiple parents. She proposes a scheme to recognize the conjugal lesbian partner of the birth mother as parent. The biological donor of sperm is not a father and with consent of the birth mother and co-mother, additional parents can be recognized.[36]

[62] Kelly acknowledges that there will be situations where the egg donor or sperm donor will want to parent with the birth mother and her partner. While the situations of multiple parents may be rare, she suggests that they be recognized if the intended parents have consented prior to conception to the donor (and the donor's partner) playing a parental role, to allow for four parents. However, she recommends the following caveats: the legal recognition of a three or four parent family should only proceed if the two mother family is first recognized, as there is a concern that legal recognition of more than two parents could threaten the security of the lesbian family. This is because the courts may treat donors in such a situation the same as other "fathers" without regard for how minimal their involvement in the child's life may be. She suggests that few lesbian families actually include a third active parent donor. Thus, she also

suggests that recognition of parents outside the two parent model should not interfere with any presumptions of parentage in favour of the non-biological lesbian co-parents. [37]

[63] During development of the paper, the Working Group also received policy advice recommending an opt-in process based on a clear agreement prior to conception and then a final court application following the child's birth. There was also support from those consulted for a presumptive maximum two parent model with an option of additional parents. It is the view of the Working Group that the approach proposed creates a practical presumption of a maximum of two parents, subject to clear criteria and a court declaration leading to recognition of additional parents.

Posthumous Issues:

Posthumous Recognition of Parentage:

10. New parentage legislation should:

- allow for posthumous recognition of birth mother, father or other parent where the DNA or other evidence establishes a genetic link or parentage status within the circumstances that fit with one of the presumptions of parentage in the Act; and

- allow existing law to apply to determine whether such a child takes as entitled under intestacy, benefits, dependant's relief, etc.

[64] The current Uniform Act deals with the situation of a child claiming a relationship when the parent is deceased. It is deficient in dealing only with parentage by fathers and not mothers and also does not recognize those born through AHR in circumstances that fit the presumptions in the Act.

[65] What rights flow from this recognition would be governed generally by the existing law related to dependants, intestacy and wills. In these cases, we assume the person exists and can either make a claim to benefits at the time of the other's death or not. This situation is different from posthumous conception where the creation of the child may occur after the donor's death.

Posthumous Conception[38]:

11. A child should be recognized as the child of a deceased person if the child is conceived using AHR after the death of the person if:

- prior to death, the person clearly consents to the use of reproductive material to create posthumous children;

- prior to death, the person clearly states whether or not such children are intended to be treated as a child of the parent for the purposes of estate law or other benefits to ensure people order their affairs to provide certainty to living dependants'; and

- steps are taken within a set time limit in order for the child to be entitled to estate or other benefits, subject to court extension in exceptional circumstances, or apportionment of funds for a future potential child.

[66] While there may be valid social reasons for allowing a child born posthumously through AHR to be recognized as the child of a deceased parent, there is a need to consider how to ensure clarity and certainty for the child and any other children/dependants of the intended parent.

[67] A review of case law and existing statutes in other jurisdictions suggests that reproductive material should not be treated merely as property, that the donor's intent on use of genetic material must be clear and that the circumstances of use must be appropriate. It is argued that the social and moral issues raised by posthumous conception extend beyond the interests of the progenitors to considerations of the interests and welfare of children who result from the practice.

[68] In most AHR situations in Canada, the deceased person will need to have consented to parent or to be a parent of the child, as required under current AHR Canada regulations.[39]

[69] Currently, Canadian law does not set any time limits within which banked genetic material must be used. In the context of posthumous conception, this may have implications for estates and other entitlements when considering issues such as the rule against perpetuities which at common law strikes down interests that vest at a remote point in time. Some jurisdictions have legislated to overtake this rule with modern legislation.[40] (See the discussion under Intestacy for further consideration of how to deal with these implications.)

[70] In the UK, posthumous parentage can be recognized, but posthumous children are denied benefits of being found a child of a deceased father.[41] This seems to ignore the stated intention of the parties and to not be in the best interests of the potential child. Thus, it is recommended that the uniform Act provide for recognition of parental status and the ability to recognize this status in terms of consequences for estates, etc., with some limitations to ensure certainty and to protect the rights of living children/dependants', as along as the process proposed is followed. Some similarity is found in dependants'' relief legislation, which sets time limits for a claim on the estate of the deceased.[42]

[71] If a child is conceived outside the recognized process as proposed by this legislative scheme, then the parties still have an ability to deal with some matters in terms of voluntary agreements by providing directly for a future child through alternative means.

<u>Mistaken Implantation:</u>

12. The rules and presumptions of parentage would apply to these cases, but parentage could be changed on court order either of adoption or based on a declaration of parentage where determined to be in the best interests of the child.

[72] While mistaken implantation is relatively rare, there is a concern that the status of the child, the parents and donors needs to be clarified to provide certainty for the child and other parties. In its 2005 report, the New Zealand Law Commission recommended that the *Status of Children Act* be amended to provide for situations of mistaken implantation of an embryo, mistaken fertilization of an egg, or mistaken insemination. It said that the court should be empowered to make parental orders in favour of, or to extinguish the legal parenthood of, any one or more of the group of adults with a proper interest in the parenthood of the resulting child, on the basis of the child's best interests taking account of specified criteria.[43]

V. Existing legislation that may be affected by decisions on policy issues related to parentage:

[73] While the Working Group was not called on to look at legislative issues beyond parentage, it became clear during our work that other legislation is either affected or may be needed to deal with legal issues beyond parentage given the recommendations made in this paper on parentage. Some examples follow. However, if jurisdictions intend to adopt legislation based on the proposed uniform Act, they will need to carefully review all of their statutes that touch on children and family entitlements.

[74] **Human Tissue** – is there any inconsistency between the existing provincial/territorial Human Tissue legislation and the *Assisted Human Reproduction Act* of Canada? The definition of "tissue" and of "transplant" may be broad enough to cover the removal of eggs, sperm or embryos from the human body pre or post death. For example, note the Saskatchewan *Human Tissue Gift Act* [44] defines these two terms as follows:

> (c) **"tissue"** includes an organ, but does not include any skin, bone, blood, blood constituent or other tissue that is replaceable by natural processes of repair;
>
> (d) **"transplant"** as a noun means the removal of tissue from a human body, whether living or dead, and its implantation in a living human body, and in its other forms it has corresponding meanings.

[75] The Australian guidelines would seem to suggest that extraction of gametes/sperm post death falls under this legislation.

[76] **Intestate Succession** – the Manitoba Law Reform Commission issued a report in November 2008 that reviews issues of entitlement for children born following the death of a parent.[45]

[77] Intestate succession in Manitoba is governed by *The Intestate Succession Act*.[46]

[78] The report states[47]:

> Subsection 1(1) of the Act defines "issue" as "all lineal descendants of a person through all generations". A posthumously conceived child, being

biologically related to the person, might seem to qualify as a "lineal descendant", but the Act states further,

1(3) Kindred of the intestate conceived before and born alive after the death of the intestate inherit as if they had been born in the lifetime of the intestate.

No mention is made of those who might be both conceived and born after the death of the intestate. The Act also makes reference to "surviving issue" in other sections.

Two American cases, in related matters, raised arguments on behalf of posthumously conceived children that the wording of their respective state succession Acts, akin to Manitoba's, could be interpreted to include such children as "issue" or as "surviving issue".

In *Finley v. Astrue*[48] a widow claimed that her child, the result of IVF, should be eligible in her husband's hypothetical intestacy as having been conceived before her husband's death but born after his death. Her argument equated conception with fertilization, which had happened in a petri dish, while her husband was still alive. The frozen embryos were thawed and implanted in her uterus eleven months after his death. The child was born in March 2003, but the father had died in July 2001. The court concluded that the Arkansas state legislature, in enacting its intestate succession statute (including a section almost identical to Manitoba's subsection 1(3)) in 1969, could not have intended the word "conceived" to include the process of IVF, which was then unknown. Conception was considered to have occurred at the embryo implantation stage. The court said that to define conception as argued, and thus to include posthumously conceived children in intestacies, would implicate public policy concerns best left to the legislature.

It could also be observed that, if the requested interpretation had been granted, posthumously conceived children born through IVF would be included in intestacies, but not those born of AI, surely an undesirable difference of treatment by the law.

In *Khabbaz v. Commissioner, Social Security Administration*[49] it was argued that a posthumously conceived child, born two years after her father's death, and conceived through AI with his banked sperm, was "surviving issue" in his hypothetical intestacy. The New Hampshire court found that the plain meaning of the word "surviving" is "remaining alive or in existence". For the child to remain alive or in existence after her father's death, she would necessarily have had to be "alive" or "in existence" at the time of his death. She was neither.

[79] Although these cases would not be binding on Manitoba courts, it would appear that Manitoba intestacy law would not include posthumously conceived children. [50]

[80] The implications of posthumous birth are not confined to wills and estates, but also involve insurance and other benefits. For example, benefits under social security were raised and allowed in a case in terms of who is entitled to compensation as a dependant child or worker who dies while employed. The most recent US cases have denied eligibility under benefit schemes.[51]

[81] A very useful case for its thoughtful analysis is *Woodward v. Commissioner of Social Security*.[52] Twins were born two years after the death of their father, by means of AI with his banked sperm. The Massachusetts Supreme Judicial Court dealt with their claim for Social Security benefits.[53]

[82] The court noted the extreme positions of the two sides in the case; the twins' representative argued that once a biological link was proved, posthumously conceived children should always enjoy intestacy rights, while the Social Security stance was that such children should never be entitled. To the court, neither position was tenable.

[83] The relevant section of the state intestacy law merely said, "[p]posthumous children shall be considered as living at the death of their parent"[54] and had stood thus for 165 years. It made no distinction between posthumous children conceived before the death and those conceived after.

[84] The court, therefore, felt unconstrained by the wording of the statute and proceeded to conclude that posthumously conceived children should have intestacy rights, albeit with limitations. Inclusion could not be automatic, based merely upon biological link, although proof of that connection would be the first requirement of a claimant. This would be to prevent fraudulent claims against an estate because the purpose of intestacy legislation is to pass wealth to spouses, common-law partners and blood relations.

[85] The court stated that there are three important concerns to consider and balance: the best interests of children, the orderly administration of estates and the reproductive rights of genetic parents.[55]

[86] The New South Wales, Australia Law Reform Commission has recommended exclusion of posthumously conceived children from intestate succession rights.[56] The purpose of such exclusion would be to eliminate delays and complexity in settling estates.

[87] In Florida a child conceived post-death is able to inherit from a deceased parent only if the parent provided for the child by will – showing intentionality and making sure that those administering the estate are aware of the potential issues.[57] California has detailed rules to grant intestacy rights to posthumously conceived children involving written consent, written notice of the availability of the deceased's material to the estate, and delay in distribution of the estate or portions of the estate.[58]

[88] Solutions offered are to:

- specifically exclude posthumously conceived children from taking under intestacy to create certainty. However, in a situation where a deceased specifically leaves estate to a posthumous child, this solution doesn't address policy needs or consistency and frustrates the intention of the testator;

- allow posthumously conceived children to share in any portion of the undistributed estate. This might, however, lead to hurried or overly delayed distribution to try to deal with the consequences of posthumous birth. This could apply in intestacy and in will situations where the share of the unborn child is clear; or

- detail provisions that allow a child to take whether on intestacy or under a will such as in the California approach. This approach requires clear consent of the parent to parent and to the child being a beneficiary, a time limit for conception/birth, proof of birth and genetic connection to the deceased parent, notice to interested parties, and could allow some portion of the estate to be distributed while the rest is held. This is to not prejudice the persons living who may require the financial support of the deceased and should not be penalized.

Dependants' Relief:

[89] The Manitoba Law Reform Commission project proposes a similar treatment for intestacy and for dependants' relief rights of posthumously conceived children.[59]

[90] In particular, the Law Reform Commission recommended that *The Dependants Relief Act*[60] be amended to include in the definition of "child", a child conceived and born alive after the parent's death, subject to the following conditions:

- posthumously conceived children must be conceived within two years of the grant of probate or administration of estate;

- notice in writing must be given by the potential user, that gametic material is available for the purpose of posthumous conception to the personal representative of the estate and to persons whose interests in the estate may be affected, within six months of the grant of probate or administration of estate, subject to a judicial discretion to extend the notice period;

- proof of biological link between a posthumously conceived child and the deceased parent must be provided;

- there must be consent in writing, signed by the deceased parent, and dated, to the use of gametic material for the purpose of posthumous conception, and to the provision of dependants' relief for any posthumously conceived child(ren);[61]

Wills and Estates – some changes may be required to place a duty of due diligence on the testator and counsel to address the potential of posthumous children or to have the counsel inquire into the potential for the existence of such children so that there can be certainty of the testator's intentions.

Vital Statistics – not only may Vital Statistics legislation need to ensure that it is aligned with the new parentage legislation, but also it may need to address the adequacy of information recording in birth registries. Is information on use of AHR needed to ensure that the child can know to access the AHR Canada registry or to be able to try to track information on health status of donor or to start the process of tracking siblings or avoid intermarriage of related persons?

Assisted Human Reproduction Act **(Canada) –** the legislation may need to deal with broader issues of record retention. The AHR legislation currently has limited information requirements and capacities. As AHR becomes a more prevalent form of creating a family, it may be necessary to reconsider what records are required to meet practitioner, donor, donee and child needs. For example, if a child needs health information on whether a donor experienced disease problems post-donation, there is no current ability to trace this information.

VI. Summary of Draft Uniform Act

[91] The existing *Uniform Child Status Act* was approved by the Uniform Law Conference of Canada in 1992. Upon review it was found to require grammatical changes, updating in terms of new AHR procedures and to deal with developing family contexts. As a result, it is recommended that the existing Act be repealed and replaced with a new uniform Act that will:

i. contain new definitions, such as "assisted conception", and "birth mother";

ii. retain existing provision on void and voidable marriage;

iii. describe what the status of parent under this legislation applies to;

iv. limit the implications of the Act to be prospective;

v. provide rules of parentage to:
   - cover the birth mother and presumed father where no assisted conception, or
   - cover the birth mother and partner where assisted conception used or person declared a parent,
   - allow for additional parents to be declared if assisted conception involved,
   - state that adoption changes parentage according to the law of the jurisdiction,
   - allow that declaratory orders can change parentage in cases of surrogacy,
   - describe that kindred relationships are to be determined according to relationships described above, and
   - state that no distinction shall be made between the status of a child born inside marriage and a child born outside marriage (the existing uniform Act does not deal with bullets 2, 3 and 5);

vi. continue the presumptions of genetic father if no assisted conception, but state these presumptions do not apply in cases of assisted conception (dealt with in section 9 of the existing uniform Act);

vii. set out the presumptions in cases of assisted conception to cover the situations of a partner married to or cohabiting with the birth mother at time of child's conception or birth and a person who consented to be a parent (presumed consent through cohabitation is implied; however, this presumption does not apply in cases of surrogacy when the birth mother relinquishes her rights);

viii. allow declarations to be made on application to court or on the court's own motion to find that a person is or is not a parent of a child -no application is allowed after an adoption has occurred;

ix. provide that a person is not a parent merely by the donation of sperm or ova, but this does not apply to a person who provides genetic material for the person's own use;

x. deal with surrogacy firstly by stating that surrogacy agreements are not enforceable and then stating how parentage can be determined in surrogacy situations by the surrogate mother relinquishing parent status to intended parents (it will provide a specified time limit after the birth for this application for declaratory order to be completed and at least one of the intended parents must be genetically related to the child, and the child is deemed upon declaratory order of the court to be the child of the intended parents);

xi. deal with situations where the surrogate mother wants to continue to be a legal parent with the intended parents (application being made within a specified time frame after the birth);

xii. allow for a declaration of an additional parent in situations involving a donor, birth mother and partner requiring consent prior to conception by all parties, recognition of a genetic link with an intended parent and the consent of that donor to be a parent (requiring all parties to obtain legal advice before entering into the agreement and the application to be made within a specified time frame after the birth);

xiii. allow the court to make a declaration as to parentage if the above criteria have been followed and unless it is contrary to public interest;

xiv. deal with blood and DNA tests to establish paternity, inference from refusal, etc; and

xv. deal with new evidence and the effects of a new order.

Appendix A: Review of Case Law

Presumption of Parentage:

(P.) v. L. (S.), 2005 SKQB 502, 273 Sask. R. 127, 262 D.L.R. (4th) 157 (Sask. QB) – the presumption in Section 45 of the Children's Law Act with contained presumption of paternity based on cohabitation with mother at time of birth was rebuttable and merely evidentiary in nature, and thus conferred no parental rights – so Charter application that presumption be extended to woman cohabiting with the mother at time of child's birth is not a Charter remedy as court cannot affect fundamentals of biology that underlay presumptions purely in the interests of equal treatment before the law.

Declaration or Finding of Parentage:

Fraess v. Alberta, 2005 ABQB 889, 278 D.L.R. (4th) 187, 23 R.F.L. (6th) 101 (Alta. Q.B.) – extension of automatic parental status to same-sex spouses in some circumstances.

Gill v. British Columbia (Ministry of Health), 2001 CarswellBC 3164, [2001] B.C.H.R.T. No. 34 – lesbian couple – registration as parents in Vital Statistics – denial was discrimination based on sexual orientation and family status and against the children on the same grounds by denying them the right to have both their parents named on the birth registration.

Rutherford v. Ontario (Deputy Registrar General) (2006), 270 D.L.R. (4th) 90, 81 O.R. (3rd) 81, 30 R.F.L. (6th) 25 (Ont. S.C.J.) – several lesbian couples with children conceived through anonymous donor insemination – were refused registration on Vital Statistics as birth mother's partner – judge ruled that the birth registration provisions of *The Vital Statistics Act* were invalid because they discriminated against the co-parents on the basis of sex, contrary the Charter.

(A.) v. B. (B.) (2007), 278 D.L.R. (4th) 519, 83 O. R. (3d) 561, 35 R.F.L. (6th) 1 (Ont. C.A.); leave to appeal to SCC refused 2007 SCC40, [2007] 3 S.C.R. 124, Ontario Court of appeal – based on *parens patriae*, the court found that based on the best interests of the child the court could recognize three parents. The SCC denied leave and characterized the decision of the Ontario Court of Appeal as based solely on the *parens patraie* jurisdiction of the courts. [Lebel, J.]

(K.G.) v. P. (C.A.), [2004] O.J. No. 3508 [QL], 2004 CarswellOnt 8819 (Ont. S.C.J.) – an order was brought by the genetic father of a child born by in vitro fertilization pursuant to a surrogacy agreement whereby the birth mother and her husband agreed that they would not be recognized as the parents of the child. The genetic father was seeking to be named the sole parent of the child. The birth mother is not genetically related to the child (anonymous donor egg was used) and agreed not to be named as the mother of the child. The court rules that the genetic father should be registered as the sole parent.

Ontario Birth Registration No. 88-05-045846, Re, [1990] O.J. No. 608 [QL], 1990 CarswellOnt 3834 (Ont. P.C.)– Parties initially entered into an arrangement where by a child would be born to

a birth mother by way of artificial insemination using the sperm of the husband of her mother (i.e. the birth mother's stepfather). All parties further agreed that they would consent to an adoption order declaring the mother and stepfather of the birth mother as the legal parents of the child entitled to custody of the child. After the birth, the birth mother's mother and stepfather sought an order for adoption, but the birth mother opposed it and refused to acknowledge the stepfather as the father of the child for birth registration purposes. The court rules that the adoption application should be granted, as the circumstances indicated it would be in the best interests of the child.

Zegota v. Zegota-Rzegocinski (1995), 10 R.F.L. (4th) 384, [1995] O.J. No. 204 [QL], 1995 CarswellOnt 75 (Ont. G.D.) – child conceived through AHR (donor sperm) with consent of both parties. Divorce granted before child born. There was an order that the birth registration be amended to show the ex-husband as the father of the child and the child's name changed to add the father's surname. Former wife wanted ex-husband removed from birth registration. Court decided in favour of ex-husband, who was granted generous access to child and unrestricted access to educational and medical records.

R. (J.) v. H. (L.), [2002] O.J. No. 3998 [QL], 2002 CarswellOnt 3445 (Ont. S.C.J.) – parties entered into a surrogacy arrangement resulting in the birth of twins. DNA evidence confirmed that JR and JK were the genetic mother and father of the twins. After the children were born, the birth mother, LH, and her husband, GH, consented to an application for a declaration of the court that JR and JK were the parents of the twins. The court granted the application.

Three way agreements break down: *C. (M.A.) v. K. (M.)*, 2009 ONCJ 18 (Ont. C.J.) – the three parents had an agreement to co-parent and adoption and planned a three parent family as allowed in *A. (A.) v. B. (B.)* (noted above) and planned to seek a three way adoption. The relationship had broken down with natural father and women restricted access and wanted to have only lesbian couple adoption and dispense with father's consent. Court did not allow this and said the following about child's best interests at paragraphs 36 and 37:

> *…This court sees all kinds of family structures and, absent specific statutory provisions otherwise, the nuclear family of two parents and a child enjoys no special preference when the court is assessing the best interests of a child. Indeed, a child can have more, or less, than two parents for the purposes of family law….*
>
> *Second, it is well-established in law that, where a child's best interest are concerned, the issue for the court is not what kind of family the parents wants, but what is best for the child.…*

(M.) v. L. (L.) (2008), 90 O.R. (3rd) 127, 52 R.F.L. (6th) 122 (Ont. S.C.J.) – the applicants MD and JD entered in gestational carriage agreement with family friends LL and IL as MD was unable to have children. The applicants wanted to be registered as parents and sought a court declaration of parentage. The applicants were declared parents as parentage was not required to be defined based on genetics only as The Children's Law Reform Act did not define parentage solely on basis of biology. The court made no finding on the validity of the gestational carriage

agreement. A previous case had also allowed such a declaration based on consent, R. (J.) v. H. (L.) (noted above), and declared that a child had more than one mother. O'Driscoll v. McLeod (1986), 10 B.C.L.R. (2d) 108 (B.C.S.C.), said court had jurisdiction to make binding declarations of paternity. Here again, the surrogate mother consented.

C. (J.) v. Manitoba, 2000 MBQB 173, 151 Man. R. (2nd) 268, 12 R.F.L. (5th) 274 (Man. Q.B.) – genetic parents sought a declaration compelling hospital staff attending at the birth to complete documentation showing that applicants to be natural and legal parents of children delivered by the surrogate mother. Based on legislation *Vital Statistics Act* found "mother" was contemplated to be the person who gives birth and held that legislature had made it explicitly clear that a declaration of paternity or non-paternity was available prior to the child's birth. Decided similar order could not be made on maternity and court refused to make the order.

In *C. (M.A.) v. K. (M.)* (noted above), the Ontario Court of Justice at paragraph 45 states that: "I begin by stating the well-established principle that, in custody and access cases, a court is not bound by the provisions of domestic contracts." *Ligate v. Richardson* (1997), 34 OR (3d) 423, at paragraph 59, Moldaver J.A. quoted from *Woodhouse v. Woodhouse* (1996), 29 OR (3d) 417 (Ont. C.A.), the well established principle that: "Separation agreements are not binding on the court because it is the interests of the children rather than those of the parents which are at issue. *Willick v. Willick*, [1994] 3 S.C.R. 670 (S.C.C.); *Droit de la famille – 1150*, [1993] 4 S.C.R. 141 (S.C.C.)." He also states: "…the terms of the agreement are to be considered as a factor, along with all of the other facts and circumstances, old as well as new, in the determination of the child's best interests."

Parental Responsibility:

Child support ordered against a surrogate mother by Australian court – January 25, 2009 article.

Rose v. Secretary of State for Health and Human Fertilization and Embryology Authority [2002] EWHC 1593 (Admin), [2002] 2 Fam Law Rep. 962 (H.C.J. – Q.B. Div.) – an English case in which a woman born as a result of sperm donation sued for the release of information about her genetic father. See article by Hilary Young, "In Search of Identity, Reconciling the Interests of Gamete Donors and Their Offspring in the Disclosure of Identifying Information About the Donor" (Paper presented to International Conference on New Reproductive and Genetic Technologies, Nanaimo, B.C., May 26, 2007).

[1] J. Gunby, F. Bissonnette & C. Librach, "Assisted reproductive technologies in Canada: 2005 results from the Canadian Assisted Reproductive Technologies Register" (2008) 91 Fertility and Sterility 1721 – says the most common reason for AHR treatment was a single male's or single female's infertility.

[2] Throughout this paper, conception that occurs as a result of sexual intercourse between a man and a woman who are the biological parents of a child is called "natural conception" and conception that occurs without sexual intercourse is called assisted human reproduction or assisted conception. The authors recognize that people may feel discomfort with calling one form of

reproduction "natural", but this term has been adopted to shorten and simplify the language in this paper. Jurisdictions may wish to adopt other, less contentious terms for public communications and statutory language.

[3] It is estimated that up to 30% of situations involve same-sex couples. As well, it appears that the most common method by which lesbian couples or single women conceive children is through some form of assisted reproduction using anonymous donor sperm – Fiona Kelly, "Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and their Children into Canadian Family Law" (2004) 21 Can.J.Fam.L. 133-178.

[4] Norris, Sonya. *Reproductive Infertility: Prevalence, Causes, Trends and Treatments*. PRB 00-32E. Ottawa: Parliamentary Information and Research Service, Library of Parliament, Ottawa, 2 January 2001.

[5] *Ibid.* – based on the inability to conceive after two years.

[6] Lori E. Ross, Leah S. Steele & Rachel Epstein, "Lesbian and bisexual women's recommendations for improving the provision of assisted reproductive technology services" (2006) 86 Fertility and Sterility 735 – estimated cost for services associated with semen for donor insemination is between $700 and $950 Cdn. per cycle in Toronto.

[7] Lori E. Ross, Leah S. Steele & Rachel Epstein, "Service Use and Gaps in Services for Lesbian and Bisexual Women During Donor Insemination, Pregnancy, and the Postpartum Period" (2006) JOGC 505 – talks about the limited selection of donor semen for women who were not Caucasian or whose partners were not Caucasian and want to have a child of ethno-cultural background. Also talked about is the limited number of cases of identity-release donors available and concern for those who use AHR.

[8] Statistics Canada, *Births – 2006* (Statistics) – Catalogue no. 84F0210X.

[9] IVF births comprise 2909 of the 3,492 IVF-FET births, but the 583 births from FET were excluded from the analysis because data on sperm source is not collected for FET treatments (Canadian Assisted Human Reproductive Technology Register CFAS data – 2005).

[10] CFAS does not collect data on whether the partners are same-sex or opposite sex, but all couples that do not require donated gametes are obviously opposite sex, while donated gametes could be for opposite or same-sex partners or single women. Correspondence from AHR Canada.

[11] Lori E. Ross, Leah S. Steele & Rachel Epstein, "Service Use and Gaps in Services for Lesbian and Bisexual Women During Donor Insemination, Pregnancy, and the Postpartum Period" (2006) JOGC 505 – the estimated cost for services associated with donor semen for artificial insemination is between $700 and $950 per cycle in Toronto, compared with $6,000 for a basic IVF cycle and an additional $3,500 in drugs (http://www.ivfcanada.com/services/fees/general_fee_schedule.cfm).

[12] Canada, Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, Vol. 1 (Ottawa: Canada Communications Group, 1993) at 435.

[13] With the exception of Quebec's *Civil Code* and Alberta's *Family Law Act*.

[14] The Working Group reviewed the Uniform Law Conference of Canada's Uniform Child Status Act (April 1992); the federal Assisted Human Reproduction Act (S.C. 2004, c. 2); the Standing Committee on Health report (ibid.); prepared a chart summarizing relevant provisions of provincial and territorial legislation; considered relevant Canadian case law; reviewed the New Zealand Law Commission, New Issues in Legal Parenthood, Report 88 (Wellington, New Zealand: Law Commission, 2005) (http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_91_315_R88.pdf); and considered the report prepared for Alberta by Professor Christine Davies, Q.C., Parentage and Artificial Reproductive Technology (2006) and shared with Working Group.

[15] *Ibid.*, New Zealand Law Commission, at 14, para. 2.19.

[16] *Ibid.* at 15, para. 3.2.

[17] The exception is Alberta, which amended its child status legislation to accommodate the use of AHR. *Charter* litigation in Alberta has resulted in the extension of automatic parental status to same-sex spouses and partners in some circumstances. See *Fraess v. Alberta*, 2005 ABQB 889, 278 D.L.R. (4th) 187, 23 R.F.L. (6th) 101 (Alta. Q.B.).

[18] "Brave New Family – Part 1", Ideas, Paul Kennedy, CBC Radio One, February 18, 2008.

[19] Article 2(1) to "…respect and ensure the rights set forth…to each child within their jurisdiction without discrimination of any kind" and under Article 2(2) to "…take all appropriate measures to ensure that the child is protected against all forms of discrimination…" Article 3(1) requires "…all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Article 3(2) requires States Parties to "…ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents,...and, to this end, shall take all appropriate legislative and administrative measures." Article 5 requires States Parties "…shall respect the responsibilities, rights and duties of parents…" and Article 18(1) calls on States Parties to "…use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.…" Article 7(1) says "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." Article 9(1) states that "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child." Article 34 states, "States Parties undertake to protect the child from all forms of sexual exploitation…" and Article 32 states, "…the right of the child to be protected from economic exploitation…"

[20] Similar principle to the approach of the Royal Commission on New Reproductive Technologies – *Supra* note 12.

[21] For example, at common law parental rights and responsibilities are inalienable and incapable of transfer as a matter of contract – see Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*, Vol. I (Toronto: Ontario Ministry of the Attorney General, 1985) at 99. Also, a child generally has two parents and the birth mother is generally recognized as the mother, except for adoption, and the "father" is determined by presumption, declaration or court order.
[22] Nicole LaViolette, "Dad, Mom – and Mom: The Ontario Court of Appeal's Decision in *A.A. v. B.B.*" (2008) 86 Can. Bar Rev. 665.
[23] *Ibid.* at 667.
[24] [2003] 2 NZLR 787.
[25] *Supra* note 14 at 65, para. 6.50.
[26] *Supra* note 24 at 8.
[27] Jennifer Rice and Madeleine McNiece, "The experience of Australian relinquishing mothers in open adoption: Contact, grief and psychological adjustment" (Paper presented to the Second International Conference on Adoption Research, Norwich, UK, July 17-21, 2006) [unpublished] – http://www.uea.ac.uk/swp/icar2/pdf's/rice66.pdf.
[28] Quebec *Civil Code*, S.Q. 1991, c 64, arts. 538-42.
[29] *Supra* note 7 – talked of women facing uncertainty regarding the parental rights of same-sex families should a known donor later petition for custody or access and this uncertainty lead women to establish a contract with their donor before insemination.
[30] 2007 ABCA 50, [2007] 4 W.W.R. 12, 278 D.L.R. (4th) 1.
[31] www.azstarnet.com/sn/news/292312.php
[32] *Human Fertilization and Embryology Act 1990* (U.K.), 1990, c. 37, s. 30.
[33] *Supra* note 14 at 66-67.
[34] *Ibid.* at 69.
[35] Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Position Paper Two: Parentage* (July 2005) (Melbourne, Australia: Victorian Law Reform Commission, 2005).
[36] Jenni Millbank, "The Limits of Functional Family; Lesbian Mother Litigation in the Era of the Eternal Biological Family" (2008) 22 Int'l J.L. Pol'y & Fam. 149.
[37] *Supra* note 3.
[38] The following circumstances are included here:

- if the child is conceived after the death of the person using genetic material provided by the person before death;
- if the child is conceived after the death of the person using genetic material obtained from the person after death ; or
- if the in vitro embryo is created before or after the death of the person using genetic material obtained from the person before death (e.g., cryopreserved embryos) and implanted after the person's death.

Conception may not technically be the appropriate terminology when dealing with in vitro embryo use, but is used as a general term in this instance.
[39] Note the AHR Canada legislation is currently under challenge in the Supreme Court of Canada.
[40] Ontario: *The Perpetuities Act*, 1966, S.O. 1966, c. 113; Alberta, *The Perpetuities Act*, S.A. 1972, C 121, British Columbia, *The Perpetuities Act*, S.B.C. 1975, c. 53; Manitoba, *The Perpetuities and Accumulations Act*, RS.M. 1982-83-84, c. 43.
[41] *The Human Fertilisation and Embryology Act* 2008, which came into force April 2009, contains a provision s. 48(3) and (4) which limits recognition of the parent for any purpose other than parental status under this legislation.
[42] For example, see *The Dependants' Relief Act*, Chapter D-25.01 of the Statutes of Saskatchewan 1996, section 4 which limits the time for bringing an application to six months from the grant of probate of the will or letters of administration.
[43] *Supra* note 14 at xxvii
[44] R.S.S. 1978, c. H-15.

[45] Manitoba, Law Reform Commission, *Posthumously Conceived children: Intestate Succession and Dependants' Relief; The Intestate Succession Act: Sections 1(3), 6(1), 4(5), 4(6) and 5*, Report #118 (Winnipeg: Law Reform Commission, November 2008).
[46] C.C.S.M. c. I85.
[47] *Supra* note 45 at 4-6.
[48] 372 Ark. 103 (Sup. Ct. 2008) [*Finley*].

[49] 930 A.2d 1180 (N.H. Sup. Ct. 2007) [*Khabbaz*].
[50] *Supra* note 45 at 6.
[51] Finley v. Astrue, supra and Khabbaz.v. Commissioner, social Security Administration, supra. But in Gillett-Netting v. Barnhard, 371 F. 3d 593 (9th cuir.2004) social security benefits were granted in Arizona.
[52] 760 N.E.2d 257 (Mass. Sup. Jud. Ct. 2002) [*Woodward*].
[53] At the outset, the court said that there was no principled reason that its conclusions would not apply equally to posthumously conceived children born from a deceased female's gametes.

[54] M.G.L. c. 190 § 8.
[55] *Supra* note 51.
[56] NSW Law Reform Commission, *Uniform succession laws: intestacy* (report #116, April 2007).
[57] *Supra* note 45 at 12. (Flor. Stat. §742.17(4))
[58] *Ibid.* at 14 (Cal. Prob. Code § 249.5)
[59] *Ibid.* at 25.
[60] CCSM c. D37
[61] *Supra* note 45 at 31-32.