

Transforming Law's Family

The Legal Recognition
of Planned Lesbian Motherhood

FIONA J. KELLY



UBCPress · Vancouver · Toronto

Sample Material © 2011 UBC Press



Law and Society Series

W. Wesley Pue, General Editor

The Law and Society Series explores law as a socially embedded phenomenon. It is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking, scholarship, educational practice, and social life. Books in the series treat law and society as mutually constitutive and seek to bridge scholarship emerging from interdisciplinary engagement of law with disciplines such as politics, social theory, history, political economy, and gender studies.

A list of titles in the series appears at the end of this book.

Contents

Acknowledgments / ix

Introduction / 1

- 1** The Legal and Social Context / 19
- 2** On Whose Terms? On What Terms? Lesbian and Gay Family Recognition / 45
- 3** Defining Queer Kinship: How Do Lesbian Mothers Understand Their Familial Relationships? / 72
- 4** Engaging with Reform: Legal Mechanisms for the Recognition of the Lesbian Family / 115
- 5** (Re)forming Law's Family / 136
- 6** Some Concluding Thoughts on Law Reform and Progressive Social Change / 160

Appendix: Participant Profiles / 169

Notes / 176

Bibliography / 199

Index / 207

Introduction

Just weeks before Canada became the fifth country in the world to legalize same-sex marriage, I interviewed Yael, a lesbian mother of two children conceived via donor insemination. As her story unfolded, it became apparent that Yael had been one of the pioneers of the planned lesbian family, defined here as families in which a single lesbian mother or a lesbian couple decide to have a child using some form of alternative conception method, typically donor insemination. With children aged 28 and 21, Yael had become a mother almost two decades before most of the other women I interviewed in 2005 for my study on planned lesbian families. In fact, Yael and her partner became lesbian mothers well before social scientists identified a “lesbian baby boom” and before same-sex couples had even the most basic legal protection. She had parented in a legal vacuum, and she suggested several times in her interview that recent legal victories meant that lesbian mothers today “had it easy.”

Yael and her partner, Judy, began their journey towards parenthood in 1974. Drawing on the services of a women’s health collective, they found a doctor who was willing to perform an insemination using anonymous-donor sperm. However, they were warned that they could never present themselves as a couple at the doctor’s surgery or give any indication to the receptionist that they were there for insemination

services. This initial experience was re-lived over and over for the next twenty years. Yael recounted numerous stories of exclusion, isolation, denial, and discrimination. She described watching her daughter screaming in pain in a hospital waiting room as the nurse informed her that they had to wait for the child's "mother" to give her consent to medical treatment. She recounted the refusal of her daughter's school to refer to her as anything but a "babysitter" and the years of fear she endured after she and Judy separated and she found herself with no legal access rights to her non-biological daughter. When Judy refused to financially support their son, Yael had no way to enforce the obligation. While Yael tried desperately to invoke the law, she also feared it, not "wanting to get too close ... 'cause you don't know if it will bite you." Even today she remains angry, primarily at the legal system that, in spite of her social and financial commitment to her children, "gave [her] no recognition at all."

When I suggested to Yael that she was a "pioneer" of planned lesbian motherhood, she agreed. Forced to "invent everything from the ground up," Yael feels quite strongly that she "broke *new* ground." She referred to herself and her family as a "fragile little island," often invisible while at other times a very public object of attack. However, she believes that by being open about her identity and the nature of her family, she has contributed to the process of change. In fact, she has a hard time reconciling the current treatment of lesbian mothers with her own experience. When I told her that several Canadian provinces allow two women to appear on a child's birth certificate from birth, she rolled her eyes and laughed, unable to believe how much had changed. To her, life seems easier for many lesbian mothers today, and she flippantly suggested that the "revolution" might be over.

In some ways, Yael is right. Many lesbian mothers parenting today do have it easy, or at least easier. Most have legal options available to them that Yael could barely have imagined when she was raising her children. They also enjoy a level of societal acceptance that Yael was routinely denied. But the more I thought about it, the more complicated it seemed. Without in any way diminishing the harrowing experiences Yael had endured, I wondered whether the path of "progress" was as straightforward as she and I had presumed. I reflected on whether the

inclusion of lesbian mothers within law might sometimes come at a price: Do strategies matter? Should we be careful about what we ask for? I thought about the long-term effects of the existing approach to reform, which tends to rely on the assertion that lesbian mothers are indistinguishable from their heterosexual counterparts. I wondered which lesbian mothers this might ultimately exclude. At the same time, I could see how much easier Yael's life would have been had she had access to exactly the same legal rights as non-biological fathers whose partners conceived through donor insemination. Identical treatment would have actually served Yael very well. Yet for other lesbian mothers, it would do little to meet their needs. In thinking about these issues, it seemed that the question to be asked was not *whether* planned lesbian families should be legally recognized – Yael's story highlighted exactly why they should – but rather *on what terms* recognition should be granted. Absent an attentiveness to both the inclusionary *and* exclusionary implications of different modes of recognition, there was a very real chance that law reform would reinforce existing norms and thus exclude lesbian families who parented outside of them.

The Visible Lesbian Family

Yael's story indicates that lesbian motherhood is by no means a new phenomenon. However, planned lesbian families are greater in number and more visible today than ever before, prompting a number of social scientists to declare that we are witnessing a lesbian "baby boom."¹ While the number of lesbian mothers in Canada is difficult to determine, the 2006 census found that of the 20,610 female same-sex couples who were willing to have their relationships recorded, 3,359 (or 16.3 percent) were raising children.² These numbers represent a 47 percent increase in the number of children being raised by lesbian couples since the 2001 census.³ Arguably, the census underestimates the number of lesbians raising children because not all lesbians would have chosen to respond candidly to the census question. Nor do the census figures include those lesbian mothers who are single or separated from their child's other parent, or who are non-custodial parents.

Another indicator of the rise in lesbian motherhood in Canadian society is the increasing presence of lesbian women among the clientele

of Canadian fertility clinics. In 2001, the Genesis Fertility Centre in Vancouver, British Columbia, noted that 15 to 20 percent of their clients were lesbian couples.⁴ In some clinics in the United States, lesbians make up over 60 percent of the clientele.⁵ Thus, while it is difficult to determine exactly how many lesbian mothers there are in Canada, a variety of social indicators suggest that the phenomenon is increasing, and at a fairly rapid rate.

While lesbian motherhood may not be an altogether new concept, lesbian families in the twenty-first century often look very different than they did in the past. Historically, most lesbian mothers conceived within the context of a heterosexual relationship.⁶ After separating from their children's father, many of these women repartnered with another woman and raised the children together.⁷ Some of these children considered themselves to have two mothers, while others viewed their mother's new partner as something other than a parent. However, with the increasing societal acceptance of lesbian relationships, as well as the younger age at which lesbians now "come out,"⁸ the number of children born to lesbian women within the context of heterosexual relationships has steadily declined.⁹ Not surprisingly, the number of children being born into lesbian relationships or to lesbian single mothers has simultaneously risen. This new type of lesbian family – a *planned* lesbian family – presents some unique and complex challenges for both the law and wider society.

Despite the significant increase in planned lesbian families in Canada, lesbian mothers, particularly non-biological mothers, remain legal outsiders. Excluded in almost all provinces from both legislative presumptions of parentage and statutory provisions addressing parentage within the context of assisted reproduction, non-biological lesbian mothers have little access to Canada's legal parentage laws. As a result, planned lesbian families, and particularly non-biological mothers, must contend with a great deal of legal uncertainty. In situations where conception has been achieved using the sperm of a known donor, the uncertainty is exacerbated by the absence in all but one Canadian province of any legislation addressing the legal status of donors. In the face of legislative exclusion, lesbian mothers have turned to the courts. While this has been a relatively successful strategy in terms of individual outcomes,

litigation has created an uneven patchwork of promising but incomplete provisions across the provinces, none of which fully meet the needs of lesbian families. Most notably, none of the litigation to date has fully resolved the legal status of either non-biological mothers or known donors, whether they donate to a lesbian couple or a single lesbian mother.

The considerable number of parentage cases initiated by lesbian mothers would suggest that the desire for law reform is high, but the process of reform is complicated by the lack of knowledge about planned lesbian families. Few studies have addressed how lesbian mothers living in Canada understand or define their various family relationships,¹⁰ and no empirical research has specifically explored the *legal* aspects of lesbian parenting in Canada. As a result, we have little sense, beyond what has been argued in individual cases, of how lesbian mothers define their family relationships or what they need from the law. This substantial gap in our knowledge poses a significant limitation on the law reform process.

The need for empirical research attentive to the specific legal needs of planned lesbian families is made all the more urgent by the tendency within the existing case law to equate lesbian families with other forms of “alternative” family – such as stepfamilies and heterosexual families created via assisted reproduction – without any inquiry into whether the comparison is helpful or accurate. While an equivalency approach, typically grounded in formal equality, may be adopted because of the strategic advantage it presents in the courtroom, the risk is that it will underplay the differences between lesbian and heterosexual parenting relationships and thus limit reform to that which can be understood within the existing normative framework. For example, while lesbian families created through the use of anonymous-donor sperm may benefit from the extension of the parentage laws that apply to heterosexual couples who conceive via the same method, for the many planned lesbian families created using the sperm of a known donor, a practice almost unheard of in the heterosexual community, the existing legal framework is inadequate. Known-donor families must grapple with the legal effect (if any) of inseminating outside a medical environment,¹¹ the legal status of the known donor, and the related legal status of the non-biological

mother. These issues would remain unaddressed by a law reform strategy that simply maps the existing heterosexual framework onto the lesbian family. The legal challenges of having a known donor are exacerbated for single lesbian mothers who are unable to provide a second parent: these mothers cannot take advantage of reforms based on equal treatment where the comparator is a heterosexual, two-parent family.

Equating lesbian families with heterosexual stepfamilies is similarly unhelpful. Unlike most heterosexual step-parents, non-biological lesbian mothers typically take part in the planning of the child, are present at conception, and raise the child from birth. In other words, most non-biological mothers are not step-parents: they are equal co-parents from the outset. Accordingly, existing laws designed to recognize the role of step-parents in children's lives, such as step-parent adoption, fail to fully capture the role played by non-biological lesbian mothers. The inability of existing legal parentage laws to respond adequately to lesbian families suggests that a new legal framework is needed. Empirical research attentive to the specific legal needs of planned lesbian families is essential to the development of such a framework.

The research findings presented in this book, which derive from an interview-based qualitative study of planned lesbian families living in British Columbia and Alberta, are designed to redress the existing empirical gap. The purpose of the study was twofold. First, speculating that the differences between planned lesbian families and other forms of family might lead lesbian mothers to define their familial relationships along non-normative lines, the study sought to investigate how lesbian mothers define and understand key familial concepts such as "family" and "parent." Without law or biological assumptions to fall back on, lesbian mothers must define for themselves what makes someone a parent and where the boundaries of family might lie. Exploring these definitions would be essential to developing a responsive law reform proposal.

The second purpose of the study was to explore the possibility of law reform. At present, Quebec is the only province to have addressed the assignment of legal parentage within lesbian families by way of legislation.¹² It is also the only province to have expressly addressed the legal status of known donors. Limited parental recognition has been achieved

in some provinces through the courts, but it remains both uneven and inadequate. No province has addressed the legal issues raised by single mothers-by-choice, some of whom conceive with known donors and many of whom are lesbians. While lesbian single mothers may have more in common with heterosexual single mothers-by-choice (who also conceive via donor insemination) than with lesbian couples, I consider them to be part of the planned lesbian family spectrum and thus relevant to a discussion of law reform.

Recognizing the severe limitations of the existing legal framework, the second purpose of the study was to develop, in conjunction with lesbian mothers, a legislative reform model that addresses the assignment of legal parentage within planned lesbian families.¹³ Key to this undertaking was the issue of the terms upon which law reform should be pursued. As noted above, most of the legal successes to date have relied on a formal equality model in which lesbian families are equated with heterosexual families created via anonymous-donor insemination. While such an approach has produced numerous legal victories, it has failed to address the needs of planned lesbian families that deviate from existing norms, such as those that include a known donor or are created by a single lesbian woman. Because the existing reform strategies might be creating new exclusions, the study sought to explore the mothers' responses to a variety of law reform models, each of which captured a different strategic approach to recognition. To address these two research questions, a qualitative study of planned lesbian families was devised.

Researching Lesbian Mothers: Design, Method, and Participants

The difficulties inherent in obtaining representative samples of marginalized groups such as lesbian women have been well documented.¹⁴ The stigmatization and relative secrecy that continue to characterize lesbian existence makes it very difficult to select participants through any kind of random modelling. Because of the difficulties associated with identifying participants, most research with lesbian women relies on "convenience sampling" whereby participants are found through advertising in written materials directed at lesbian readers, in physical locations frequented by lesbian women, or on email listservs to which lesbian

women subscribe. Convenience sampling was employed in this study, with email listservs for lesbian and gay parents living in British Columbia and Alberta producing the bulk of the study's participants.

While convenience sampling is often the only method by which to build a sizeable group of participants from within a marginalized community, it can produce highly self-selected samples of friends or networks within the particular community in question.¹⁵ To overcome some of these deficiencies, study participants were gathered from as diverse a variety of backgrounds as possible. Foremost, I sought to maximize the range of family configurations represented within the study. This diversity was important for a number of reasons. First, I was concerned that the vast majority of research related to planned lesbian parenthood has deliberately focused on lesbian nuclear families, usually for the purposes of comparison with heterosexual families.¹⁶ Such a starting point inevitably prioritizes the nuclear family and may imply that families that take some other form are somehow inadequate or illegitimate.¹⁷ By actively recruiting lesbian mothers who parented outside of the nuclear model, I sought to displace the nuclear family as the reference point from which all discussion flows. Similarly, I made efforts to include mothers who parented within diverse family configurations because of their remarkable absence from the mainstream legal debate over parental and family recognition. I was concerned that the singular focus on the lesbian nuclear family in recent Canadian litigation has overlooked alternative approaches to parenthood emergent within the lesbian community or has deliberately omitted them because they did not fit easily into a formal equality framework. Finally, I hoped that by including participants who parented within a diverse array of family configurations, I might draw attention to new and innovative approaches to parenthood that are easily overlooked or even elided in narrower studies. Revealing these alternative approaches might help highlight the constructed nature of existing legal and social norms.

To achieve the greatest diversity possible, I created a list of the various family configurations that might exist among planned lesbian families. The final list comprised the following: two-mother families with anonymous donors, two-mother families with known donors, multiple-parent families, single-mother families by choice, separated lesbian

families, reconstituted families (both nuclear and non-nuclear), couples in which only one parent identified as a mother, non-conjugal same-sex co-parents, and non-conjugal opposite-sex co-parents (where the mother identified as a lesbian). Saturation point was reached only after concerted effort had been made to attract participants from across the full spectrum of configurations. Some configurations were better represented than others, though I suspect the frequency with which they appear might be an accurate reflection of their actual numbers within society.

As the list of possible family configurations suggests, a significant limitation was placed on the sample: only women who had conceived at least one of their children via either donor insemination or in vitro fertilization were included. In other words, the focus was on planned lesbian families that were created through some form of alternative conception method and that therefore included at least one biological parent. While this approach ran the risk of reproducing the discourse of biologism, the decision to focus on women who became parents in this particular context – and not on those who became parents through adoption, fostering, or a heterosexual relationship – was based on a number of reasons. First, there is at least anecdotal evidence that lesbian families created through alternative conception methods represent the fastest growing group of lesbian parents in Canada, yet no Canadian empirical research addresses their legal needs.¹⁸ Second, while most provinces offer some method by which to acquire legal recognition for planned lesbian families, such recognition is both incomplete and inconsistent. Significant issues, such as the legal status of known donors, remain unclear. In addition, unlike lesbian women who adopt, foster, or conceive in the context of a heterosexual relationship, there is no established legal framework to fall back on. Legal recognition has thus become a matter of urgency for this particular group of lesbian mothers. Finally, because planned lesbian families challenge so many of the traditional signifiers of legal parenthood, perhaps more than any other family form, they provide an unprecedented opportunity to unpack the various assumptions upon which the current law is based. Such a discussion is likely to make a significant contribution to the more general debate about how legal parenthood should be defined in the twenty-first century.

Despite my original intention to include gay fathers and donors (due to their role as significant stakeholders in the debate about the legal recognition of lesbian parents), they are also omitted from the sample. Because many lesbians conceive using anonymous-donor sperm, I had not expected to locate as many gay donors and fathers as lesbian mothers. Despite these low expectations, the failure to recruit sufficient numbers to constitute a sample was disappointing. In recruiting the men, I used all of the same techniques I had used with the mothers. I also contacted two support groups for gay fathers, but both informed me that their members were men who had become parents in the context of a heterosexual relationship. From all of my advertising, I received only three responses.

It is difficult to know exactly why the response rate from fathers and donors was so low. They are certainly not a large population, but that alone cannot explain the numbers. Perhaps because some donors do not see themselves as parents, they were poorly represented on the various *parenting* listservs used to recruit participants, yet the study was advertised within the gay community more generally. It is also possible that donors may not have been sufficiently invested in parenting to feel that the study was relevant to them. As my own data suggests, most donors are “occasional parents” at best, and they may not feel that their stories are particularly important to a study such as this. Finally, most gay donors and fathers may feel satisfied with their existing parenting arrangements and therefore have no concerns about reforming the current legal framework.

While locating mothers who parented within a diverse range of family configurations was the central focus of my sampling strategy, participants were also sought from a variety of racial, cultural, and economic backgrounds. I felt that it was possible that the different social, racial, and cultural positions women occupy might inform their experiences of and attitudes towards both parenting and the law. In an effort to locate participants from different backgrounds, the email advertisement was sent to a number of social groups directed towards racialized lesbians, as well lesbians who are members of religious minority groups. Also contacted were several lesbian and gay social and community groups that were

located within, and presumably drew their members from, lower-income areas of the regions in which the interviews were conducted.

The final decision with regard to sampling was to determine from which geographical regions participants would be drawn. Ultimately, interviews were conducted with women who lived within a two hundred-kilometre radius of Vancouver, Calgary, or Edmonton. Vancouver, a city of approximately 2 million people with a thriving and visible lesbian and gay community, seemed a logical choice. Calgary and Edmonton were chosen partly because they varied in size both from each other and from Vancouver. Their lesbian and gay communities were thus much smaller and far less visible than Vancouver's. In addition, the location of Calgary and Edmonton within Alberta, a socially conservative province often perceived as being hostile to lesbians and gay men, was expected to increase the range of configurations and understandings of family represented within the study. However, few distinct trends emerged between the provinces.

The Interviews

Thirty-six interviews were conducted between February and October 2005. Twenty-four occurred in the Vancouver area, seven in the Calgary area, and five in the Edmonton area. Thirty-six families and forty-nine mothers are represented within the sample. Twenty-two of the interviews were conducted with one mother alone, though most were members of a couple, and the remaining fourteen included both mothers together.

The interview schedule took a semi-structured form and was designed to address four key research questions. The first question focused on how mothers defined "family": mothers were asked to describe their own families and who they included within them. During these discussions, concepts such as chosen family, social family, and biological family were explored. The mothers were also invited to articulate where they would ideally draw the boundaries around the concept of family and why. Discussions centred on whether the mothers endorsed the law's existing preference for the nuclear family or whether they preferred a more expansive concept of family, perhaps capable of including three or more parents and/or other chosen family members.

The second research question involved an exploration of how parenthood is understood and defined within the lesbian family. Mothers were asked to provide their own definitions of parenthood and to describe how these understandings were enacted within their own families. Did they draw any distinction between biological and non-biological motherhood and, if not, how did they work to displace the significant social meaning attached to biological relationships?

The third question addressed the role of sperm donors within the lesbian family. The mothers, whether they had conceived using the sperm of anonymous or known donors, were asked how they understood the role of donors in lesbian families and in what circumstances (if any) they might understand a donor to be a parent. They were specifically asked about the meaning (if any) they attached to the biological connection between donor and child. The mothers who had conceived using the sperm of a known donor were asked to describe the role (if any) their donor actually played in their family and the language they used to define his identity.

The final research question focused explicitly on law reform: If the mothers were able to create their own model for parental recognition, what would they propose? The mothers were first invited to explore their attitudes towards law and legal engagement. They were then asked to describe what *kind* of law reform they would ideally pursue. To initiate the law reform conversation, the mothers were asked to respond to three loosely defined recognition models gathered from the international literature on same-sex parenting: What were the pros and cons of each model? Which model did they prefer? And, if necessary, what limitations or additions would they add to their preferred model so that it adequately met their needs?

While the interview schedule was relatively well defined, it was used more as an *aide-mémoire* in an effort to achieve what feminist researchers have described as a “dialogical” mode of interaction.¹⁹ Dialogical interviews are designed to look less like question/answer sessions and more like fluid “conversations with a purpose.” Such a model can assist in overcoming the hierarchical nature of subject/object interactions that are inherent in interview practice. In this study, the fluid nature of the

interview was established with the first question: “Can you tell me the story of how you came to be a mother?” The answers to this question often extended to twenty to thirty minutes of narration as mothers pieced together the various elements of their family history. Answers often went well beyond the basic details to include very personal and often emotionally charged stories about failed relationships, unsuccessful negotiations with donors, fertility problems, miscarriages, infant death, and postpartum depression. I was often surprised by the ease with which mothers talked to me, as well as by their willingness to share stories outside of the study’s parameters. Ultimately, I attributed their openness to the dialogical model, my commitment to active listening and a non-judgmental approach, and my own identity as a lesbian.

The Participants: A Summary

Recent research on planned lesbian families has revealed that they are far from a homogenous group.²⁰ The thirty-six families and forty-nine women who participated in the study were no different. Together, the women were the parents of forty-six children – twenty-six girls and twenty boys. The children ranged in age from four months to twenty-eight years, though the vast majority were under the age of seven. Eighteen of the mothers interviewed were biological mothers and five were non-biological mothers; in fourteen instances, both mothers were interviewed together.²¹ While most of the families lived in one of the three cities, approximately 15 percent were located in suburban areas and small towns.

In accordance with the study’s sampling goals, I recruited mothers who parented in a number of different family configurations. The complexity of these configurations makes it difficult to categorize them, and in several cases, the categories overlap. Short summaries of the characteristics of each family can be found in the appendix. The most common family configuration, with eighteen of the thirty-six families falling within it, was the two-parent nuclear model with an anonymous donor. The prevalence of this model within the sample, despite my best efforts to de-centre the nuclear family, suggests that it may be the most common parenting model within the lesbian community.

In addition to the anonymous-donor nuclear family, however, the sample included a variety of other family constellations. Twelve known-donor families were represented, each demonstrating a slightly different approach to the known-donor relationship. Seven of the thirty-six families had experienced parental separation, and in three of these families, the mother interviewed remained single. In an additional three families, the biological mother had planned at least one of her children as a single parent, raising legal issues that pertain to both lesbian mothers and single mothers by choice. Finally, in one of the thirty-six families, the biological mother parented with a non-conjugal, non-cohabiting female co-parent, an arrangement that had been agreed upon prior to conception.

As suggested above, a variety of donor relationships were identified within the sample. Two of the families who used anonymous donors had conceived at a time when lesbian access to fertility clinics was prohibited. These women, whose children were considerably older than the average, had accessed sperm through a third-party intermediary, in both cases a friend who self-identified as a feminist. The remaining twenty-two anonymous-donor families had purchased sperm from a sperm bank. The twelve families with known donors tended to define their donor's role in one of three ways.²² In seven of the families, the donor was understood as a significant male figure in the child's life who exercised regular contact but was not considered a parent. In some instances, the children (where old enough) and their mothers used the word "father" to refer to these men, while in other families the man's first name was used to identify him. In two of the twelve families, donors played the role of "symbolic father."²³ These men were not involved in the child's life but were known to the child and could be pointed to in the event that the child needed to identify someone as "dad." Finally, in two of the known-donor families, the donors (and their male partners) were active, practicing parents with all of the rights and responsibilities implied by that status, though without legal custody. In these families, the mothers considered their children to have four parents. In all but one of the families with a known donor, the donor identified as gay.

Despite my attempts to recruit mothers from a diverse array of racial, ethnic, and social backgrounds, the sample remained largely middle

class, urban, able-bodied, and Anglo-Canadian. Forty-two of the forty-nine women were of Anglo-European descent. Of those who were not, three identified as French Canadian, two claimed a Jewish ethnic heritage (one of these women was Israeli), one hailed from South Africa, and one was Aboriginal. The vast majority of the women were also well educated, most had professional qualifications, and several worked in senior positions. However, because they were clustered in the “caring industries” – teaching, nursing, and social work – few were high earners.

A high representation of white, middle-class, well-educated mothers is a general feature of most studies of planned lesbian parenthood.²⁴ There is no doubt that at least part of the explanation for this lack of diversity lies in the use of convenience sampling. Some researchers have argued, however, that the over-representation of race- and class-privileged mothers in studies about lesbian motherhood may reflect the actual racial and economic composition of planned lesbian families.²⁵ For example, Stacey and Biblarz have suggested that there may be more white and middle-class lesbian mothers because socially privileged lesbians are more likely than the less privileged to possess the required sense of entitlement to have children in the face of considerable moral judgment and disapproval of their actions.²⁶

Beyond the question of entitlement, there are a number of other possible explanations for why white, middle-class families are so well represented within the sample. The most obvious relates to the costs associated with becoming a lesbian mother, particularly if the services of a fertility clinic are utilized.²⁷ The cost of buying and storing sperm, as well as insemination and other consulting services, means that lesbian women who conceive using anonymous-donor sperm face pre-conception costs of between \$1,500 and \$20,000, depending on the number of attempts necessary to become pregnant and the difficulties experienced along the way. Even the easiest conceptions are expensive. For example, a single insemination attempt (including the purchase of sperm) at any of the five clinics used by my study participants cost between \$500 and \$800. A single in vitro fertilization cycle, including the required medications, could cost up to \$10,000.²⁸ It is thus possible that lower-income women are less likely to conceive using donor insemination. Conception using known-donor sperm obviously reduces the cost,

and some researchers have suggested that lower-income lesbians might be more likely to choose this option.²⁹ In my own study, however, I found no discernible connection between income level and donor choices.

The prevalence of middle-class participants in the study may also be explained by the fact that the sample was drawn from three of the wealthiest areas of Canada. The average median incomes in Vancouver, Calgary, and Edmonton are above both the Canadian average and the average for other regions within the two provinces.³⁰ It is therefore not entirely surprising that many of the participants were comfortably middle class. It is also possible that the study's focus on law may not have been particularly appealing to working-class lesbians. While the middle class often perceive law to be a tool of social justice and progressive change, the working class are more likely to experience law as a tool of oppression. For example, working-class women may have experienced some form of state surveillance, perhaps in the context of social assistance law or child protection law, and are thus less likely to perceive legal mechanisms as positive or capable of assisting them in any way. The generally privileged nature of the study participants may mean that their approach to law reform is not representative of lesbian mothers from more marginalized backgrounds. This concern will be revisited in the law reform chapters.

Overview of the Book

The book is divided into three sections. The first section comprises the Introduction and Chapters 1 and 2, and addresses the contextual, methodological, and theoretical aspects of the study. The second section comprises Chapters 3, 4, and 5, and is based on analysis of the interviews. Chapter 3 addresses definitional issues, while Chapters 4 and 5 focus on law reform. In the third section, a concluding chapter draws together the main legal, theoretical, and policy implications of the study and makes recommendations for further research. Each chapter is discussed in more detail below.

Chapter 1 situates the study in its broader legal, social, and political context. First, it outlines the existing legal framework available to lesbian mothers, including its strengths and limitations. Second, it identifies some of the wider trends in Canadian family law, such as the influence

of the fathers' rights movement and the rise of neo-conservatism, that form additional barriers to the legal inclusion of planned lesbian families.

Chapter 2 addresses the theoretical and policy dimensions of the study. It situates the issue of lesbian and gay parental recognition within the wider debate about the terms upon which lesbians and gay men have sought entry into legal "family." Focusing initially on relationship recognition, the chapter questions the continued reliance by lesbians and gay men on formal equality or "sameness" strategies, and suggests that these strategies may have the effect of reinforcing existing hierarchies and erasing lesbian and gay difference. The chapter then considers whether the critique of a formal equality strategy in the relationship recognition context resonates in the context of parenting. It posits that while the use of formal equality to achieve parental status raises numerous concerns, there may also be fundamental differences between parental and adult relationship recognition that make the critique less convincing in the parental context.

Chapter 3 presents the first stage of the data analysis. Drawing on the mothers' voices, it explores how the mothers understand and define key familial concepts, including "family" and "parent." The mothers' definitions are discussed in the context of wider debates about the meaning of kinship in contemporary Western society. Particular attention is given to what the mothers understand to be the key signifiers of parental status, analyzed first in the context of their own parent/child relationships and then with regard to donor relationships. Chapter 3 also considers the extent to which the mothers embrace or reject some of the key features of the traditional family. For example, it explores their attitudes towards parenting outside of a nuclear model, as well as the relationship between parenting and legal marriage.

Building on the mothers' definitions and understandings of key familial concepts, Chapter 4 considers how they might approach law reform directed towards recognizing their parental relationships. Acknowledging that legal engagement may be hazardous for marginalized groups, the chapter begins by considering the mothers' attitudes towards engaging with law. Given the tentative willingness on the part of most of the mothers to pursue a law reform agenda, particularly a

legislative one, the second half of the chapter explores both existing and proposed law reform.

Continuing the discussion of law reform, Chapter 5 considers how the mothers' parental definitions might translate into a reform context and what kind of a legislative model would be required. Ultimately, it argues that the most appropriate reform proposal would combine the automatic extension of legal parentage to non-biological lesbian mothers with additional, more expansive provisions that capture the desire among the mothers for a more flexible definition of family.

The concluding chapter addresses the question of how progressive social change might be achieved. In particular, it considers how lesbian mothers might encourage government to pursue legislative change and what additional work still needs to be done.

The Legal and Social Context

1

As planned lesbian families have emerged as a significant component of Canada's demographic makeup, the assignment of legal parentage within them has become a contentious issue for Canadian family law. Traditionally, legal parentage has been granted to the "natural" or biological parents of a child and limited to two individuals of the opposite sex. The traditional parameters of legal parentage obviously exclude many lesbian parents. In an attempt to counter the existing exclusions, lesbian mothers have sought relief through the courts; after a decade of relatively successful litigation, they have access to some of the most inclusive laws in the world. However, significant gaps remain: the legal framework is uneven across the country, non-biological mothers continue to be treated as second-class parents or even legal strangers to their children, and the legal status of known donors remains unresolved.

This chapter discusses the existing provincial laws, as well as the broader legal and social context within which planned lesbian families must assert their parentage claims. I argue that while planned lesbian families have been reasonably successful through the courts in securing a number of methods by which non-biological mothers can proactively seek legal recognition following the birth of their child, the legal benefits they have gained fall well short of what is needed. Planned lesbian families may be able to erect a variety of legal structures around themselves

in the months following their child's birth, but legal parentage laws – for example, laws that would treat non-biological lesbian mothers (and not known donors) as *presumptive* legal parents from the time of their child's birth – remain elusive. Influenced by the fathers' rights movement and broader neo-conservative rhetoric, neither the courts nor legislatures have been willing to create a legal framework that treats a two-mother family as complete.

The Existing Legal Framework: A Limited Model

In Canada, legal parentage is addressed primarily, though rarely explicitly, at the provincial level in family law, vital statistics, and adoption legislation.¹ In almost all instances, legal parentage is conferred on the child's "natural" or biological parents, the assumption being that these individuals are easily identified. Though legal parentage can be transferred in a number of strictly defined circumstances to someone other than a biological parent, such as in an adoption scenario, the undisturbed assumption is that the biological parents are the child's legal parents at the time of birth.

The focus on biological parenthood has been historically straightforward in the context of assigning legal maternity. Though rarely defined in legislation, it is presumed that the woman who gives birth to a child is the child's (biological) "mother."² As Roxanne Mykitiuk explains, "Because birth can be witnessed, the biological and social/legal aspects of maternity have been construed as inextricably linked."³ Thus, while BC law does not define "mother" or legal maternity in any of its statutes, the provincial *Vital Statistics Act* does refer to the child's "mother" in the context of its definition of "birth."⁴ Section 1 defines "birth" as "the complete expulsion or extraction from its *mother*, irrespective of the duration of the pregnancy, of a product of conception" (emphasis added).⁵ The act therefore assumes that the woman who gives birth is the child's legal mother. Until fairly recently, such an assumption was likely to be biologically accurate; however, with the advent of surrogacy and egg donation, which will be discussed below, a new dimension of complexity has been added.

In contrast to maternity, paternity has always been a complicated designation because of the impossibility, until fairly recently, of proving

biological fatherhood. The category of legal paternity has thus always been more of a social construction than an accurate statement of biological fact.⁶ In the absence of clarity, a series of legislative “presumptions of paternity” have developed, and though it was historically impossible to know whether the presumptions accurately identified the biological father, underlying them was a belief that they did.⁷ The original presumption of paternity derived from the Latin maxim *pate rest quem nuptia demonstrat* (by marriage the father is demonstrated) and typically stated that if a man is (or was at the estimated time of conception) married to – or, more recently, in an opposite-sex common-law relationship with – the mother, he is presumed to be the legal father. No additional proof of parentage was required. Underlying this presumption is the belief that the only man with sexual access to a woman is her husband or, more recently, her husband or male common-law partner.

In conjunction with the traditional marriage presumption, additional paternity presumptions are included in most provincial family law statutes, though their focus is primarily on parentage for the purpose of paying child support. A survey of provincial family law legislation indicates that a man may be presumed to be the father of a child for at least some legal purposes if (a) he was married to the mother of the child and the marriage was terminated within three hundred days of the birth; (b) he married the mother of the child after the birth and acknowledged that he was the father of the child; (c) he was cohabiting with the mother in a relationship of some permanence at the time of the birth of the child, or the child was born within three hundred days after the person and the mother ceased to cohabit; (d) he has acknowledged paternity of the child and is so registered under the *Vital Statistics Act* or similar legislation; or (e) he has been found by a court of competent jurisdiction in Canada to be the father of the child.⁸ Now that paternity testing is widely available, a presumptive father’s status can be challenged on the basis of genetic information to the contrary. Otherwise, the presumptions simply apply.

One might expect that the law would choose to be more exact with its assertions now that biological paternity can be proven absolutely.⁹ However, the paternity by presumption regime remains active today, enabling a significant number of non-biological fathers to secure legal

parentage.¹⁰ While this could be understood as an important step towards the recognition of social fatherhood, Maguire Schulz suggests that the continued reliance on the presumption regime is more about preserving normative claims about the nature of marriage and family:

What purports to be an inference about biological fact may actually grow out of a normative aspiration and may readily be transformed into a prescriptive command about marriage and family, often without acknowledgement that such a transformation has taken place. The important issue becomes not who is, but who *should* be having sex with the mother: her husband. Thus, the social construct, in fact normative and mutable, draws substantial but disguised legitimacy from the representation that it simply expresses “givens” of nature.¹¹

In this statement, Maguire Schulz captures the ways in which the existing paternity regime permits the selective deployment of either biological or social paternity to fulfill its particular ideological ends. As will be seen later in this chapter, the ideology typically underlying the deployment of paternity presumptions is the preservation of the patriarchal nuclear family. In fact, the ease with which men can achieve legal parentage, particularly in contrast to the rather limited means by which women can claim the same identity, makes it very difficult for lesbian mothers to assert the completeness of a fatherless family.

While DNA testing has made traditional paternity presumptions increasingly difficult to sustain, perhaps the most significant challenge to existing parentage laws comes from the rapid growth in the use of assisted reproductive technologies. The conception of children via sperm and egg donation, or as a result of surrogacy agreements, has challenged the law to rethink the traditional bases upon which parentage is assigned. Presumptions built around a child’s biological or “natural” parents are simply no longer sustainable. In a situation of sperm donation, the mother’s male partner is clearly not the child’s biological father, and in the case of surrogacy or egg donation, the woman giving birth may be neither the genetic nor intentional mother of the child. In other words,

biological relationships may not be parental ones, and parental relationships may have no connection to either biology or genetics. In response to the legal and social conundrums presented by reproductive technologies, a number of provinces have introduced new parentage presumptions that apply specifically to situations of assisted conception. Replacing traditional parentage presumptions, which tend to rely on (assumed) biological relationships, the new presumptions derive from a mix of intention, relationship status, and genetics. For example, section 13 of Alberta's *Family Law Act*, which is replicated in a number of other provinces, addresses the assignment of parentage in the context of donor insemination. The section declares that a man is the legal father of a child conceived via assisted conception (with his consent) in circumstances where he is married to, or in a relationship of interdependence of some permanence with, the child's mother. The man's parental status thus derives from the conjugal relationship he shares with the child's biological mother and his consent to the assisted conception. Section 12 of the act addresses surrogacy. It permits the genetic mother of a child carried by a gestational surrogate to be named the sole legal mother, providing the surrogate consents. In the surrogacy case, the genetic (though not biological) link between the mother and the child is sufficient to displace the gestational mother's legal status, providing the gestational mother agrees.

What appears to underlie both provisions, though it is not explicit, is a desire to manipulate legal parentage laws in the assisted conception context so that they reflect the parties' pre-birth intentions. The non-biological father who consents to his female partner's assisted conception *intends* to play the role of father: section 13 gives legal force to that intention through the extension of legal paternity to such a man. Similarly, in the context of a surrogacy agreement, both the "commissioning" or intentional mother and the surrogate mother intend that the commissioning mother be the legal parent: section 12 gives that intention legal force. Though not available in all provinces, provisions such as those found in Alberta's *Family Law Act* suggest that the law is willing, where the child will be raised by two parents of the opposite sex, to sever the traditional link between biological and legal parenthood (whether actual

or created via legal presumptions), replacing it with a form of social parenthood derived from pre-birth intentions and/or relationship status. The limiting of the applicability of section 13 of the *Family Law Act* to heterosexual couples was successfully challenged in 2005 by a married lesbian couple, who argued that it violated section 15 of the *Canadian Charter of Rights and Freedoms*.¹² The court allowed their application on the basis that section 13 created legislative consequences for same-sex couples that it did not create for heterosexual couples and was thus in violation of the *Charter*. The solution provided by the court was to read a provision into the act that did not limit the deeming provision to only a male spouse or partner. The act itself has not been amended.

Despite the Alberta example, most provinces explicitly exclude lesbian mothers from traditional presumptions of parentage as well as from the new laws pertaining to assisted conception. Recent attempts by non-biological lesbian mothers to utilize statutory paternity presumptions on the analogous basis that they frequently enable social fathers to secure legal parentage have been rejected because the assumption underlying the legislation – that the mother’s male partner *could* be the biological parent of the child – could never be factually accurate in a lesbian context.¹³ That the presumption is not always factually accurate in the heterosexual context was considered irrelevant. Similarly, legislation assigning legal parentage in cases of assisted conception is, in all provinces but Quebec, available only to heterosexual couples, thus excluding lesbian mothers from its benefits. As a result of these exclusions, non-biological lesbian mothers living in common law Canada have no statutory authority to assert legal parentage at the time of their child’s birth.¹⁴ For families that include known donors, there is a very real possibility that the *donor* is in fact the child’s second legal parent.

In the absence of legislative authority, lesbian mothers have turned to litigation to secure their parenting relationships. Perhaps surprisingly, given the lack of legislative interest in the issue, Canadian courts have exhibited a tentative willingness to extend a number of existing legal mechanisms by which non-biological lesbian mothers can secure legal rights with respect to their children, particularly in the absence of conflict.¹⁵ However, access to these mechanisms is limited, depends on the

consent of the biological mother and donor (if known), and cannot always be utilized at the time of birth.

The most common way by which non-biological mothers secure legal parentage in relation to their children is through a second-parent adoption. Similar to a step-parent adoption, though available to parents of the same sex and typically completed as soon after the child's birth as legally possible, a second-parent adoption allows a non-biological mother to adopt the biological child of her partner without the biological mother losing her legal status. In such circumstances, the non-biological mother becomes a legal parent, and the parental rights of the donor, if he is known, are severed. The introduction of second-parent adoption was a significant breakthrough for lesbian mothers because, unlike traditional step-parent adoption, which requires that the adoptive parent replace the biological parent of the same sex, second-parent adoption allows two parents of the same sex to enjoy legal parentage simultaneously.

First secured via litigation in Ontario in 1995 and now available in all but two Canadian provinces/territories, second-parent adoptions are currently the only way by which non-biological mothers can secure all of the rights and responsibilities of parenthood.¹⁶ However, they come with significant limitations. Second-parent adoptions require the consent of the biological mother (and the biological father in the case of a known donor), typically involve a waiting period of several months after the birth of the child, necessitate hiring a lawyer, and cost several thousand dollars to complete. The waiting period and the ease with which biological mothers and donors can withhold or withdraw consent leave non-biological mothers extremely vulnerable. For example, in the BC case of *K.G.T. v. P.D.*, the biological mother refused to consent to the non-biological mother's adoption of her daughter, instead consenting to her new partner adopting the child. The non-biological mother challenged the adoption, arguing that she was entitled to adopt the child on the basis that the two women had intended to co-parent and had done so for over five years. While the court ultimately barred the new partner from adopting, it also refused to dispense with the biological mother's consent to the non-biological mother's adoption, stating that

any anticipated benefits for the child of having a second legal parent were “nebulous.” In effect, the decision enabled the biological mother to bar her child’s second mother from securing legal parentage. The court also rejected the non-biological mother’s application for joint custody, preferring to award guardianship and access. The effect was that while the non-biological mother had some rights and responsibilities in relation to her daughter, she was denied actual legal parentage.

Another significant limitation of second-parent adoptions is that they cannot be utilized to secure legal parentage at the time of birth. Rather, they require the non-biological mother to take some positive action after the birth of the child. In some provinces, an application for adoption cannot be filed until the child is three or six months old. This waiting period leaves non-biological mothers vulnerable to a change of heart on the part of either the biological mother or the donor. As the facts in *K.G.T.* illustrate, the effects of not securing a second-parent adoption can be dire. While most lesbian mothers take advantage of second-parent adoption laws, it is difficult to secure an adoption without the assistance of a lawyer. Thus, mothers must not only be aware of the availability of second-parent adoptions; they must also be able to afford the services of a lawyer. Further complicating the situation is the fact that very few lawyers have any familiarity with second-parent adoptions. Even in Vancouver, a city with a large lesbian population, only two lawyers regularly complete second-parent adoptions.

In addition to second-parent adoption, and as a result of litigation, a number of provinces allow two mothers to appear on the child’s birth certificate from birth.¹⁷ The “gender-neutral birth certificate” was considered to be a significant breakthrough for lesbian mothers because, unlike second-parent adoption, it can be utilized at birth. It is therefore possible to assert the legal status of the non-biological mother as a “co-parent” from the moment of the child’s birth. However, unlike an adoption, the gender-neutral birth certificate does not actually secure legal parentage. Similar to the traditional presumptions of paternity, it is presumptive proof of parentage only and is thus rebuttable by either the biological mother or a known donor. Furthermore, in Ontario and British Columbia, the new birth certificate can only be used if the child was conceived using the sperm of an anonymous donor, implying that

if the donor is known, *he* is the child's second parent. The gender-neutral birth certificate therefore does nothing to address the vulnerability of lesbian families vis-à-vis known donors.

The final area in which lesbian mothers have made limited legal inroads through litigation is in relation to the recognition of multiple-parent families. While my study shows that most lesbian mothers *and their donors* wish to exclude donors from the status of legal parent, a small number of participants have chosen to co-parent their children within a three- or four-parent unit. Unfortunately for these families, the law has traditionally limited parentage to two individuals. However, in a recent case initiated by two mothers and their donor, *A.A. v. B.B.*, the Ontario Court of Appeal held that a child could have three legal parents – his two mothers and his donor father.¹⁸ While *A.A. v. B.B.* is the only decision of its kind and is not applicable outside of Ontario, or perhaps even beyond the individual facts of the case, it suggests that in families in which three adults agree that they are all parents, the courts *may* be willing to give legal recognition to the arrangement.

As is the case with second-parent adoptions, the decision in *A.A.* does not address legal parentage at birth. Rather, it requires parents to initiate a legal process after the child is born. *A.A.* also seems to continue to prioritize the biological parents over the non-biological mother. In *A.A.*, it was the non-biological mother, not the donor, who sought to be added as the child's third parent, the donor having been listed on the child's birth certificate. While the parties' decision to name the two biological progenitors as the child's "parents" may have been strategic – the child's biological parents can be named on the birth certificate without challenge – the effect of the strategy was that the donor's biological relationship was prioritized and the burden of applying for third-parent status fell on the already vulnerable non-biological parent. The irony of this situation would be less if the three parties were sharing responsibility for the child, but the reality was that the child was being raised primarily by his two mothers, with the donor having much more limited contact and not taking part in any of the day-to-day decision making.

Given the significant, though limited, legal changes achieved via litigation, it is surprising that so few provinces have been willing to consider a legislative response to planned lesbian families. As noted

above, while several provinces have legislated with regard to parentage in cases of assisted conception within heterosexual families,¹⁹ the only province to do the same for lesbian families is Quebec. Introduced in 2002 as part of a review of provincial filiation laws, Quebec's *Civil Code* includes a series of parental presumptions applicable at the time of the child's birth to all individuals or couples who conceive using third-party gametes.²⁰ Article 538.3 of the code states that "if a child is born of a parental project involving assisted procreation between married or civil union spouses during the marriage or the civil union or within three hundred days after its dissolution or annulment, the spouse of the woman who gave birth to the child is presumed to be the child's other parent."²¹ This article extends traditional paternity presumptions to couples who enter into a medically assisted "parental project." The term "parental project" is defined in article 538: "A parental project involving assisted procreation 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." Thus, a parental project can be entered into by a couple or by a single person, and the gender-neutral terminology indicates that the provision applies to both same-sex and opposite-sex couples. Finally, article 538.2 states, "The contribution of genetic material for the purposes of a third-party parental project does not create any bond of filiation between the contributor and the child born of the parental project." Article 538.2 appears to exclude sperm donors from being awarded parental status if they are not parties to the parental project. Thus, in cases of assisted insemination involving a parental project, a same-sex couple or single lesbian woman is treated in the same manner as a heterosexual couple or single woman who conceives using the same method. However, Quebec remains the only province in which the assignment of legal parentage is addressed in this way.

Changing Families, Changing Attitudes

While the existing legal framework is limited in its capacity to meet the needs of planned lesbian families, the challenges that lesbian families encounter in asserting their legitimacy do not end with inadequate provincial law. Lesbian mothers must also contend with broader legal

and social trends that work to exclude them, such as the recent resurgent interest within both family law and wider society in biological family, and biological fathers in particular.²² While the impact of these trends is at least somewhat offset by the concurrent, and seemingly contradictory, willingness on the part of some courts to extend limited forms of legal recognition to non-normative families, they nonetheless make it very difficult for lesbian couples to assert the legitimacy of their families.

In 1996, Judith Stacey described planned lesbian families as the “pioneer outpost of the post-modern family” – perhaps the most complex example of the improvisation, ambiguity, and diversity that characterize twenty-first-century families.²³ However, Stacey was careful to note that lesbian families are by no means the only family form confronting traditional norms. They are part of a much broader shift in Canadian family demographics: in Canada, just over a third of children are being raised in homes that do not resemble the married, nuclear, heterosexual norm.²⁴ In fact, the sharp rise in divorce, single motherhood, stepfamilies, common-law relationships, and the use of assisted reproductive technologies have made it increasingly difficult to assert that the heterosexual biological nuclear family is any longer the norm. Lesbian mothers obviously benefit from this demographic and ideological shift, as it enables them to position themselves as just one more type of a growing number of alternative families. In fact, it comes as no surprise that the increased willingness on the part of the courts to recognize planned lesbian families as “functional families” has occurred in tandem with the recognition and growing acceptance of alternative family forms more generally.²⁵

While non-normative family arrangements have reached new levels of legal and social acceptance in recent decades, the path of progress is by no means straightforward. At the same time that non-normative “functional” families, including lesbian and gay families, have received unprecedented legal support, a backlash against non-normative family practices, particularly those that exclude or marginalize biological fathers, has simultaneously emerged. Bolstered by an increasingly powerful fathers’ rights movement, the emergence of a neo-conservative political agenda, and an unprecedented adherence to gender-neutral formal

equality in family law, fathers have emerged as critical to both the preservation of “the family” and children’s best interests. The resurgent interest in fathers, and biological fathers in particular, has made the legal terrain a complicated one for lesbian mothers who wish to assert the completeness of their two-mother family unit.

Fathers’ Rights and Father Presence

A key impetus behind the increased focus on fathers in both Canadian family law and broader state policy has been the emergence over the past two decades of a vocal fathers’ rights movement.²⁶ Frustrated by what they believe to be the favouring of mothers within the family law system, fathers’ rights groups have become active participants in Canadian family law reform. While their legal interventions have not always been successful, fathers’ rights discourse exerts considerable influence in Canadian family law. In fact, the “best interests of the child” test, which governs both custody and access law in Canada, has been so influenced by the fathers’ rights agenda that there now appears to be a de facto presumption that father access is in a child’s best interests.

It is difficult to pinpoint exactly why the fathers’ rights movement has been so successful in influencing family law and policy in Canada. The explanation may lie with the fact that much of what the movement promotes resonates with the neo-conservative and neo-liberal agendas that currently dominate the Canadian political landscape.²⁷ Neo-conservatives respond positively to the movement’s desire to preserve the traditional patriarchal family, while neo-liberals presume that maintaining father/child relationships following parental separation will reduce the economic burden on the state.

The key site of critique for the fathers’ rights movement is the family law system, which the movement accuses of favouring mothers and marginalizing fathers. Along with complaints about child support, the movement’s primary focus has been on custody and access law and, in particular, the importance of maintaining father/child access in separated and divorced families. Arguing before numerous government committees on custody and access law that it is in the best interests of children to have regular access with their fathers, fathers’ rights groups

© UBC Press 2011

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without prior written permission of the publisher, or, in Canada, in the case of photocopying or other reprographic copying, a licence from Access Copyright, www.accesscopyright.ca.

20 19 18 17 16 15 14 13 12 11 5 4 3 2 1

Printed in Canada on FSC-certified ancient-forest-free paper
(100% post-consumer recycled) that is processed chlorine- and acid-free.

Library and Archives Canada Cataloguing in Publication

Kelly, Fiona J., 1975-

Transforming law's family : the legal recognition of planned lesbian
motherhood / Fiona J. Kelly.

(Law & society, ISSN 1496-4953)

Includes bibliographical references and index.

ISBN 978-0-7748-1963-3

1. Lesbian mothers – Legal status, laws, etc. – Canada. 2. Gay parents – Legal status,
laws, etc. – Canada. 3. Parent and child (Law) – Canada. I. Title. II. Series: Law and
society series (Vancouver, B.C.)

KE600.K44 2011

346.71017

C2010-908006-8

KF547.K44 2011

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Aid to Scholarly Publications Program, using funds provided by the Social Sciences and Humanities Research Council of Canada, and with the help of the K.D. Srivastava Fund.

Printed and bound in Canada by Friesens

Set in Myriad and Sabon by Artegraphica Design Co. Ltd.

Copy editor: Joyce Hildebrand

Proofreader: Andrea Kwan

Indexer: Christine Jacobs

UBC Press

The University of British Columbia

2029 West Mall

Vancouver, BC V6T 1Z2

www.ubcpres.ca