The Application of Family Law to Non-Traditional Relationships: Ozzie & Harriet Do Not Live Here

A New Day Dawns: Moving Towards Equal Legal Recognition for Same-Sex Families

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We are living in what has been described as the "age of the postmodern family."

It is an age where one marriage and its biological relations have ceased to determine family composition. Choice increasingly appears to be the principle determining family composition: choice to single-parent, choice of fictive kin, choice to combine nuclear families (in extended kin networks, in re-marriage, or in divorce-extended families), choice of semen donors or contract birthgivers, choice to dissolve marital bonds, choice of who will function as a parent in children's lives...As family forms multiply, the traditional, heterosexual and procreative, nuclear family delimited by bonds of present marriage and blood relation...has ceased to be the "natural" family form.

Family law has evolved in light of the realities of “the postmodern family,” shifting away from a focus on the form of families to their functions, and abandoning hierarchies of status founded in discrimination.

Family law first responded to this social transformation by discarding the notion of "illegitimacy" of children. Unmarried different-sex couples were accorded myriad rights and obligations, along with recognition of the spousal status for same-sex couples. The concept of in loco parentis was deployed across the statute book to extend parental responsibilities whenever a person took on parental functions. Among the first jurisdictions in the world, Ontario achieved equality in marriage when same-sex couples celebrated legal weddings on June 10, 2003, with the release of Halpern v. Toronto

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1 On March 26, 2007, I will be moving my practice from Epstein Cole LLP to Martha McCarthy & Company, The Flatiron Building, Toronto, and can then be reached at joanna@mccarthyco.ca
3 Judith Stacey alerted me to the difficulties in using the phrase “opposite-sex” -- that terminology suggests that men and women are opposite and perhaps somehow naturally complementary. Different-sex is a more apt descriptor.
(City), 2003 CarswellOnt 2159; 36 R.F.L. (5th) 127 (C.A.). More recently, the focus of same-sex equality rights litigation has been on parental status, specifically birth registration and declarations of parentage.

The theme throughout this social and legal revolution has been to abandon formalistic markers of relationship, like biology and marriage, to instead respond to the diverse lived realities of families. A new day has dawned.4 The meanings of "spouse," "parent," and "child" have expanded to embrace actual relations of love, escaping arbitrary and discriminatory limitations. Marriage is now concerned with freedom of choice based on love, rather than being a religious and cultural imperative.


After introductory comments on professional obligations, this paper will review the law of spousal support, marriage, property, and child-related issues for same-sex families. Despite the gains in the recent parenting cases, more work remains to be done to recognize the equal human dignity of same-sex parents and their children. The law must continue to respond to the requirements of the *Charter* as we experience widespread social changes to Canadian families in this postmodern age. Our commitment to a functional approach to family law requires that we fully recognize parentage in non-nuclear families, in accordance with children's best interests.

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4 I am no Celine Dion fan but this song was playing when fellow counsel Martha McCarthy and I drove down to receive the *Halpern* appeal judgment. As I married my wife that day, very pregnant with our son, it did feel as though a new day had dawned, and the *Rutherford* and *AA v. BB v. CC* decisions demonstrate just how much progress has been made since cases like *Andrews v. Ontario (Minister of Health)* (1988), 64 O.R. (2d) 258.
1. Professional Obligations

In our day-to-day interaction with clients, we must also be sensitive to the realities of family diversity. The *Rules of Professional Conduct* state that, “A lawyer has a special responsibility … to honour the obligation not to discriminate on the ground[] of … sexual orientation...” Lawyers are expected to “respect the dignity and worth of all persons and to treat all persons equally without discrimination.” [Rule 5.04 (1)]

We live in a culture in which it is widely assumed that every person is heterosexual, and certainly that every married person, and every parent, is heterosexual. Heterosexuality is valorized and privileged, and persons are stigmatized for gender and sexual orientation non-compliance.

Members of the legal profession are not immune from discriminatory views regarding same-sex families. To “respect the dignity and worth of all persons”, lawyers must treat all clients respectfully, which includes not making assumptions about sexual orientation. Intake forms should not be limited to categories of “husband” and “wife,” nor should it be assumed that a child has been adopted, or was the product of a different-sex relationship, because there are two mothers.

It is incumbent upon us to honour a client’s self-definition and cultural heritage, including respect for diverse gender identities and sexual orientations. In a society rife with heterosexism and homophobia, lawyers should engage in continuing education and reflection on their heterosexual privilege or internalized homophobia. This is an essential element of competent, professional service in the age of the postmodern family.
2. Spousal Support

a) Standing to Claim Spousal Support

The issue of standing to claim spousal support is straightforward where same-sex spouses have been married. For unmarried couples, there may be difficulties. One problem that arises is establishing conjugal cohabitation. Another is addressing short-term relationships with children.

i) Conjugal Cohabitation

The first hurdle in obtaining spousal support is to show that unmarried parties are spouses, rather than roommates or friends. Although this is rarely a consideration in different-sex cohabitation cases, it is an argument sometimes made by reluctant respondents to same-sex spousal claims.

Where the couple has been “closeted” (has tried to conceal their status as a same-sex couple in the community), it may be more difficult to establish the spousal nature of the relationship. Moreover, where the parties are unwilling to take their relationship seriously and respectfully over the course of the relationship because they are uncomfortable with their sexuality, a potential payor is not likely to acknowledge that she or he has a support obligation to the other spouse. Since spousal support for same-sex couples is still relatively new, the community is only just becoming aware, and more accepting, of the reality of spousal support obligations and entitlements.

Determining whether the relationship is spousal in nature is a question of fact. The Supreme Court of Canada has approved the list of factors, and relevant questions, set out in Molodowich v. Pennitten (1980), 17 R.F.L. (2d) 376. Cohabitation is determined on the basis of several elements, none of which is determinative. These include shared shelter; intimate sexual and personal behaviour; gratuitous exchange of services; shared social interaction; community recognition; mutual economic support; and care giving for
children, if any. Counsel must be careful to ensure the Court is sensitive to the realities and diversity of GLBT cultural communities, avoiding a heterosexist perspective to determining spousal status.\(^5\)

**ii) “Natural or Adoptive Parents” of a Child**

Section 29 of the *FLA* permits applications for spousal support where the parties continuously cohabited in a conjugal relationship for three years or they were in a relationship of some permanence, if they are the natural or adoptive parents of a child.

The language “natural parents” is problematic. Traditionally, this phrase has been judicially interpreted as referring to biological parents. As found by the Court of Appeal in *AA v. BB v. CC*, parentage is not limited by biology. The CLRA was intended to end the stigmatization of children related to their parents' marital status, to abolish illegitimacy, so there should be no new hierarchy of children based on biology. The common law concept of "natural" child should include parents who use assisted reproduction and who intend to rear a child together as their own.

Until this is recognized, the FLA arguably excludes dependent same-sex parents whose cohabitation is less than three years, if the parties did not obtain an adoption order, unless both are biological parents [a gestational and genetic mother]. The FLA also fails to acknowledge the possibility that parentage may have been established “for all purposes” by declaration of parentage. The statutory provision focuses exclusively on being a “natural” or adoptive parent. Perhaps a declaration of parentage is sufficient to render a person a “natural” parent?

Privileging biological connection in determining rights and obligations, including spousal support, is offensive to families with non-biological bonds, including same-sex families and those who require assisted reproduction. The “natural parent” language [found also

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in s. 5 of the *Guidelines* and s. 137(1)(b) of *Child and Family Services Act*] is ripe for constitutional challenge / legislative amendment. [See too *Rutherford* at para. 52, for discussion]

**b) Entitlement to Spousal Support**

There are few reported cases of same-sex couples seeking and obtaining spousal support.⁶ Like all cases, but perhaps particularly for same-sex families, settlement is the norm. Many same-sex couples have a greater interest in privacy since their sexual orientation remains socially stigmatized. It is also possible that payors do not want to develop a reputation in the community as persons who are unfair and who resist equality gains. Recipients too may not have the same sense of entitlement because of differential community and social expectations based on gender or family status.

In those cases that are litigated, there is a danger that the court will impose an idealized heterosexual model as the standard for entitlement. The “perfect” spousal support case likely involves a long-term marriage with a stay-at-home mom and a breadwinner, work-focused husband. Insofar as a same-sex couple departs from that model, judges may be disinclined to make an award.

Even in different-sex cases, where the parties do not follow this traditional division of labour, it seems that the courts often struggle with the issue of spousal support. The Supreme Court found in *M. v. H.*, [1999] 2 S.C.R. 3 at para. 97, that the purposes of spousal support are not based on gender difference. Still, in sexist culture, we all struggle with preconceived notions of the proper roles of men and women in the public sphere. Simply put, courts seem reluctant to view men as recipients of support. The idea seems to be that a man, gay or straight, should be able to take care of himself. Courts also sometimes hesitate to require women, gay or straight, to pay support. In my experience, it is more difficult for a man or lesbian spouse to get spousal support than a woman in a different-sex relationship on otherwise identical facts.

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⁶ One example is *A. (N.) v. W. (C.M.)*, 2003 CarswellOnt 1928.
Social science research cited by the Supreme Court in *M. v. H.*, [1999] 2 S.C.R. 3, suggests that same-sex relationships are typically more egalitarian, with a strong desire for equal sharing of household labour and childcare. Perhaps compensatory spousal support cases are less likely. Still, there will be many circumstances, with and without children, where a spouse suffers very real need or disadvantage, and there is corresponding advantage to the other spouse arising from the relationship or its breakdown. Spousal support must be available in these situations. Emulation of a traditional heterosexual relationship cannot be a necessary condition for entitlement.

Counsel must return to the fundamental principles underlying spousal support as set out in *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. As Chief Justice McLachlin recognized in *Bracklow* at para. 32, “there is no one model of marriage.” Spousal support entitlement may be present in diverse family situations. Given the discrimination against same-sex families, and gender stereotypes, it is a useful tool to test one’s settlement expectations by imagining the parties as a different-sex couple. Counsel should appeal to *Charter* principles to guide the analysis.

3. **Marriage**

   **a) Recognition of Canadian Marriages in Other Jurisdictions**

Most jurisdictions deny same-sex couples the freedom to marry. Since Ontario has no residency requirement for marriage, same-sex couples from around the world have flown to Toronto, paid a fee, obtained a licence and married. What happens when these couples return home?

Hopefully, they do not separate. While there is no residency requirement for marriage, there is a one-year residency requirement for divorce in Canada. Couples then have to address the issue of the separation in their home states. Those who remain happily married will also seek recognition of their marital status.
The Irish and United Kingdom High Courts have denied the validity of marriages of two women performed in Canada, and the British couple was ordered to pay 25,000 pounds in costs to the government for their unsuccessful equality bid. In contrast, the Israeli Supreme Court required the registration of the Canadian marriages of same-sex couples.

Even in many “unfriendly” jurisdictions, for different purposes, the marriages of same-sex couples are being recognized. Evan Wolfson, a New York attorney, founder and executive director of Freedom to Marry, advises that some American recognition of Canadian marriages has already been achieved by individual couples who have negotiated successfully with insurance companies, municipal governments and employers to obtain benefits that are reserved for married couples only.

In our own practice, one of our clients has achieved recognition of her Canadian marriage by American immigration. She and her female spouse have two children. As an American citizen who had a baby in Canada, she was granted joint citizenship for the child whom she had birthed but, even though she had adopted the child whom her partner had birthed, she was denied that same recognition for the second child. U.S. immigration said such a privilege was only available to a non-biological child if the parents were married. After she and her partner were married in Canada, she re-applied, provided her marriage licence, and joint citizenship for the child was granted.

Struggles for recognition of marriages performed in Canada will no doubt continue in jurisdictions around the world. Same-sex couples in Hong Kong and New Zealand are pursuing recognition of their Canadian marriages.

**b) Adultery**

In defending its discrimination in marriage in the courts, the federal government warned there were significant problems with our request for immediate equality in marriage. The government asked for a suspension of any remedy. It cited non-recognition of Canadian
marriages abroad as a problem. It also complained that the common law suggested that only heterosexual sex acts constituted adultery and that this would need to be changed if there were marriages between same-sex couples.

Not surprisingly, after equal marriage, the common law displayed its remarkable ability to respond to changing social circumstances. Same-sex sexual activity may now constitute adultery. \cite{P. (S.E.) v. P. (D.D.), 2005 CarswellBC 2137.}

4) **Property**

Unmarried same-sex spouses may bring constructive and resulting trust claims, under the same principles, and with all the same difficulties, as unmarried different-sex spouses.

In *Wylie v. Leclair*, 2003 CarswellOnt 1966; 226 D.L.R. (4th) 439, 172 O.A.C. 187, the Court of Appeal held that, in a case involving unmarried different-sex couples, equitable remedies should not be used for the purposes of attempting to replicate an equalization entitlement.

The Court relied on the Supreme Court of Canada’s decision in *Walsh v. Bona*, 2002 CarswellNS 511/512, 32 R.F.L. (5th) 81. There, the Court held that there was no discrimination in restricting default property sharing to married couples alone, so as to respect the parties’ freedom of choice. While I tend to agree with Justice L’Heureux-Dube's dissent, the analysis simply cannot be the same with same-sex couples who had no real choice about equalization protections so long as they were denied the freedom to marry.

In my view, *Wylie* and *Walsh* should be distinguished in the same-sex spousal context. A significant injustice is likely to result otherwise. Equitable remedies are often inadequate and very difficult and time-consuming \cite{read costly} to prove. There can be particular unfairness if a principal asset is a pension, where it is often impossible to show a nexus between the spouse’s services and the property.
Now, thankfully, married same-sex spouses are subject to the same scheme of equalization of net family property as married different-sex spouses, but some situations continue to pose interesting questions. For example, many same-sex couples had holy unions, commitment ceremonies or other marriage celebrations without legal recognition prior to Halpern. Do these have any status for the purposes of default property sharing?

Some same-sex couples will have both a pre-Halpern wedding and a later civil marriage. Which date of marriage applies for the purposes of equalization? These questions have yet to be formally addressed by any court, although I understand that the argument for retrospective effect has won favour with at least one case conference judge. The parties apparently settled by using the commitment ceremony date as the date of marriage for equalization purposes.

a) Parties Entered into Void Marriage in Good Faith

The FLA provides that a party to a void marriage, who entered into the marriage in good faith, may obtain equalization of net family property. Does this include same-sex couples that married in a religious or cultural ceremony that did not have legal recognition on the wedding date?

For heterosexual couples, informal or religious-only marriages generally have no status for equalization purposes. In Debora v. Debora (1999), 43 R.F.L. (4th) 179 at para 7-9, the Ontario Court of Appeal held that the "good faith" requirement under s. 1 of the FLA and s. 31 of the Marriage Act, R.S.O. 1990, c. M.3, s. 31, requires that the parties had the "intention to comply with Ontario law".

Accordingly, where spouses had a Jewish religious marriage not intended to be registered in compliance with Ontario law and later a civil marriage, the date of marriage for equalization purposes was the date of the later valid legal marriage. This was necessary to preserve "certainty of identification of the status of being married as the indicator for
the distribution of assets." [at para. 10] As a case of first impression, then, it would seem pre-

_Halpern_ marriages of same-sex couples would not be relevant to equalization.

In my 2005 Institute paper, "Miles to Go Before We Sleep," I argued that a declaration of constitutional invalidity with respect to marriage ought to have retrospective effect. Since the bar on the marriages of same-sex couples was unconstitutional, it should never have been of any force or effect, and the marriage should be recognized for equalization purposes. As written by Professor Hogg, a declaration of constitutional invalidity “involves the nullification of the law from the outset” [P. W. Hogg, Constitutional Law of Canada (loose-leaf ed.), vol. 2, at p. 55-2.] The invalidity of the marriage on the basis of the unconstitutional common law bar, too, should be nullified.

This argument has particular force in those situations, prior to the Court of Appeal decision in _Halpern_, in which same-sex couples complied with all formalities of marriage. This was often the case where the marriages were solemnized by publication of banns. Some couples were even issued marriage certificates. At the time of the issuance of the certificates, this was an administrative error -- the Registrar simply did not notice or could not tell the sex of the parties from their forenames.

Subsequent to the Court of Appeal ruling in _Halpern_, though, if the reformulation of the common law of marriage has retroactive effect, these marriages may be legally valid. Given the attention to securing marriage certificates, it would seem the parties intended to comply with Ontario law in "good faith", except its unconstitutional aspect, which is arguably _void ab ignitio_.

Even where couples did not comply with the requisite formalities – they did not have a civil marriage licence, for example – it is possible that such marriages may now have legal effect. Section 31 of the _Marriage Act_ provides that parties who enter into marriages solemnized in good faith and who cohabit thereafter have a valid marriage despite any irregularity or insufficiency in the publication of banns or issuance of the licence. This section might apply to render such marriages valid. Certainly in situations
where the parties first applied for marriage licences and were rejected, it is difficult to assert that the parties did not seek solemnization in good faith, wishing to comply with Ontario law, but were thwarted by discrimination.

There is a something of a parallel analysis in the spousal support context. In *S.(R.) v. H.(R.)* [2000] O.J. No. 2128 (S.C.J.), Justice Benotto addressed whether the amendments to the FLA establishing the support obligation of same-sex spouses could assist a claimant whose action commenced prior to *M. v. H.* She noted that the statute did not expressly provide for retroactive effect, and recognized the presumption against it. Nevertheless, she held that the FLA itself contains a retroactive provision so the amending legislation did not need one: section 34(1)(f) gives the court the power to make an order "in respect of any period before the date of the order".

Benotto J. went on to say, at para. 12, "a statute which impairs rights is not retroactive [it is retrospective] if it only determines the future exercise of rights acquired in the past". Also, the amending legislation was designed to remedy a systemic wrong and must be interpreted broadly. Although the parties separated in 1993, the case was started within eight months of separation, so the limitation period had not elapsed. In any case, there would have been good reason to extend the limitation.

If same-sex couples could claim spousal support even if they separated prior to the enactment of remedial legislation following *M. v. H.*, does it follow that the reformulation of the common law of marriage has effect on earlier marriages for the purposes of claiming equalization? Spousal support addresses ongoing need, so it cannot be said that an application for support for a relationship that pre-dates the legislative amendment is truly retroactive in nature; it is retrospective.

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates *backwards*. A retrospective statute operates *forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a
A retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original]\(^7\)

Again, in the equalization context, we are arguably dealing with an attempt to apply constitutional remedies retrospectively. As Justice Iacobucci observed in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, at para. 56, in distinguishing between prospective and retrospective remedies, “the important point is not the moment at which the individual acquires the status in question, it is the moment at which that status is held against him or disentitles him to a benefit”. In the equalization context, the point in issue is the date of marriage, a past date, to which the claimant would be seeking to attach new consequences for the future.

Certainly, it is a more challenging question whether equalization ought to recognize marriages on a retrospective basis. These ceremonies, while morally and culturally intended to be marriages, may not have been intended to bear the legal consequences of marriage. At the same time, it seems manifestly unjust to treat such couples as unmarried when they were prevented from marrying by unconstitutional common law that violated their *Charter* rights.

The recent decision of *Canada (Attorney General) v. Hislop*, 2007 SCC 10, is now the leading case on the retroactive and retrospective effect of *Charter* remedies. In addition to their successful claims, the claimants requested a remedy in respect of same-sex spouses’ exclusion from survivors’ benefits between the date of the *Charter* taking effect and the date granting recognition to same-sex spouses for the purposes of the Canada Pension Plan.

A majority of the Supreme Court held, at para. 86 that, “When the law changes through judicial intervention, …it may be appropriate for the court to issue a prospective rather than retroactive remedy.” In *Hislop*, the Court denied the retroactive relief sought.

Recognition of same-sex spousal status was a substantial change to the law, apparent with changing social conditions and understanding. In circumstances of “substantial change,” it is necessary to balance a myriad of factors, including whether there was good faith reliance on prior law, what is required for fairness to the litigants, and the need to respect the constitutional role of legislatures in determining whether a remedy should operate prospectively or retroactively. In *Hislop*, given the significant change in the law, and fairness considerations, a retroactive remedy was found to be inappropriate.

The achievement of equal marriage may be the sort of legal shift that justifies consideration of prospective, rather than retroactive or retrospective, remedies. On the other hand, there are here no questions of governmental cost, deference to the legislature and good faith considerations when the parties jointly agreed to enter into a form of marriage.

Perhaps the best guidance is the Ontario Court of Appeal decision in *Halpern* itself. The Court ordered the registration of the marriage certificates of Kevin Bourassa and Joe Varnell, and Anne and Elaine Vautour. These couples were married by publication of banns prior to the declaration of unconstitutionality and reformulation of the definition of marriage, and commenced a proceeding seeking to compel the Province to register their marriage certificates. An order in the nature of *mandamus* was granted.8

The Court's order of registration of the marriage certificates, dated January 14, 2001, prior to its judgment, suggests that the date of ceremonies of marriage celebrated by same-sex couples prior to *Halpern*, at least those for which marriage certificates were issued or licences sought, ought to be considered as the effective date of marriage for equalization purposes.

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8 There is no elaboration on this point. The Court stated that, “We recognize that an order requiring the Registrar General of the Province of Ontario to accept for registration the marriage certificates of Kevin Bourassa and Joe Varnell and of Elaine and Anne Vautour does not flow from our rejection of MCCT's legal arguments. However, given our conclusion on the equality issue, and bearing in mind the consolidation of the two applications, we are of the view that a remedy for the two couples involved in the MCCT application is also appropriate.”
b) Date of Marriage

Many of the thousands of same-sex couples married in Ontario following Halpern had been together for years, if not decades. Since these parties never had a choice whether to legally marry prior to June 10, 2003, it seems manifestly unfair to use a recent date of marriage for equalization purposes. This is particularly true in cases involving long-term cohabitation when there is a significant pension or other asset for which it is more difficult to assert a constructive trust interest. The discussion above, including the impact of the Supreme Court decision in Hislop, is apposite. The argument for retrospective effect is particularly compelling in these circumstances, because there can be no argument about the parties’ intentions. These are spouses who wished to invoke the regime of equal property sharing. The date of commencement of cohabitation will typically serve as the just marker to begin sharing the fruits of the relationship.

5) Issues with Respect to Children

Lesbians have always formed families and raised children, but we are currently in the midst of what many describe as a lesbian "baby boom." Experts estimate that at least 30% of lesbians are parents. Some have children from prior different-sex relationships, but many become parents in the context of same-sex relationships. These women often choose to form two-parent families using an unknown or uninvolved donor. Others incorporate known donors into their child's life, to varying degrees, including for some families, recognition and participation of the donor as the child's father. Gay men are also increasingly choosing to parent, whether by acting as known donors who participate as fathers, through surrogacy or by adoption. Research suggests that currently one-tenth of gay men are parents.

a) Research Literature on Same-Sex Parenting

Professors Judith Stacey and Timothy Biblarz have written a comprehensive analysis of the leading research literature investigating the impact of sexual orientation of parents on
their children. In their highly accessible article, “(How) Does the Sexual Orientation of Parents Matter?,” (2001) 66 Am. Soc. Rev. 2, the authors find suggestive superior benefits of lesbian parenting and no detrimental differences between same-sex and heterosexual parenting.

Stacey and Biblarz conclude, based on decades of research, that there is every reason to believe that children parented by same-sex couples are at least as well parented, and their development is at least as successful, as children with heterosexual parents. This is the case even though same-sex parents confront disadvantages deriving from the non-legal status of their relationship, the social invisibility of the second parent's relationship and the social stigma with which both they and their children must contend. Stacey and Biblarz therefore conclude that there must be compensatory processes in gay and lesbian parenting that enable those children to develop as well as they consistently have been shown to develop.

b) Giving Birth


Some lesbians wish to include a known donor in the child’s life in some capacity ranging from “friend” to “father.” Others do not want the donor involved in any way, other than as a gratuitous provider of semen. Using a known donor does not provide any security to a lesbian family who wishes to parent with autonomy. While we routinely prepare donor contracts, these are very likely unenforceable and really only function as statements of intent. Access and child support are the rights of the child and cannot be bargained away. [Willick v. Willick, [1994] 3 S.C.R. 670; Richardson v. Richardson, [1987] 1 S.C.R. 857 at 869; Young v. Young, [1993] 4 S.C.R. 3 at 60.]
i) Birth Registration: The Immediate Benefit of Two Legal Parents

In 2005, four lesbian families, known as the Rutherford Applicants, commenced a proceeding in the Superior Court of Justice (Family) asking for recognition of their parentage immediately on their children's birth registrations under the Vital Statistics Act ["VSA"]. Inclusion of both mothers' particulars on the Statement of Live Birth would provide the listed parents with presumptive proof of parentage. That is, the listed parents would be considered parents absent proof to the contrary. The VSA birth registration document is what most people rely on to provide evidence of parentage when dealing with daycares, schools, border crossings and with other third parties in their day-to-day lives.

The Rutherford Applicants also asked for declarations of parentage under s. 4 of the CLRA. A declaration of parentage is a declaration in rem -- it is conclusive proof for all purposes that a person is a parent of a child. Most parents have no need for CLRA declarations, but the Rutherford Applicants were concerned by the ruling of Justice Aston in AA v. BB v. CC, the case of a lesbian family who parent with an involved father, which held that declarations of parentage were not available to two mothers under principles of statutory interpretation.

The Rutherford Applicants wanted secure parental recognition for their families and for other lesbian parents and children. All the children of the Rutherford Applicant families were included as parties to the litigation and made their own s. 15 and s. 7 Charter claims.

The four Rutherford Applicant families included married spouses Melanie and Mel. Melanie gave birth to twins Emerson and Alexander, and Mel impregnated her wife using her fertilized ova. Both women are biological parents: Melanie is the gestational mother and Mel the genetic mother. After they started the Rutherford proceeding, the
government agreed that they were both parents and allowed both to be listed on their children's Statements of Live Birth.

Rutherford Applicants Veronica and Rosemarie together decided to have a child, and are the mothers of daughter Ayoka. Only Rosemarie was recognized as Ayoka's mother on the Statement of Live Birth. Rosemarie said, "it is an insult and a lie that Veronica is non-existent as Ayoka's parent. It jeopardizes Ayoka's security."

Applicants Bonnie and Beatrice married and wished to expand their family, giving birth to a son, Samuel. After litigation commenced, Bonnie was diagnosed with breast cancer before Beatrice had any legal recognition of her parentage. If Bonnie had died without Beatrice having parental recognition, Samuel's relationship to Beatrice would have been uncertain and vulnerable. A family adoption order is not possible in the event of the death of the birth mother, or separation, as the parties are no longer "spouses".

Applicants Rachel Epstein and Lois Fine are parents of Sadie Rose Epstein-Fine, now fourteen years old. While Rachel was pregnant, Lois cooked for her, tied her shoes when she could not bend over, attended the midwife appointments, was present at the birth and cut Sadie's umbilical cord. Only Rachel was recognized as Sadie's mother on the Statement of Live Birth. Sadie swore an affidavit in the Rutherford proceeding describing her worries - how Lois might not be recognized as her mother by medical staff; "faking" her signature on her passport to reflect her legal name; and remembering to lie at border crossings and say she only has one mother. Sadie deposed:

I just want both my moms recognized as my moms. Most of my friends have not had to think about things like this they take for granted that their parents are legally recognized as their parents. I would like my family recognized the same way as any other family, not treated differently because both my parents are women.

Most kids understand that I have two moms. But a few kids are mean or just do not understand. They ask who my "real" mom is. I explain that both of my moms are my real moms. Some adults do not understand either. It would help if the government and the law recognized that I have two moms. It would help more
people to understand. It would make my life easier. I want my family to be accepted and included, just like everybody else's family.

Imagining winning the case, it would feel amazing. It would feel like we would not have to lie anymore. We would not have to worry about getting in trouble. Nobody could question who my mothers are anymore. I would feel more secure and safer. We could tell the truth. I could just be who I am, and sign my own signature, Sadie Rose Epstein Fine.

On June 6, 2006, Sadie and the other Rutherford Applicant children won their case. Justice Rivard struck down the birth registry scheme of the VSA as unconstitutionally discriminating against same-sex families. The Court said:

Lesbian mothers lack even a language to identify themselves. Given this overall context of homophobia and heterosexism, it makes an even bigger difference to them for the government to recognize their parental relationships. Failure to recognize these relationships perpetuates views that there is something wrong or unnatural about their families. Rather than the law seeking to remedy their historic disadvantage, it is placing additional burdens upon them, and is therefore discriminatory. Likewise, for children of lesbian mothers, who are even more vulnerable than their parents to the lack of symbols of their families in popular culture, exclusion of their parents from birth registration furthers this vulnerability. [Rutherford at para. 205]

Justice Rivard suspended the declaration of invalidity for 12 months to give the government time to correct the constitutional violation. The government did not appeal.

Justice Rivard also granted declarations of parentage under s. 4 of the CLRA in favour of both mothers. He relied on his parens patriae jurisdiction but noted that if there was no authority under parens patriae to grant the relief requested, then the CLRA discriminated against lesbian co-mothers in a manner that could not be justified in a free and democratic society.

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9 The term "co-mother" is used throughout to describe lesbian non-birth mothers since it is a more positive articulation of their status, rather than non-biological or non-birth mother, which frames their identity as a negative, as “not” biological mother.
It is respectfully submitted that it was not open to the Court to decline a constitutional remedy. Justice Rivard specifically found that the CLRA had a discriminatory effect on lesbians, and there was no s. 1 justification. The impugned provisions of the CLRA were found unconstitutional, but Justice Rivard declined to make a specific remedial order under the Charter. Perhaps he wished to defer to the Court of Appeal, which was to be considering the same issue in AA v. BB v. CC. Still, a law that is unconstitutional is, to the extent of the inconsistency, of no force and effect. [Halpern at paras. 149-151; Charter, ss. 52.]

Even though the constitutional remedy was limited to the VSA, and the CLRA was left untouched, once again, it was the Court that was required to protect the equality rights of same-sex families. The Government hotly contested the recognition of lesbian co-mothers on their children’s Statements of Live Birth in the Rutherford proceeding. It claimed that the VSA birth registration document was meant to capture biological particulars, although the evidence was overwhelming that straight families using donor sperm or egg registered the particulars of the intended parents without question.

In fact, through cross-examination of the Deputy Registrar General of Ontario, we obtained an internal government document that expressly required the rejection of applications by "same-sex parents". It seems there was a conscious effort to "vet" the gender/sexual orientation of applicants and to reject the birth registrations of lesbian mothers.

The Government also failed, and continues to fail, to respond appropriately to problems with the CLRA. In the Rutherford litigation, the Government said that lesbian co-mothers did not need recognition under the VSA because they could get CLRA declarations. The Government consented to the granting of CLRA declarations in Rutherford, alleging that there was authority to do so, despite the ruling otherwise in AA v. BB v. CC. The Government then declined to participate at the hearing of AA before the Court of Appeal, failing to appear so as to state its support for the granting of declarations of parentage to two mothers.
The Government also stated in Rutherford that it would be possible to have three legally recognized parents at least in circumstances of egg donation [that is, the gestational mother, the genetic mother and the biological father]. Again, the Rutherford Applicants, now party interveners in AA v. BB v. CC, had to alert the Court of Appeal to the Government's position. The Government has also seemingly implicitly recanted from its position in its legislative response to Justice Rivard's striking down of the birth registry scheme under the VSA, as the legislative amendments do not allow for recognition of three parents.

The Government's purported answer to the Rutherford ruling was introduced August 24, 2006. The Government proclaimed a legislative amendment that had been on the books since 1994 but never proclaimed, alongside a regulation. It was the "easy fix" to the VSA, because the change could be made without debate in the Legislature.

The VSA will now permit, effective January 2, 2007, that two lesbian mothers may register their child's birth as parents, but only if the father is unknown and conception is by assisted reproduction. Ontario now joins British Columbia, New Brunswick, Manitoba, Alberta and Quebec in recognizing, without a court order, the parentage of lesbians who have a child together, at least in some circumstances.

As usual, though, the Government has attempted to do the minimum required, and has failed to consider the equality rights of co-mothers in crafting its remedy. The violation of equality rights of lesbian families continues for those who use known donor sperm, even for families involving two biological mothers. The Government has avoided a comprehensive examination of its exclusionary legislation, and in so doing, maintains its discrimination.

If it causes psychological distress to deny a lesbian co-mother status as her child's parent, as the Government essentially admitted by its failure to appeal Rutherford, how is there less distress because there is a known donor or an involved father? Of course, the
offence to dignity is the same. The VSA continues to discriminate against lesbian co-
mothers. Non-recognition of parentage is dehumanizing and psychologically distressing. 
As Rutherford Applicant Lois Fine deposed, "When your heart overflows with aching 
love and devotion for your child, the failure to recognize your mothering ... invalidates 
your very humanity."

ii) Declarations of Parentage: AA v. BB v. CC

AA v. BB v. CC involves lesbian moms who are spouses and the primary caregivers of 
their child, and who wish to acknowledge their child’s father as a parent. The co-mother 
was without the parental status available to the biological mother and father. An 
adoption order in favour of the co-mother would extinguish the parental status of the 
father. The parties therefore sought a declaration of parentage in favour of the co-mother 
under the CLRA or the Court’s parens patriae power, on consent. At first instance, they 
were unsuccessful.

The parties appealed and asked to advance constitutional arguments for the first time. 
The parties declined to adduce evidence in support of their Charter claims, on the basis 
that the discrimination was obvious, but the Rutherford Applicants obtained status as 
added party interveners and provided the Court with the extensive evidentiary record 
from their hearing.

The amicus curiae, the Rutherford Applicants as party interveners, and the Office of the 
Children's Lawyer argued the CLRA discriminated against the appellant co-mother and 
her child on the basis of family status and advocated a remedy that would advance the 
equality rights of diverse families in Ontario. The Appellant AA, and the Rutherford 
Applicants, also argued that the CLRA discriminated on the basis of sexual orientation 
and sought recognition for all same-sex families that involve a different-sex biological 
parent in their children's lives.
Added party intervener Alliance for Marriage and the Family -- a coalition including REAL Women and the Evangelical Fellowship -- argued that there was no discrimination. Declarations of parentage were meant to be available to biological parents only, and parents in many families were excluded from parental recognition by way of the CLRA.

On January 2, 2007, the Ontario Court of Appeal granted the lesbian co-mother, status as the parent of her child. The Court ruled that the CLRA did not permit declarations in favour of two mothers as a matter of statutory interpretation and declined to rule on the constitutional arguments. Instead, the Court granted the co-mother status as a parent using its *parens patriae* jurisdiction.

The Court held that the drafters of the CLRA had not contemplated the realities of modern family forms. There was no intention to exclude lesbians, or other non-biological parents, from parental recognition. Rather, the legislative gap had become obvious now as a result of changing social circumstances. The Court was required to use its *parens patriae* power to fill the gap, in accordance with the child’s best interests, and the parentage of the co-mother was accordingly recognized.

The Alliance for Marriage and the Family, as intervener, is now seeking standing to bring an appeal to the Supreme Court of Canada. This attempt at standing is expected to be unsuccessful, but represents another economic and emotional stress for this family.

The Court of Appeal judgment’s is a great relief for the individual *AA v. BB v. CC* family. It is expected that lower courts will also exercise their *parens patriae* jurisdiction in similar circumstances for other families, but given the fact-specific, highly discretionary nature of *parens patriae* there is concern about outcomes for less traditional family formations or those resident in conservative jurisdictions not as familiar with these issues.

The ruling permits the CLRA to discriminate on its face in at least sections 1(1), 4, 8, 12 and 20(1). The statute continues to assume that all children are born from one man and
one woman and these are the child's intended and actual "real" parents. The CLRA recognizes only this dominant nuclear family paradigm, excluding other family forms from respect and recognition. This is family status discrimination.

Another constitutional case, at great expense, or government action, is needed to recognize and affirm the realities of all families, rather than enforce traditional family forms as privileged. The equality guarantee of the Charter requires that we move past fear and rejection of what is unfamiliar, look at the effects of legal exclusion from the perspective of the rights claimant, and see the common humanity that unites us all. Children in postmodern families and their parents should not be marginalized, nor the child’s best interests threatened, because their families are "different" from the culturally dominant, yet increasing statistically rare, norm of the nuclear family.

c) Gay and Lesbian Custody Issues

i) Breakdown of a Different-Sex Relationship

Cases involving the breakdown of a heterosexual relationship in which a parent has “come out” as gay or lesbian are some of the most difficult custody and access cases to litigate. There is a serious risk of discrimination against the gay or lesbian parent. The "best interests" test, while appearing to be neutral, is often not applied in a manner that recognizes the requirements of equality.

As an example, the decision of Bezaire v. Bezaire (1980), 20 R.F.L. (3d) 358 (Ont. C.A.), establishes that sexual orientation is irrelevant -- except insofar as it affects the best interests of the child. Query whether anyone would suggest that heterosexuality is "irrelevant except as insofar as it affects the best interests of the child". Obviously not. The better view, and the required view, adopting an equality-rights focussed approach, is that sexual orientation, without more, is irrelevant. Unfortunately, this approach is not always applied in practice.
In one of our cases a few years ago, a judge stated in open court that he had “no problem” with our client “as a mother”: it was her lesbian “lifestyle” with which he “had a problem.” Interim custody was awarded to the father and the mother was ordered to vacate the matrimonial home that afternoon. Our client was a devoted stay-at-home mom who had operated a daycare out of the family home. Such clearly discriminatory judicial reasoning is abhorrent and has no place in a system of law that cares about justice. However, such incidents still occur with alarming frequency.

Lawyers are well-advised to present the court with the extensive sociological and psychological evidence that illustrates that gay and lesbian parenting has no adverse impact on, and may in fact be of benefit to, children. It may be helpful to refer judges to the Ontario case of Re K (1995), 15 R.F.L. (4th) 129 (Ont. Ct. Prov. Div.) in which Judge Nevins summarizes an array of expert evidence and effectively rebuts any myths with respect to a detrimental impact of a parent's sexual orientation on children.

As many academics have noted, judges are apt to distinguish between "good" and "bad" gay and lesbian parents on the basis of whether or not the parent is "discreet" (S. Gavigan, "A Parently Knot: Can Heather Have Two Mommies?" in Herman and Stychin, eds. Legal Inversions: Lesbians, Gay Men and the Politics of Law (Philadelphia: Temple University Press, 1995)). "Bad" lesbian mothers are those who are open about their sexual orientation and who participate in the gay and lesbian community. Arnup and Boyd conclude that these women "are almost certain to lose custody of their children to their ex-husbands" (K. Arnup and S. Boyd, "Familial Disputes? Sperm Donors, Lesbian Mothers and Legal Parenthood" in D. Herman and C. Stychin, eds., Legal Inversions: Lesbians, Gay Men and the Politics of Law (Philadelphia: Temple University Press, 1995)). While that statement is likely a significant over-statement today, there are still demands of "discretion" which attempt to require gay and lesbian parents to suppress and deny their full personhood.

Courts threaten to punish people for participating in their cultural community, for being an "activist" for lesbian and gay rights, for failing to demonstrate appropriate shame, and
for falling in love. The approach is discriminatory and unacceptable (It is also contrary to the best interests of the child. The American Psychological Association notes that, by being open with their children about their relationships and by living with their same-sex partners, gay and lesbian parents assist their children to become well-adjusted adults.) [American Psychological Association, Lesbian and Gay Parenting: A Resource for Psychologists (District of Columbia, 1995)].

Some have suggested that the only way to ensure consistent results in custody and access cases involving gay and lesbian parents is to codify a requirement that sexual orientation is irrelevant to the best interests of the child. Others suggest that sexual orientation must be a relevant consideration, and that "sexual orientation can never be entirely irrelevant in a society that continues to be homophobic and to take heterosexuality as its norm.” [Susan Boyd, "Lesbian (and Gay) Custody Claims: What Difference Does Difference Make?” (1998) 15 C.J.F.L. 131]

Since children of a gay or lesbian parent are likely to encounter homophobia regardless of which parent has custody, under this analysis, an appropriate factor is which parent is better suited in assisting the child in dealing with issues of sexuality, including sexual orientation discrimination, in a constructive and supportive manner. The gay, lesbian or bisexual parent would therefore offer advantages in being able to support and nurture the child.

The safest approach is for counsel to address the issue of sexual orientation directly, supported by substantial psychological and sociological evidence. It is clearly necessary to demand equal respect for the life of the gay or lesbian parent in accordance with our equality rights jurisprudence. The "best interests" test must be framed in an unbiased manner.

This approach is articulated, in the context of gender identity, in the decision of Forrester v. Saliba (2000), 10 R.F.L. (5th) 34 (Ont. Ct. J.). In that case, my client was a lesbian male-to-female transsexual father. The mother alleged that the gender transition of the
father constituted a material change in circumstances such that the parties’ shared parenting arrangement was no longer in the child’s best interests. The mother also argued that a change of custody was warranted as a result of the father’s depression and gender dysphoria at the time of the transition.

Judge Wolder held that the transition was irrelevant to a determination of the child’s best interests. He also recognized that the period of depression, now in remission, could not constitute a material change. Material change must be assessed as at the time of trial.

In this manner, the court rejected the traditional stigma of mental illness and confirmed that transsexuality is not a relevant factor in making a custody determination. Rather than branding a parent as necessarily flawed, the court understood mental illness as an illness like any other, from which a person may experience successful treatment. Accordingly, there was no material change requiring a change in the custody arrangement.

**ii) Breakdown of a Same-Sex Relationship**

In a claim for custody or access involving the breakdown of a gay or lesbian relationship where the relationship with the child has been formalized legally, the parents should start off on an equal footing. Where only one party is the legal parent and the other a social parent, the court could still order custody or access in favour of either party. “The best interests of [the child] are, of course, what will govern any decision relating to custody in this matter. In this fundamental principle, same-sex parents seeking custody are no different from opposite-sex parents seeking custody.” [Murphy v. Laurence, (2002) CarswellOnt 1281 at para. 12]

A court would be required to consider the bond between the child and each parent and each parent's parenting abilities, in addition to the biological or legal connection between parent and child. Buist v. Greaves, [1997] O.J. No. 2646 (Gen. Div.) involved a lesbian co-mother who was seeking sole custody and a declaration that she was a mother of the
child. The couple planned for the child's birth together and shared in all aspects of his life. After the parties separated, the co-mother moved out and had access to the child. The birth mother was offered a job in Vancouver and wished to move there with her son. Justice Benotto held that, although the co-mother was very involved in the child's care, the birth mother was the primary caregiver. It was in the child's best interest to be with the birth mother, and to maintain regular contact with the mother's former partner. The co-mother's claim for sole custody was denied because the conflict between the parties made joint custody unworkable.

There is an unreported Ontario decision in which interim sole custody was awarded to a lesbian co-mother. Re L. and S. involved two children, one adopted legally by the applicant and the other conceived by alternative insemination by her partner during their relationship. On consent, the Court ordered that the applicant retain sole custody of the adopted child, joint legal custody of the other child, and that the children would be primarily resident with the applicant. The Court relied on the CLRA, which states that the parties to an application for custody and access in respect of a child shall include a person who has demonstrated a settled intention to treat the child as a child of his or her family.

In practice, at least in Metro Toronto, there seems to be a strong tendency towards joint custody and generous time to the non-biological parent in same-sex family disputes. This is generally a welcome development. While some American courts have severed important relationships between a child and a gay or lesbian parent, Canadian courts are able to recognize that a child’s love for his or her parent is not based on biological connection, but on bonds of care giving and love. Still, our desire to avoid discriminatory reasoning cannot result in a refusal to consider the facts of each individual case or the superficial application of “equality” reasoning.

Indeed, in an effort to respect the connection of the co-mother, I worry that biological mothers are sometimes being treated quite harshly, similar to the frequent disparate treatment of mothers and fathers in different-sex families. In my experience in these
cases, biological mothers are sometimes “punished” for being “too focussed” on work or other pursuits, rather than their children. Meanwhile, fathers’ sometimes relatively lesser levels of commitment and care of children are celebrated. In the lesbian context, it seems expected that a biological mother will want to be more involved in her child’s life, and failure to do so is perceived as her abandoning her maternal role. Little recognition is given to the possibility of any biological attachment arising from pregnancy or lactation. All too often we have seen judges eager to immediately grant significant time and joint custody to co-mothers, regardless of the particular facts of the case. I suppose this is “equal opportunity.” The same treatment is often accorded to fathers in a different-sex context who have been little more than sperm donors.

This raises important and interesting questions about what makes a relationship with a parent valuable to a child. Is it mere biological connection or psychological attachment? What quality of relationship constitutes attachment? If the adult parties live together and have a relationship, are they necessarily both parents to a child or does that require a proven relationship with the child herself?

It will also be interesting to see the judicial response to lesbian families who choose not to, or who are unable to, pursue an adoption or declaration of parentage to secure legal recognition now that such mechanisms are available. In the U.S., once co-mothers could adopt, those who did not were frequently accorded limited rights and obligations. In my view, this focus on legal status could obscure proper attention on the child’s best interests and should best be avoided here.

Another area of interest for future development will be custody and access claims by known sperm donors. As discussed, custody and access are the rights of the child. Although lesbians spouses who intend to parent autonomously, without involvement by the biological father, frequently enter into donor contracts that provide for no or limited contact, it is only a matter of time before a dispute arises that must be resolved by the courts. Lesbians in the United States have had very little success in defending their vision of their child’s family from intrusion by donors.
d) Child Support

Where a person has demonstrated a settled intention to treat a child as a child of his or her family, there is an obligation of support for the child. However, the table amount is not necessarily used if there is no “natural” or legal relationship. The Ontario Guidelines provide in section 5 that:

Where …the parent is not a natural or adoptive parent of the child, the amount of the order is, in respect of that parent…, such amount as the court considers appropriate, having regard to these guidelines and any other parent’s legal duty to support the child.

Child support claims for same-sex families may be impacted by section 5 of the Guidelines. Lesbian parents using unknown donor semen will likely no longer obtain adoption orders or declarations of parentage, but will rely on their Statement of Live Birth showing both mothers’ names to deal with third parties and institutions. If these mothers, who jointly planned the pregnancy, are not recognized as the “natural parents” of their child, the payor may seek to rely on section 5, although I expect this would be unsuccessful. Still, the constitutional problems with the phrase “natural parent” have been discussed at length.

The interesting question arises in cases where there is a known and uninvolved donor. Many lesbian families are unwilling to adopt their own children and will simply rely on a Statement of Live Birth showing both mothers, even where the donor is known, despite the terms of the VSA requiring that only the birth mother’s particulars appear in such circumstances.

In my community education work, most lesbian families strongly object to differential treatment on the basis of whether they paid a sperm bank or used gratuitous sperm from an uninvolved friend. The exclusion of the lesbian co-mother offends her dignity regardless of the source of the semen. The other approach taken by lesbian families is to
use two sperm donors, perhaps a gay male couple, for the same cycle of insemination. In this way, they quite cleverly claim, the father is “unknown”.

In the event of a child support claim in these cases, who will bear primary financial responsibility for the child? Who is the “natural” parent? An uninvolved donor who masturbated into a vial and who has had no involvement otherwise in the child’s life, or the co-mother who planned the pregnancy with the birth mother and has acted as primary caregiver for the child? The Guidelines might suggest that the uninvolved donor should be obliged to pay table child support at a minimum, regardless of the parties’ intentions and the child’s realities, and that the lesbian co-mother ought potentially to be subject to a lesser obligation.

Likely, the co-mother would be obliged to pay the table amount of support. Courts have, in my view rightly, held that section 5 of the Guidelines should have no application where child support is sought and ordered where the non-biological parent made an unconditional commitment to stand as a stepparent, and the biological parent is not before the court or the subject of a previous support order. [Dovicin v. Dovicin, (2002) CarswellOnt 1745 at para. 27] In Ballmick v. Ballmick (2005), CarswellOnt 1205 at para. 21, Justice Maresca required child support from a non-biological father, even though he had been deceived as to paternity, writing:

Modern society has moved away from a rigid definition of the family. Illegitimacy has been abolished. Marriage is not a pre-requisite for support. Same-sex couples raise loving, healthy families. There has been a recognition both by society at large and our legal system that it is the relationship that matters, not the legality. It is the sense of family and bonding between parent and child that is important, not whose DNA is lodged in the child's cells.

DNA does matter in determining the obligation of the sperm donor, however. He is going to be required to pay table support too. The case of C.(K.) v. B.(S.) [2003] O.T.C. 227, 6 R.F.L. (5th) 22 (S.C.J.), confirms, in accordance with the plain language of the section, that the biological parent cannot use section 5 to reduce his or her obligation to pay the table amount of support under the Guidelines. In Wright v. Zaver (2000), CarswellOnt 2208, a father who had no contact with his son for 15 years was ordered to
pay the table amount of support although the parties had agreed, and there was a court order, that he pay only a small lump sum. Whatever the parents’ intentions, child support and access are the right of the child and these rights cannot be bargained away by tying together access and support.

Section 5 of the Guidelines is offensive to non-biological/non-legal parents in privileging the responsibilities of a “natural” or adoptive parent, as though these relationships are inherently more important. It unfairly assumes the lesser significance and corresponding lesser obligation of a de facto parent. Of course, it is always open to a person who stands in the place of a parent to “do the right thing” and simply pay the table amount.

A biological father who objects to paying the full table amount, when the same is not required from non-biological fathers, has mounted a constitutional challenge claiming that section 5 discriminates against him. This approach is misguided in my view. There is no violation of the human dignity of the biological parent pursuant to section 5, and the applicant cannot attempt to raise the infringement of someone else's rights for his own benefit.

While the provision might offend the dignity of de facto parents and the children of these parents, it is settled law that a party cannot rely upon the violation of a third party’s Charter rights to seek a constitutional remedy. [R. v. Edwards, [1996] 1 S.C.R. 128, at p. 145; Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342, at p. 367] Litigation by a child directly affected by the impugned provision, or a parent receiving less support, appears to be the "reasonable and effective manner" in which one would expect an allegation of an equality rights breach to be raised with respect to section 5 of the Guidelines.

6. Conclusion

A new day has dawned in the legal recognition of same-sex families. In the span of less than a decade, Canadian law has afforded new protections, from equal spousal status for
the purposes of support, to equal marriage and property rights, and more recently, equal parental status by birth registration and declaration of parentage.

Canada is a leader in the worldwide civil rights movement for equality for same-sex families. We have achieved much for which we can be proud, but there is still work to do to protect the people whom we hold closest to our hearts, our children. Old ideas about the sex and number of adults in a family must not trump the new realities in the age of the postmodern family. All children need the best we can achieve in family law to protect their relationships with their parents. This requires a comprehensive rewrite of parenting-related statutes, without further delay.