PARENTING BEYOND THE NUCLEAR FAMILY: *DOE V. ALBERTA*

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Can a single mother maintain her parenting rights if she is involved in an intimate relationship with a man? Or will they be legally assimilated into a nuclear family, with its attendant rights and responsibilities? That is the question at issue in *Doe v. Alberta*.[1] Jane Doe lived with John Doe in an unmarried relationship. She said she wanted to have a baby. He did not. She decided to have a child on her own, through alternative insemination from an unknown sperm donor. A child was born. Jane Doe and John Doe want to continue their relationship, but neither of them want John Doe to be a parent. They have asked the courts to enforce an agreement stating that she, not he, is the parent. Jane Doe argues that her parental liberty rights under s. 7 of the *Canadian Charter of Rights and Freedoms*[2] should allow her to make this decision, and protect her exclusive parenting rights. However, the courts have refused. The Alberta Court of Appeal has even suggested that the mere fact that John Doe lives in a relationship with Jane Doe inevitably makes him a father. *Doe v. Alberta* raises questions about the recognition of alternative families and the possibility of parenting beyond the traditional nuclear family. To what extent can or should parents be able to structure their parenting relationships and intimacy relationships outside of the roles and assumptions of the traditional, two-parent family?

I. *DOE V. ALBERTA*: FACTS AND FINDINGS

Jane Doe and John Doe cohabit in an unmarried relationship. Jane Doe is described as a professional, who has worked as such for more than ten years. Jane Doe expressed her desire to have a child. John Doe did not wish be a father. More specifically, he did not wish to father a child, stand in the place of a parent, act as a guardian, or support a child. Jane Doe decided to have a child on her own, through assisted insemination from an unknown sperm donor. Her child was born in August 2005. Both Jane and John Doe want to continue their relationship. They agreed to govern any rights or obligations with respect to the child of Jane Doe through an express written agreement which, at the time of the application, had yet to be executed. The agreement was to specify that John Doe is not the father of the child, and does not have any parental rights or obligations towards Jane Doe's child. To that end, they brought an action in the Alberta Court of Queen's Bench seeking a declaration that they had the right to enter into an express, binding contract detailing their agreement that she, not he, is the parent.

John Doe is not the biological or adoptive father of Jane Doe's child. The legal question is whether he would nevertheless be found to "stand in the place of a parent."[3] According to s. 48 of the *Family Law Act*, a person could be found to stand in the place of a parent if he

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1 2005 ABQB 885, 390 A.R. 227 [*Doe v. Alberta* (Q.B.)], aff'd 2007 ABCA 50, 404 A.R. 153 [*Doe v. Alberta* (C.A.)], leave to appeal to S.C.C. refused, 31986 (12 July 2007).

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

3 *Family Law Act*, S.A. 2003, c. F-4.5.

(or she) is the spouse of the mother or in a relationship of interdependence of some permanence, and has demonstrated a settled intention to treat the child as his own child. Section 48(2) then provides a list of factors to be considered in determining whether a person has demonstrated such a settled intention, each which focus on some dimension of the relationship between the child and the putative parent.[4] A person found to stand in the place of a parent under this section would then incur child support obligations. He would also be in a position to apply for guardianship and access rights to the child. Jane and John Doe seek to enter into an agreement to preclude the operation of this section by stating that John Doe has no intention to stand in the place of parent.

The Alberta Court of Queen's Bench dismissed their application.[5] Justice Martin reviewed s. 48 of the *Family Law Act*, but was of the view that any determination as to whether John Doe does in fact meet the criteria of standing in the place of a parent was to be determined in the future, through a "contextual, holistic and ex poste inquiry into the relationship between the child and [the] particular person."[6] In her view, the applicants could not "by agreement preclude the possibility that a Court may sometime in the future find John Doe to stand in the place of a parent."[7] While intention is relevant in this question, it is not determinative. Justice Martin held that although the *Family Law Act* allows parties to enter into agreements on issues of child support, guardianship, and parenting, such agreements are not binding or determinative.[8] The Court further held that this restriction on the ability of Jane and John Doe to enter into a binding agreement did not violate s. 7 of the *Charter*.[9] According to Martin J., "the liberty interest does not give parents unfettered discretion to make decisions on behalf of their children."[10]

Jane and John Doe appealed, but the Alberta Court of Appeal also dismissed their claim.[11] Justice Berger, writing for the Court, held that John Doe could be found to be standing in the place of a parent.[12] The appellant argued that John Doe could not be held to have a

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4 *Ibid.*, s. 48(2).

5 *Doe v. Alberta* (Q.B.), *supra* note 1.

6 *Ibid.* at para 23.

7 *Ibid.*

8 Justice Martin, *ibid.* at para. 37 wrote that:

> [T]he Act confers upon the Court a supervisory jurisdiction to make orders in relation to support, guardianship and parenting despite any agreements between the parties.… The Act balances the rights and responsibilities of parents with the need to protect and provide for children and does not therefore allow a categorical preference to be given to the parent's desires over the best interests of the child. The impugned powers permit some deference to private ordering but give discretion to the courts to ensure that agreements between parents respecting children meet the childrens needs.

9 Although Martin J. reviewed the liberty arguments of both Jane and John Doe at some length (see *ibid.* at paras. 46- 67), she concludes that neither had their liberty interests violated: "The Applicants have not been prevented from making any fundamental personal choices. The female Applicant made a decision to have a child and both Applicants made a decision as to whom they wish to reside with" (*ibid.* at para. 65).

10 *Ibid.* at para 65. She further held that there was no violation of security of person within the meaning of s. 7, and even if she was wrong in relation to these interests, that the applicants "failed to demonstrate that any deprivation of liberty or security of the person is outside the 'principles of fundamental justice'" (*ibid.* at para. 74).

11 *Doe v. Alberta* (C.A.), *supra* note 1.

12 *Ibid.* at paras. 23, 28.

demonstrated intention to the treat the child as his own because of his express statement of intent to the contrary. The Court of Appeal responded that the answer to this argument was to be found in the relationship between Jane and John Doe: "The 'settled intention' to remain in a close, albeit unmarried, relationship thrust John Doe, from a practical and realistic point of view, into the role of parent to this child." [13] In other words, the fact that John Doe has chosen to remain in a relationship with Jane Doe will invariably make him a father. According to the Court, the intention to be a partner leads to the practice of being a parent.

On the *Charter* argument, the Court of Appeal held that John Doe was not deprived of any ability "to order his life and his respective rights and obligations towards Jane Doe's child as he saw fit. In fact, he chose freely to enter into a relationship of interdependence of some permanence with the mother of a newborn child."[14] Any support obligations that may arise, therefore, "flow from the choice made by John Doe."[15] He chose to continue the relationship with the mother. Therefore, he chose to become a parent. In two short paragraphs, the parental liberty argument was thereby dismissed.

The Court of Appeal's reasoning is troubling on a number of grounds. First, its interpretation of the test for standing in the place of a parent is unsustainable on the face of the Alberta legislation, as well as Supreme Court of Canada jurisprudence. Second, the Court failed to sufficiently engage with the parental liberty claims under s. 7, particularly those of Jane Doe. Third and more generally, the Court has simply allowed the norm of the traditional nuclear family to unreflectively determine the case, rather than seriously engaging with the challenging issues that this case presents for those who seek to live in alternative family forms.

II. STANDING IN THE PLACE OF A PARENT

Doe v. Alberta raises the question of the appropriate test for standing in the place of a parent. More specifically, it raises the question of the role of intention in establishing legal parentage, particularly in relation to this category of social parents. Section 48(1) of the *Family Law Act* states that:

> A person is standing in the place of a parent if the person
> (a) is the spouse of the mother or father of the child or is or was in a relationship of interdependence of some permanence with the mother or father of the child, and
> (b) has demonstrated a settled intention to treat the child as the person's own child.[16]

As the Court of Appeal held, Jane and John Doe are living in a relationship of some permanence; therefore, John Doe fits within the first criteria. However, the question is whether he has a demonstrated intention to treat the child as his own. Section 48(2) sets out the specific criteria for determining whether such a settled intention exists, including the child's age, the duration and nature of the relationship with the child, whether the person has

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13 *Ibid.* at para 22.
14 *Ibid.* at para. 28.
15 *Ibid.*
16 *Supra* note 3, s. 48(1).

considered applying for guardianship or adopting the child, any financial support provided for the child, the nature of the child's relationship with any other parent, along with the more open ended "any other factor the court considers relevant."[17]

The Court of Appeal does not, however, engage with these factors. After noting that the legislation allows the court to consider any other relevant factor, the Court focuses on the question of intention in determining whether a person stands in the place of a parent. The Court cites a lengthy passage from *Chartier v. Chartier*,[18] the leading Supreme Court of Canada authority on when a person stands in the place of a parent, decided under the federal *Divorce Act*:[19]

> What must be determined is the nature of the relationship…the court must determine the nature of the relationship by looking at a number of factors, among which is intention. Intention will not only be expressed formally. The court must also infer intention from actions, and take into consideration that even expressed intentions may sometimes change. The relevant factors in defining the parental relationship include, but are not limited to, whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on the ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; the nature or existence of the child's relationship with the absent biological child.[20]

Despite the Supreme Court's emphasis in this passage on examining the relationship between the child and the parent, the Alberta Court of Appeal in *Doe v. Alberta* focuses exclusively on the issue of intention, holding that "[s]o while a person's 'actual intention' is relevant, it is also not determinative," and that intention is to be determined objectively, based on how a person acted.[21] The Court then shifts its focus to the relationship between Jane and John Doe, as evidence of such objective, settled intention:

> The 'settled intention' to remain in a close, albeit unmarried, relationship thrust John Doe, from a practical and realistic point of view, into the role of parent to this child. Can it seriously be contended that he will ignore the child when it cries? When it needs to be fed? When it stumbles? When the soother needs to be replaced? When the diaper needs to be changed?
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> In my opinion, a relationship of interdependence with the mother of the child in the same household, will likely create a relationship of interdependence of some of some permanence, *vis-à-vis* the child. John Doe's subjective intent not to assume a parental role will inevitably yield to the needs (and not merely the physical needs) of the child in the same household.[22]

There is virtually no interrogation of the actual relationship between John Doe and the child, despite the statutory criteria and the judicial approach in *Chartier*. According to the Court

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17 *Ibid.*, s. 48(2).
18 [1999] 1 S.C.R. 242 [*Chartier*].
19 R.S.C. 1985 (2nd Supp.), c. 3.
20 *Doe v. Alberta* (C.A.), *supra* note 1 at para 16, citing *Chartier*, *supra* note 18 at para. 39.
21 *Doe v. Alberta* (C.A.), *ibid.*
22 *Ibid.* at paras. 22-23.

of Appeal's decision, whether John Doe has a settled intention to remain in a relationship of some permanence with Jane Doe becomes the only question. This focus on the relationship between John and Jane Doe as determinative of his parenting status is unsustainable on the face of the legislation and the leading judicial approaches to determining whether a person stands in the place of a parent. The factors set out in s. 48(2) of the *Family Law Act* and by the Supreme Court in *Chartier* are all directed towards the relationship between the person and the child, not the relationship between the person and the mother. Moreover, if this threshold were correct, Jane Doe — and any mother like her — would be at risk of losing her exclusive parental rights simply by virtue of beginning to cohabit with a man, regardless of the nature of the relationship between him and the child.[23] It is an approach to standing in the place of a parent in which the parental liberty rights of single mothers would be undermined as soon as they began an intimate relationship with a man.

III. PARENTAL LIBERTY RIGHTS

The Court of Appeal does not engage in any substantive way with the arguments regarding the parental liberty interests of Jane Doe. The Court's reasoning focuses exclusively on the intention and choices made by John Doe, concluding that his liberty rights were not infringed by the legislative scheme. However, another significant issue in the case is the liberty rights of Jane Doe. It is not only John Doe who does not want to become a parent; it is also Jane Doe who wishes to retain her exclusive parenting rights. According to s. 48 of the *Family Law Act*, a person who stands in the place of a parent has support obligations. But, the legislative scheme as a whole has potentially broader implications. If John Doe were found to stand in the place of a parent, according to the basic principles of *in loco parentis*, then he would be in a position to seek other parenting rights under the *Family Law Act*, including guardianship and contact rights. Jane Doe would then stand to lose her exclusive guardianship rights, and the decision-making authority that goes with it.

The Court of Appeal failed to sufficiently appreciate that it is Jane Doe's liberty rights — specifically, her claimed right to retain her exclusive parenting status over her child — that are at stake in this case. Jane Doe represents a growing demographic of single mothers, namely, single mothers by choice.[24] Jane Doe has chosen to have a child on her own, and

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[23] It is reasoning that assumes that if a woman cohabits with a man, he will automatically become responsible for the support of her child. This assumption of women's economic dependency on men is similar to that found in the spouse-in-the-house rules in welfare law. According to these rules, a woman who was in an intimate relationship with a man was deemed to be ineligible for welfare. The assumption was that if she was in an intimate relationship, she would be economically dependent upon him, and therefore should turn to him, and not the state, for her economic support. These rules, and the assumptions of economic dependency that lies beneath them, have been extensively criticized. See e.g. Patricia M. Evans & Gerda R. Wekerle, eds., *Women and the Canadian Welfare State: Challenges and Change* (Toronto: University of Toronto Press, 1997); Margaret Jane Hillyard Little, *'No Car, No Radio, No Liquor Permit':The Moral Regulation of Single Mothers in Ontario, 1920-1997* (Toronto: Oxford University Press, 1998). Canadian courts have held that it is unconstitutional to deem a woman to be a spouse and hence ineligible for welfare simply by virtue of her intimate relationship with a man: see *Falkiner v. Ontario (Minister of Community and Social Services*) (2002), 59 O.R. (3d) 481.

[24] According to the 2006 Census, there were 1.4 million single parent families in Canada, 80.1 percent of whom were headed by women: Statistics Canada, "Table 4: Distribution of census families by family structure, Canada, provinces and territories, 2006," online: Statistics Canada <http://www12.statcan.ca/English/census06/analysis/famhouse/provterr.cfm>. Although no reliable statistics are available for the

wished to retain her exclusive parenting status. She does not want John Doe to become a parent, simply by virtue of her relationship with him. If the threshold of "settled intention" put forth by the Court of Appeal is correct, then she is at risk of losing her parental rights simply by virtue of her intimate relationship. She is left with few choices: she can terminate her relationship with John Doe (and presumably, never enter into another intimate relationship again), or she can accept the dilution of her parenting rights.

Jane Doe argues that the restrictions constitute a violation of her parental liberty rights under s. 7 of the *Charter*.[25] More specifically, she argues that she has the right to make decisions of fundamental importance with respect to her child pursuant to her parental liberty rights under s. 7, and that such decisions should include the ability to decide what role, if any, third parties may play in relation to her child. This is an interesting and novel claim.[26] The Supreme Court of Canada has not yet provided a definitive judgment regarding the existence and scope of a parental liberty right pursuant to s. 7 of the *Charter*. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*,[27] La Forest J., writing for four members of

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number of these single parents who are single by choice, family demographic experts agree that this number is growing. See Anne-Marie Ambert, *One Parent Families: Characteristics, causes, consequences, and issues* (Ottawa: Vanier Institute for the Family, 2006) at 8: "[p]lanned births to and adoption by single women *in the 30-to-45 age bracket* are becoming more common." According to Ambert, social science evidence suggests that these single parent families are a healthy and stabile alternative to the two-parent family: "[t]hese women are generally financially secure, have a support group, and their children are at a relatively lower risk of developing problems" (at 8.) She notes that according to other studies conducted on this demographic of single mothers by choice, they are able to "provide their children with a home environment equivalent to that available in similar two-parent families" (at 8, citing E.G. Menaghan & T.L. Parcel, "Social courses of change in children's home environments" (1995) Journal of Marriage and the Family 57 at 69-84). Ambert further observes that "[t]he older single mother who has planned the birth/adoption encounters fewer structural family complications than couples do for the simple reason that her family structure is less complex: the parental subsystem consists of herself and she does not have to share her parenting role" (at 8). On single mothers by choice, see generally Bernie D. Jones, "Single Motherhood by Choice, Libertarian Feminism, and the Uniform Parentage Act" (2003) 12 Tex. J. Women & L. 419; Jane Mattes, *Single Mothers by Choice: A Guidebook For Single Women Who Are Considering or Have Chosen Motherhood* (New York: Times Books, 1994); Jane D. Bock "Doing the Right Thing? Single Mothers by Choice and the Struggle for Legitimacy" (2000) 14 Gender and Society 62.

25 See *Doe v. Alberta* (C.A.), *supra* note 1 (Factum of the Appellant); *Doe v. Alberta* (C.A.), *supra* note 1, leave to appeal to S.C.C. refused, 31986 (Memorandum of Argument of the Appellant).

26 Jane Doe's claim is distinctive from that claimed by the mother in *Johnson-Steeves v. Lee* (1997), 203 A.R. 192 (Q.B.), aff'd (1997), 209 A.R. 292 (C.A.) [*Johnson-Steeves*]. In *Johnson-Steeves*, the child was the biological child of the two parents. The father agreed to pay child support, but the mother subsequently made an order denying the father access to the child. She argued, *inter alia*, that her s. 7 *Charter* rights included "her right to decide what type of family she would create in which to raise her child" ((C.A.) at para. 19). Both the trial court and the Court of Appeal disagreed. The Court of Appeal, although doubtful that s. 7 even applied, held that if it did, "we reject the suggestion that s. 7 creates a right for the custodial parent to decide on a family model which excludes the other parent f[ro]m the life of the child, especially where such a model is inconsistent with the best interests of the child, as found by the Trial Judge in this case. If s. 7 protects the rights of parents, it protects the rights of both parents" (at para. 19). In the Jane Doe case, however, John Doe is not the biological father, and is not seeking any rights or responsibilities in relation to the child. Nor is the biological mother seeking child support. Whereas *Johnson-Steeves* was a case with two disputing parents, *Doe v. Alberta* is a case of one, and only one, parent, who is seeking to establish her s. 7 parental liberty rights.

27 [1995] 1 S.C.R 315 [*B.(R.)*]. The case involved the question of whether Jehovah's Witness parents were entitled to refuse a blood transfusion for a newborn child on the basis of their religious beliefs. For an excellent discussion of this case, and parental liberty rights under s. 7, see Hester Lessard, "Liberty Rights, The Family and Constitutional Politics" (2002) 6 Rev. Const. Stud. 213.

the Court, was of the view that parents have a constitutionally protected interest in their children, and held that parental decision-making and other aspects of custody were protected within the liberty interest of s. 7.[28] Four other members of the Court disagreed with this view, and Lamer C.J.C. dismissed the idea that parents had a liberty interest within s. 7.[29]

Several years later, in the case of *New Brunswick (Minister of Health and Community Services) v. G.(J.)*,[30] the majority of the Supreme Court of Canada held that parental rights are included within the ambit of security of the person within s. 7 of the *Charter*. Chief Justice Lamer, as he then was, was of the view that the removal of a child from parental custody "constitutes a serious interference with the psychological integrity of the parent."[31] The parental interest in raising and caring for a child is, as La Forest J. held in *B. (R.)*, "an individual interest of fundamental importance in our society."[32] However, despite this endorsement of the passage from La Forest J.'s opinion in *B. (R.)*, the Court declined to address the question of the existence and scope of the liberty interest.[33] The existence and scope of parental liberty rights under s. 7 of the *Charter* therefore remain unclear, as the Supreme Court opinion is still divided. This lack of uniformity has, in turn, created divided case law in the lower courts on the question of the existence and scope of parental liberty rights. Some cases refer to parental liberty as an established principle,[34] while others have identified the uncertainty in the law regarding its existence and scope.[35]

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28 *B.(R.)*, *ibid.* at 371-74.

29 Justice Sopinka, the swing vote, avoided the issue, deciding the case instead on the basis that the parents in the case had some protection under the right to freedom of religion in s. 2 of the *Charter*.

30 [1999] 3 S.C.R. 46 [*G.(J.)*]. The case involved whether a parents have a constitutional right to be provided with legal aid in a child protection proceeding when a government seeks to terminate parental rights. For a discussion of parental liberty rights in *G.(J.)* in the broader context of privatization and child welfare law, see Hester Lessard, "The Empire of the Lone Mother: Parental Rights, Child Welfare Law, and State Restructuring" (2001) 39 Osgoode Hall L.J. 717.

31 *G.(J.)*, *ibid.* at para. 61.

32 *B.(R.)*, *supra* note 27 at 371.

33 Justice Lamer specifically noted the unresolved and divided opinion of the Court on the question of parental liberty rights, writing that "[s]ince the appeal can be disposed of on this basis and there have been differing views expressed about the scope of the right to liberty in the Court's previous judgments, I will not address the issue of whether the appellant's right to liberty was also engaged in this case" (*G.(J.)*, *supra* note 30 at para. 56. As Lessard argues, *supra* note 30 at 759, leaving G.(J.)'s rights under security of the person rather than liberty,

> enables Chief Justice Lamer to leave intact his own repeated statements that section 7 liberty should be confined to a right to non-detention. Liberty rights, however are lurking quite visibly beneath the surface of the right of non-detention.… The interference with G.(J.)'s security of the person upon which the analysis hinges consists, in essence, of the stresses resulting from an interference with what would ordinarily be called her liberty rights.

34 See e.g. *T.L.O. v. Alberta (Director of Child Welfare)* (1995), 175 A.R. 194 (Q.B.) at para. 27; *Harrison v. Vigeant* (1996), 188 A.R. 8 (Q.B.) at paras. 35, 40 and 48; *A.L.G.C. v. Prince Edward Island*, [1998] 160 Nfld & P.E.I.R. 151 (T.D.) at para. 26; *Children's Aid Society of Hamilton v. W.(M.)* (2003), 63 O.R. (3d) 512 (Sup. Ct. J.) at paras. 67-69; *Giles v. Beisel*, 2004 SKQB 330, 252 Sask. R. 134 at para. 22; *J.F.M. v. V.P.*, 2004 ABQB 208, 366 A.R. 239 at para. 48; *Children's Aid Society of Toronto v. S.A.C.*, [2005] O.J. No. 2154 (Ont. Ct.) at para. 69.

35 See e.g. *B.S. v. British Columbia (Director of Child, Family and Community Services)* (1998), 160 D.L.R. (4th) 264 (B.C.C.A.) at para. 37; *J.M. v. Alberta (Director of Child Welfare)*, 2004 ABQB 512, 364 A.R. 93 at para. 29; *Children's Aid Society of the Districts of Sudbury and Manitoulin v. P.M.* (2002), 112 A.C.W.S. (3d) 889 (Ont. Ct. J.) at para. 106; *R.A.S. (Re)*, [1996] B.C.J. No. 2227 (Prov. Ct. (Civ. Div.)) at para. 60; *New Brunswick (Minister of Health and Community Services) v. J. G.* (1997), 187 N.B.R. (2d) 81 at paras. 33-53, Bastarache J.A., dissenting; *Dixon v. Hinsley* (2001), 108 A.C.W.S. (3d) 497 (Ont. Ct. J.) at para. 75; *Canadian Foundation for Children, Youth and the Law v. Canada*

Doe v. Alberta raises the question of the existence and scope of parental liberty rights within s. 7, a question that was not adequately addressed by the Alberta Court of Appeal, and that has not yet been resolved by the Supreme Court of Canada. The case was also a lost opportunity to address whether and to what extent parental liberty is protected within the liberty interests contemplated by s. 7. How would or should such a parental right, assuming its existence, apply to the decision-making authority of a single parent by choice who wishes to maintain her status, role, and right as a single parent? To what extent can Jane Doe, by her own consent, limit the parental rights of a third party? What is the appropriate balance between protecting her parental right to make decisions for her child and the supervisory jurisdiction of the court to intervene on behalf of the best interest of the child? These are challenging and as yet unresolved issues that are deserving of a more serious engagement than the cursory consideration provided by the Alberta Court of Appeal.

IV. PARENTING BEYOND THE NUCLEAR FAMILY

On a more general level, *Doe v. Alberta* raises questions about the recognition of alternative families, and the possibility of parenting beyond the nuclear family. Not unlike the challenges brought earlier by same-sex couples, this is a case that challenges the dominance of the nuclear, heterosexual family form.[36] The assumption underlying the imposition of parental status on the basis of spousal or partner status lies in this very particular family norm that has long dominated the legal regulation of the family; namely, a nuclear and heterosexual unit comprised of two opposite sex adults in a sexual relationship, and their children. Both statutory and case law specifically stipulates that attention be directed to the actual lived relationship between the step-parent and the child.[37] Yet, the assumption underlying these legal tests, and the appropriateness of imposing obligations like child support, is that a nuclear family is the norm, and that a person in an intimate relationship with a parent will, according to this norm, become a parent themselves.

There have been many challenges to this traditional vision of the family. The same-sex challenges have successfully broadened the legal vision of family to now include two adults regardless of whether they are of the opposite sex.[38] Other more recent cases, such as the

(Attorney General) (2000), 49 O.R. (3d) 662 (Sup. Ct. J.), aff'd (2002), 57 O.R. (3d) 511 (C.A.), aff'd 2004 SCC 4, [2004] 1 S.C.R. 76 at paras. 104-13 (cited to Sup. Ct. J.).

36 On the influence of the traditional, nuclear, heterosexual family form in family law, see generally Susan Boyd, "Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law" (1991) 10 Can. J. Fam. L. 79; Katrysha Bracco, "Patriarchy and the Law of Adoption: Beneath the Best Interests of the Child" (1997) 35 Alta. L. Rev. 1035; Shelley A.M. Gavigan, "Feminism, Familial Ideology and Family Law: A Perilous Menage à Trois" in Meg Luxton, ed., *Feminism and Families: Critical Policies and Changing Practices* (Halifax: Fernwood Press, 1998) 98.

37 See *supra* notes 16, 20.

38 On same-sex relationship recognition, see *M. v. H.*, [1999] 2 S.C.R. 3; *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.); *Egale Canada v. Canada (Attorney General); Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698. On same-sex parenting recognition, see *K. (Re)* (1995), 23 O.R. (3d) 679 (Prov. Div); *M.D.R. v. Ontario (Deputy Registrar General)*, 2006 O.J. No. 2268. See generally Fiona Kelly, "Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and Their Children into Canadian Family Law" (2004) 21 Can. J. Fam. L. 133 at 133-78.

three-parent cases, have begun to challenge the nuclear part of the traditional family.[39] Even the very legal category of step-parents, or standing in the place of a parent, in some ways challenges the established nuclear vision, in so far as it contemplates the existence of more than two parents. Yet, the traditional understanding of the family as a nuclear, heterosexual unit continues to cast a long shadow over the legal and social imagination, especially when it remains difficult to separate a spousal relationship from a parenting one, and when a conjugal relationship with a parent continues to be equated with parenting.[40]

Often, this normative vision may very well be the case. A person who becomes involved with a parent may eventually come to stand in the place of parent. And, at least in principle, the legal tests contemplate that this may not be the case. That is, the tests allow for a person in an intimate relationship with a mother or father not to be found to be standing in the place of the parent if they do not met the criteria discussed in Part II. However, in *Doe v. Alberta*, it appeared to be beyond the imagination of the Alberta Court of Appeal that a person in a committed relationship with the mother would not demonstrate some parenting towards the child, and hence, become a parent. This is a classic example of the operation of the underlying familial normativity: a partner of the mother equals the father of the child. The family must be made to fit the nuclear assumptions, even if these assumptions are contrary to the express intentions of the parties themselves.

The case raises the question of the role of intention in the determination of parentage. What role should be given to the express intentions of the parties to structure their lives outside of the normativity of the nuclear family? What role, if any, should intention play in relation to establishing legal parentage, and the rights and responsibilities that accompany it? In *Doe v. Alberta*, the Court of Appeal held that intention, although relevant, is not determinative,[41] and in any case, found that John Doe had a settled intention to stand in the place of a parent simply by virtue of remaining in a relationship with Jane Doe. Jane and John Doe's actual intentions — for Jane to be the parent, and John not to be the parent — were thereby obscured and negated. But, what role should intention play in the establishment of parentage? For example, what would a proper interpretation of the statutory and judicial approaches to standing in the place of parent say about Jane and John Doe's intentions? The Supreme Court in *Chartier* affirmed that intention is relevant, and that intention can be

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39 See *AA v. BB* (2003), 225 D.L.R. (4th) 371 (Sup. Ct.), rev'd 2007 ONCA 2, 83 O.R. (3d) 561, in which one woman in a lesbian couple had a child with the assistance of male friend. The lesbian partner, who was not the biological mother, wanted to have herself declared as a parent, alongside the biological mother and biological father. The lower court held that it could not do so under the Ontario *Children's Law Reform Act*, R.S.O. 1990, c. C.12, as the *Act* did not allow more than one mother. The Ontario Court of Appeal reversed this decision, holding that it had jurisdiction under the *parens patriae* principle to declare that a child could have more than one mother. See also *D.W.H. v. D.J.R.*, 2007 ABCA 57, 71 Alta. L.R. (4th) 225.

40 It is interesting to observe that the Alberta Government relied on the same set of assumptions in its response to Jane Doe's application for leave to appeal to the Supreme Court of Canada. The Alberta Government denies that Jane Doe is a single mother: "This case … is not about the constitutional rights of *single* mothers or *single* parents. Any notion the Applicant is a single mother is not born out by the facts. This case is about a woman who decided to have a child while residing with a male partner and who continues to reside with her partner and the child" (*Doe v. Alberta* (C.A.), *supra* note 1, leave to the S.C.C. refused, 31986 (Response to the Respondent) at para. 13). Partner status is elided with parenting status.

41 *Doe v. Alberta* (C.A.), *supra* note 1 at para. 18.

expressed through both words and actions.[42] Yet, *Chartier* was not a case involving a written agreement in which the parties expressed a clear intention for one not to be a parent. In striking contrast, it was a case where the actions of the parties spoke loudly; where the mother and the putative father had falsely held the father forth as the actual biological father of the child, where he had planned to adopt the child, where the child was given the father's last name, and where he, for all intents and purposes, held himself out to the child, the family, and the world as the father of the child. *Chartier* is a case where intention is to be inferred from actions, and where that intention is incontrovertible. The case does not resolve the question of how much weight is to be placed on an express intention, particularly an express intention that is consistent with actions.

A number of commentators have recently suggested that intention should play a greater role in the establishment of parentage.[43] This issue is one that arises most often in the context of assisted reproduction and/or alternative families. The kind of parentage questions these cases bring about include whether individuals can contract away their biological parentage (cases involving sperm and egg donor cases, and gestational surrogacy), and/or contract into legal parentage outside of a biological connection (cases involving lesbian couples and three-parent cases).[44] Many suggest that greater weight should be given to the intentions of these parents as they plan their alternative families, and plan who is and is not a parent.[45] Susan Boyd suggests that we should take seriously the intentions of birth mothers who intend to enter motherhood alone.[46]

This rethinking of the role of intention in establishing legal parentage may be helpful in thinking about *Doe v. Alberta*. Like the sperm/egg donor and gestational surrogacy cases, this is a case in which the intention of the parties was established before birth, indeed, before

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42 *Chartier*, *supra* note 18 at para. 39.

43 For arguments supporting a greater role for intention in establishing legal parentage, see e.g. Majorie Maguire Shultz, "Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality" (1990) Wis. L. Rev. 297; Anne Reichman Schiff, "Frustrated Intentions and Binding Biology: Seeking *AID* in the Law" (1994) 44 Duke L.J. 524; John Lawrence Hill, "What Does it Mean to be 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 N.Y.U.L. Rev. 353; Richard F. Storrow, "Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage" (2002) 53 Hastings L.J. 597; Nancy D. Polikoff, "The Deliberate Construction of Families without Fathers: Is it an Option for Lesbian and Heterosexual Mothers?" (1996) 36 Santa Clara L. Rev. 375. See also Susan Boyd, "Gendering Legal Parenthood: Bio-genetic Ties, Intentionality and Responsibility" Windsor Y.B. Access Just. [forthcoming in 2007], who argues for a nuanced and "thick" conception of intention.

44 According to Boyd, *ibid.*, recent developments in the recognition of parenting have been contradictory, sometimes giving greater weight to bio-genetic ties, and other times, giving greater weight to intention:

> Intentionality concerning family form and who should be named parent seems to carry increasing importance — but not just any kind of intentionality. The privileged form of intention is that which is formed before birth either by an existing, acknowledged, genetic parent, or increasingly, by a genetic father after birth. Intention does not tend to prevail when a female headed family attempts to exclude a known genetic father from claims to legal parenthood — especially one who has had some financial relationship with the children.

45 See *supra* note 43.

46 Boyd, *supra* note 43, is careful to endorse a nuanced or "thick" rather than an absolute approach to intentionality, that seeks to recognize gendered power differentials in parenting: "An approach that gives some weight to the intentions of intentions of the birth mother — particularly one who intends to parent without the influence of a man – might also enable what has been called the radical potential of insemination — it destroys the centrality of the hetero(sexed) couple and re-centres the woman."

conception, and it was an intention that continued after the birth of the child. Jane Doe chose to have a child without John Doe. She wanted to have a child on her own, and this desire is uncontested, in so far as John Doe agrees with Jane Doe. Not unlike some of the assisted reproduction cases, John Doe does not intend to be a parent. However, unlike these cases, he does not have a bio-genetic connection to the child that needs to be overcome or trumped by intentions to the contrary. The *only* claim to parentage is based on social parenting — on whether he is standing in the place of a parent — in which case his (and her) intentions to the contrary should given considerable weight.

Jane and John Doe are trying to structure their lives outside of the assumptions of the traditional nuclear family. They are trying to separate parenting and adult intimacy. Jane Doe is the child's mother and wants to protect her status as the child's only legal parent. John Doe does not want to be a parent, but he does want to be a partner. While the legal tests contemplate this possibility, the couple is seeking to make this a reality through an express statement of their intentions in a contract. The reliance on contract in the context of parenting may be suboptimal. Family contracts have traditionally been subject to considerable scrutiny,[47] and agreements dealing with children are generally subject to the best interest of the child test.[48] Yet, given the way in which the law operates, a contract is the only tool that Jane and John Doe have available to express their clear and settled intentions to live their lives outside of the assumptions of the traditional nuclear family that the law will otherwise impose. Giving greater weight to the intention of the parties, particularly to their intention in relation to alternative family structures established prior to conception and birth of the child, may require a reconsideration of the role of contract and intention in establishing legal parentage.[49]

Finally, *Doe v. Alberta* requires that we think about what makes a person a parent, and particularly, what makes a person a father. To what extent is a father still envisioned simply

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[47] There are many critiques of the use of contract as a model for structuring familial and parenting relationships, which questions the extent to which the assumptions underlying the model of contract are appropriate in a familial setting. For a general critique, see e.g. Robert H. Mnookin, "Divorce Bargaining: The Limits of Private Ordering" (1985) 18 U. Mich. J.L. Ref. 1015; Marcia Neave, "Resolving the Dilemma of Difference: A Critique of 'The Role of Private Ordering in Family Law'" (1994) 44 U.T.L.J. 97. Yet, others have argued that a greater role should be given to private ordering in family law. See Michael J. Trebilcock & Rosemin Keshvani, "The Role of Private Ordering in Family Law: A Law and Economics Perspective" (1991) 41 U.T.L.J. 533, in which the authors argue that contract can enhance autonomy and individual fulfillment of women on marital breakdown.

[48] The federal *Divorce Act* and provincial family law, either expressly by statute or by case law, subject agreements in relation to children to the best interest of the child test. See e.g. *Woodhouse v. Woodhouse* (1996), 29 O.R. (3d) 417 (C.A.) at 431: "Separation agreements are not binding on the court because it is the interests of the children rather than those of the parents which are at issue." Boyd, *supra* note 43, has noted that contractual arrangements are typically frowned upon or disallowed in relation to children in family law, in the name of their best interests. Yet, Boyd also suggests that at least in the context of sperm donor arrangements, there is reason to reconsider this disfavorable attitude towards contracts. In discussing a proposal by Harrison on limiting the rights of sperm donors, Boyd observes that "[w]hile the proposal may appear focused less on best interests of children and more on parental interests, the logic is that children benefit from clearly defined familial ties, and to the extent that conflict is diminished, this too is beneficial" (*supra* note 43). On rethinking the role of contract and intended parentage, see generally the sources cited in *ibid.*

[49] Increasing numbers of alternative families appear to be turning to contractual agreements to formalize their relationships, notwithstanding the fact that these agreements may not be enforceable. See Hayley Mick, "Three parents and a contract" *The Globe and Mail* (29 May 2007) L3.

in terms of a person in a sexual relationship with a child's mother? Consider the following hypothetical. What if Jane Doe had been living with her brother? Or a paid caregiver? Or a gay male friend? How might the Court of Appeal have viewed the role of these persons vis-à-vis the child? By virtue of living with the child, any of these persons would also be unlikely to "ignore the child when it cries? When it needs to be fed? When it stumbles? When the soother needs to be replaced? When the diaper needs to be changed?"[50] The idea underlying this passage is that it is impossible to completely ignore the needs of a child when sharing a household. Yet, one might ask whether not completely ignoring the needs of a child is the test for legal parentage. And would the Court of Appeal have so readily imposed fatherly status on the brother, the paid caregiver, or the gay friend, simply on the basis that they did not completely ignore the needs of the child? It seems unlikely that the Court of Appeal would have done so, for reasons arguably more related to the norms of the traditional nuclear family than with the actual relationship between the child and the adult, although such an assertion is speculative. A brother could not be the father; that would be incest. A paid giver could not be a father (somewhat tautologically) because caregivers are paid. And a gay male friend? Well, that is just not what friends are for. These are examples of the way in which ideas of the nuclear family inform "common sense" around who is and is not a parent. However, when the underlying and unstated assumptions are unearthed, it is clear that what seems to matter most is whether the person is involved in a sexual relationship with the child's mother.

A father is more than a person involved in a sexual relationship with a child's mother. Section 48(2) of the *Family Law Act*, and the Supreme Court of Canada in *Chartier* clearly recognize that parenting involves something more: something involving attitude, care-giving, disciplining, financial support, and intention.[51] The Alberta Court of Appeal does not do justice to the men who really do become stepfathers, who come to stand in the place of a parent to the children of their partners. Indeed, it denigrates the very real caring for and caring about children that comes with being a social parent. The Alberta Court of Appeal relies on some of the most discredited elements of the nuclear family norm, where a sexual relationship with a mother is enough constitute a family.

V. CONCLUSION

Doe v. Alberta is a hard and fascinating case that captures many of the contemporary challenges to the way which we live in families. It requires that we seriously engage with ideas of parenting beyond the traditional nuclear family form. It requires that we seriously consider the liberty rights of single parents, the role of intention in legal parentage, and the role of contract in setting out those intentions. It requires that we not fall back upon traditional assumptions of familial arrangements, where being a father involved little more than being involved in a conjugal relationship with the mother. It requires that we consider the legitimacy of single mothers by choice, a category of parents who do not fit the stereotypes of single mothers as economically vulnerable and in need of the law to enforce

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[50] *Doe v. Alberta* (C.A.), *supra* note 1 at para. 22.

[51] Although s. 48(1) of the *Family Law Act*, *supra* note 3, does require that the person be a spouse of the biological parent, or be in a relationship of some permanence with the parent. The conjugal relationship appears to be a necessary but insufficient condition to be found to be standing in the place of a parent.

parental obligations against a potential father figure. It is a case that requires that we rethink common stereotypes about parents, parenting, families, and contracts. Taking Jane Doe's claim seriously requires that we at least consider the possibility of disarticulating the various dimensions of family life, recognizing that parenting and partnering might not be synonymous, rather than assuming all roles, rights, and responsibilities flow from the traditional nuclear unit.[52] Family life is changing — bundling, unbundling, and re-bundling in ways that may have previously been unimaginable. The law needs to join in this reimagining of the possibilities and realities of Canadian families.

[52] In this respect, the case could be seen through the lens of the approach adopted by the Law Commission of Canada in *Beyond Conjugality: Recognizing and supporting close personal adult relationships* (Ottawa: Minister of Public Works and Government Services, 2001) [*Beyond Conjugality*], which suggests that public policy should re-evaluate the way in which adult personal relationships are regulated. Instead of assuming that marriage and marriage-like relationships are an appropriate proxy for the imposition of relational rights and responsibilities, *Beyond Conjugality* argues that we should interrogate laws and public policies to examine the legitimacy of the relational interest, and then, if that intent is legitimate, allow for a more comprehensive definition that would include all interdependent relationships. Marriage or conjugality would no longer be the basis for the imposition of rights and responsibilities. Rather, the law would look to actual interdependencies, based on the particular objectives of the law. It is a kind of unbundling of the rights and responsibilities that have traditionally attached to marriage. In the context of *Doe v. Alberta*, the approach being advocated in this article imagines the possibility of a similar unbundling of parenting and partnering, by no longer automatically assuming that the one necessarily follows from the other, but instead exploring the actual intentions and actions of the parties.

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